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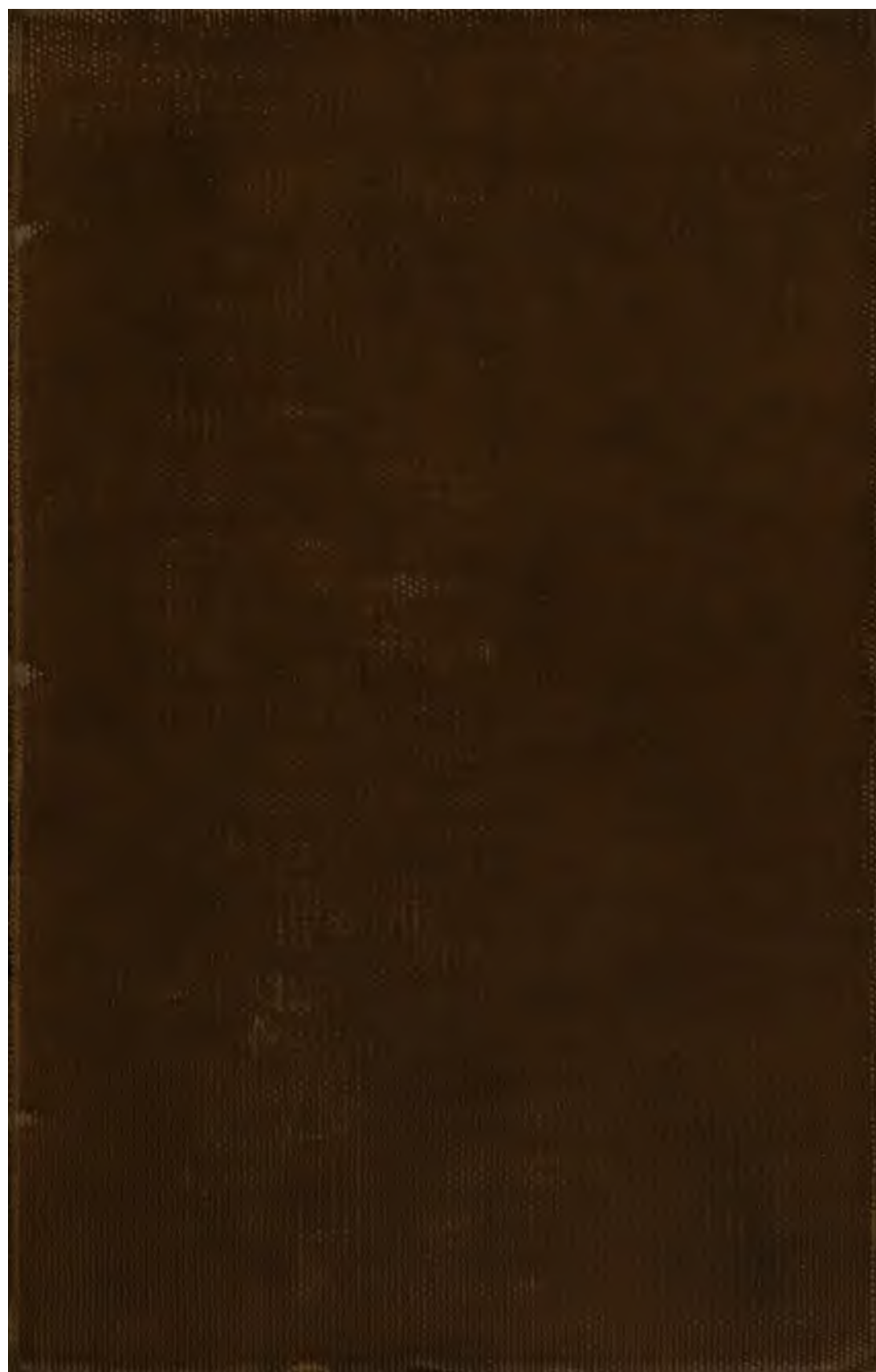
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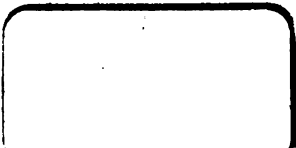
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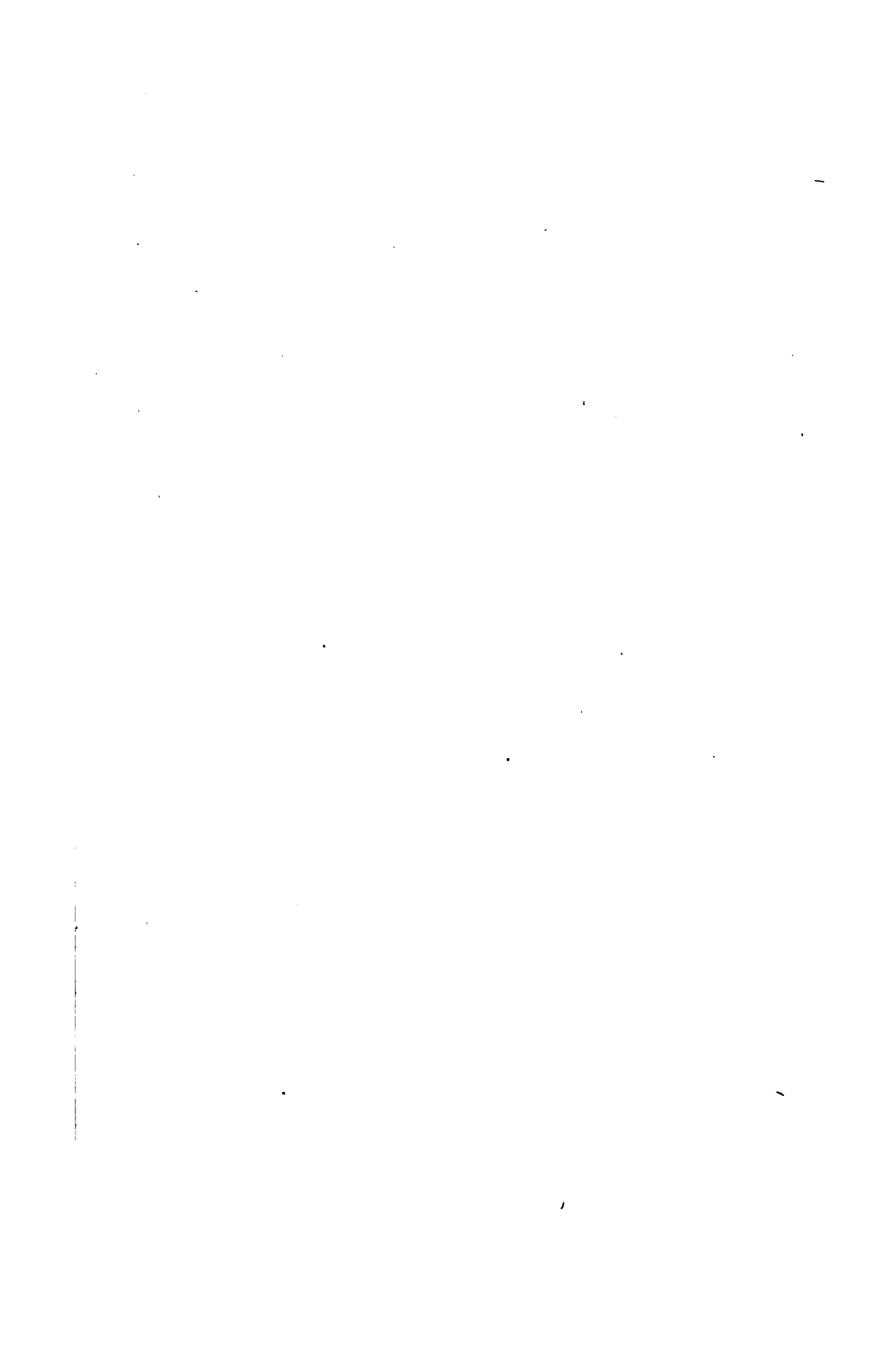
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*[Criminal Code, 1919]*  
**ANNOTATED**  
**CRIMINAL CODE, 1919**  
**CANADA**

**BY**  
**W. J. TREMEEAR**  
of Osgoode Hall, Barrister-at-Law

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# THE CRIMINAL CODE

(CANADA)

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## An Act Respecting the Criminal Law

(*E.S.O. 1906, ch. 146, and amendments 1907-1918.*)

### SHORT TITLE.

#### Short Title.

1. This Act may be cited as the Criminal Code.

*Origin*—Criminal Code 1892, 55-56 Vict. Can., ch. 29; draft English Criminal Code as reported 1880 by Royal Commissioners to the British Parliament but not adopted; various Canadian statutes dealing with criminal law and procedure.

*General effect as a Code*—The Criminal Code was intended to make complete and exhaustive provision as to the subjects with which it deals, in so far, at all events, as its provisions relate to procedure. It is explicitly called a code by the first section of the chapter in which it is embodied and its utility as a code will be greatly impaired if it cannot be so considered. *E. v. Snelgrove*, 12 Can. Cr. Cas. 189, per Russell, J.: *Vagliano Case*, [1891] 1 A.C., 144.

Sec. 16 (Section 7 of the 1892 Code) which expressly makes common law justifications and excuses applicable to charges under the Act, implies that, in the absence of such a provision, the common law was meant to be superseded by the Act or else expressly embodied in it in the terms of a statute. For this reason sec. 999 of the Code is held to provide exhaustively for the cases in which and the conditions under which the depositions taken on the preliminary examination can be used on the trial in the event of the deponent's decease, and that the common law procedure as to this matter has been superseded.

See also notes to secs. 15 and 16.

*Citation of Code in other statutes*—In the general Interpretation Act for the statutes of Canada there was introduced, 6 Edw. 7, ch. 21, set. 6 (now *E.S.C.*, ch. 1, sec. 39), this provision: "any such citations of, or reference to any Act (in any Act, instrument or document)

shall, unless the contrary intention appears, be deemed to be a citation of or reference to such Act as amended."

*Marginal notes in official text of Code not part of statute*—Sec. 3 of the Canada statute 6-7 Edw. VII, ch. 43, enacts as follows:

"The Revised Statutes of Canada, 1906, are hereby confirmed and declared to have and to have had, on, from and after the thirty-first day of January, 1907, the force of law as if herein enacted."

The marginal notes thereon, the reference to former enactments at the foot of the sections, and the explanatory notes and tables inserted by the Commissioners, shall form no part of the said Revised Statutes, and shall be held to have been inserted for convenience only, and may be corrected or omitted."

Further it has been said that the enactment itself should be read and not the sense or meaning given to it in a margin note by the official who saw to the publication of the statute. *R. v. Battista*, 21 Can. Cr. Cas. 1, 9 D.L.R. 138 (Que.).

*Official text in both English and French*—Where statutes are officially printed in two languages and the text of one version appears to be in conformity with the intention of the legislature, while an ambiguity exists in the other version, the former may be followed in interpreting the statute. *Corporation of Coaticook v. People's Telephone Co.*, 19 Que. S.C. 535.

*Juvenile Delinquents*—In cities in which the Juvenile Delinquents Act, 1908, Can., is in operation, any provisions of the Criminal Code inconsistent therewith are superseded as regards such cities. 7-8 Edw. VII, ch. 40 and amendments; 2 Geo. V, ch. 30; 4-5 Geo. V, ch. 39.

*Crimes*—The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this—that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. 4 Bl. Com. p. 5. As defined in *Russell on Crimes*, vol. 1, p. 1, crimes are:—

"Those acts or omissions involving breach of a duty to which by the law of England a sanction is attached by way of punishment or pecuniary penalty in the public interest." See also, 1 Austin's *Jurisprudence*, Lecture 17, p. 405.

*Federal jurisdiction over criminal law*—Sec. 91, sub-sec. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." The fact that from the criminal law generally there is one exception, namely, "the constitution of courts

of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament. *Attorney-General v. Hamilton Railway* (1903), 7 Can. Cr. Cas. 326 [1903] A.C. 524.

It is competent also for the Parliament of Canada to declare that what previously has constituted a criminal offence shall no longer do so, although a procedure in form criminal was kept alive. *Toronto Ry. Co. v. The King* (1917) 29 Can. Cr. Cas., 29 at 34, [1917], A. C. 630, reversing 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

The Canada Temperance Act was, by decision of the Privy Council, upheld on the ground that it might be referred to the general powers of the Dominion Parliament in respect of "the peace, order and good government of Canada." That legislation does not rest upon the execution of Dominion powers with regard to criminal law, although having direct relation thereto. *Russell v. The Queen*, 7 A.C. 829, 840; *Hodge v. The Queen*, 9 A.C. 117, 129; and see *re McNutt*, 21 Can. Cr. Cas. 157; 47 Can. S.C.R. 259; 10 D.L.R. 834.

In *Russell v. The Queen*, 7 App. Cas. 829, at page 838, Sir Montague Smith, referring to the Temperance Act there in question, there says:—

"Their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects 'property and civil rights.' It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things as well as intoxicating liquors can, of course, be held as property, but a law placing restrictions on their sale, custody or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same consideration the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do



as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights."

Commenting upon this in *re Richard* 12 Can. Cr. Cas. 204 at 216, Duff J. of the Supreme Court of Canada said:

"Their Lordships, it is true, abstain from deciding the question whether the competence of Parliament to pass the enactment can be supported on the ground that it was passed in exercise of the exclusive power to legislate respecting the criminal law conferred by section 91 of the British North America Act, 1867. But it seems to me that there is no good ground for holding that, where Parliament under its power to make laws for the peace, order and good government of Canada declares in the interests of public order that certain acts shall be offences punishable by fine or imprisonment, the proceedings by which such laws are enforced are any the less proceedings in a 'criminal case' because in enacting them Parliament did not formally profess to be dealing with the criminal law."

The Manitoba Liquor Act of 1900 for the suppression of the Liquor traffic in that Province is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature in the Province within the meaning of sub-sec. 16 of sec. 92 of the British North America Act, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly with business operations outside the Province. (*Re Liquor Act*, 13 Man. L.R. 239, reversed.) *Attorney-General of Manitoba v. Manitoba License Holders' Association* [1902], A.C. 73.

In *Hodge v. The Queen*, 9 App. Cas. 117, where the validity of a local regulation prohibiting the playing of billiards in taverns on Sunday, made under a Provincial License Act, *Sir Barnes Peacock* said: "Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquor by retail, and such as are calculated to preserve in the municipality peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion Parliament." Speaking of this case, the Chief Justice of Canada, in *Huson v. The Township of South Norwich*, 24 Can. S.C.R. at page 147, said: "That these words, 'municipal institutions,' do confer a police power to the extent of licensing and regulating was decided by the Privy Council in the case of *Hodge v. The Queen*."

A provincial law dealing with the prohibition of acts within its legislative authority may impose fine and imprisonment for infraction. *Union Colliery Co. v. Bryden* [1899], A.C. 580; *Cunningham v. Toney Homma* [1903], A.C. 151; *Re McNutt*, 47 S.C.R. 259, 21 Can. Cr. Cas.

157; *Quong Wing v. The King*, 6 W.W.B. 270, 49 S.C.R. 440, 23 Can. Cr. Cas. 113; *R. v. McLeod*, 6 Can. Cr. Cas. 94 (N.W.T.); *Canadian Pacific Ry. v. Notre Dame de Bonsecours* [1899], A.C. 367.

As to Sunday observance laws, see the Lord's Day Act, R.S.C. 1906, ch. 153, and pre-Confederation provincial statutes; *Re Sunday Legislation*, 35 S.C.R. 581; *Attorney-General for Ont. v. Hamilton Street Railway* [1903], A.C. 524. *Ouimet v. Bazin*, 46 S.C.R. 502, 20 Can. Cr. Cas. 458, reversing 20 Que. K.B. 416 and 14 Can. Cr. Cas. 136 (sub nom. *R. v. Ouimet*); *Audette v. Daniel*, 21 Can. Cr. Cas. 403, 14 Que. P.R. 432; *R. v. Walden*, 19 B.C.R. 539, 22 Can. Cr. Cas. 405; *Tremblay v. City of Quebec*, 38 Que. S.C. 82, 16 Can. Cr. Cas. 482.

"*Indictable offences*" and "*offences*"—Every Act (of the Parliament of Canada) shall be read and construed as if any offence for which the offender may be,—

(a) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence; and,

(b) punishable on summary conviction, were described or referred to as an offence; and,

all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence. Interpretation Act, R.S.C., 1906, ch. 1, sec. 28.

*Provincial laws of evidence*—The provincial laws of evidence are made applicable to criminal prosecutions by the Canada Evidence Act, R.S.C. 1906, ch. 145 in so far as that Act itself or some other federal statute does not make provision.

## INTERPRETATION.

### Definitions.

2. In this Act, unless the context otherwise requires,—

(1) 'any Act,' or 'any other Act,' includes any Act passed or to be passed by the Parliament of Canada, or any Act passed by the legislature of the late province of Canada, or passed or to be passed by the legislature of any province of Canada, or passed by the legislature of any province now a part of Canada before it was included therein;

*Origin of sec. 2*—Sec. 3, Code of 1892, 63-64 Vict., ch. 46, sec. 3; 1 Edw. VII, ch. 41, sec. 11; 6 Edw. VII, ch. 4, sec. 4; 6-7 Edw. VII, ch. 8; 6-7 Edw. VII, ch. 9; 7-8 Edw. VII, ch. 10, sec. 4; 3-4 Geo. V, ch. 13, sec. 3.

*Same words elsewhere in Code*—Where the same words occur in different sections of the Code they should be given the same meaning unless a contrary intention appears. *R. v. Romer*, 23 Can. Cr. Cas. 23.

*Interpretation under prior Code*—Where a judicial interpretation had been placed upon a section of the Code prior to the re-enactment in R.S.C. 1906, ch. 146, without material change, Parliament presumably recognizes and adopts such interpretation. See sec. 7 of the Act respecting the Revised Statutes of Canada, 1906. It would not be safe to draw the conclusion that, because Parliament placed in the revision the section under a different title, it was its intention that the section should receive an interpretation other than that previously adopted by the Courts. *R. v. Shing*, 17 Can. Cr. Cas. 463, 20 Man. L.R. 214.

*Interpretation of penal statutes generally*—Beal, on Cardinal Rules of Legal Interpretation, 443, says: A penal statute is to be interpreted, like any other instrument, according to the fair common sense meaning of the language used.

Penal statutes should be construed strictly so that no cases shall be held to be reached by them but such as are within both the spirit and letter of such laws.

If there are two possible interpretations of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum.

If there is a reasonable interpretation which will avoid the penalty in any particular case, it must be adopted.

If the words are merely equally capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail. *R. v. Eaves*, 21 Can. Cr. Cas. 23 at 32; *London County Council v. Aylesbury Dairy Co.* [1898], 1 Q.B. 106; *Blackpool v. Johnson* [1902], 1 K.B. 646.

The Court must see that the thing charged as an offence under a statute is within the plain meaning of the words used: *Dyke v. Elliott* (1872), L.R. 4 P.C. 184, at p. 191; *R. v. Cohen* (1915), 24 Can. Cr. Cas. 238 at 241, 33 O.L.R. 340.

(2) 'Attorney General' means the Attorney General or Solicitor General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the Northwest Territories and the Yukon Territory, the Attorney General of Canada;

*Attorney-General*—An acting Attorney-General is in a very different position to that of a deputy or agent of the Attorney-General. He is the Attorney-General for the time being, and clothed by statute (in British Columbia) with all the powers and authority of the office. *R. v. Faulkner*, 19 Can. Cr. Cas. 47, 16 B.C.R. 229, per Macdonald, C.J.A.

(3) 'banker' includes any director of any incorporated bank or banking company;

(4) 'bank-note' includes all negotiable instruments issued by or on behalf of any person, body corporate, or company carrying on the business of banking in any part of the world, or issued by the authority of the Parliament of Canada, or any governor or other authority lawfully authorized thereto in any of His Majesty's dominions, or by the authority of any foreign prince, or state or government, and intended to be used as equivalent to money, either immediately upon their issue or at some time subsequent thereto, and all bank bills and bank post bills;

(5) 'cattle' includes any horse, mule, ass, swine, sheep or goat, as well as any neat cattle or animal of the bovine species, and by whatever technical or familiar name known, and shall apply to one animal as well as to many;

(6) 'chief constable' includes the chief of police, city marshal or other head of the police force of any city, town, incorporated village or other municipality, district or place, and in the province of Quebec, the high constable of the district, and means any constable of a municipality, district or place which has no chief constable or deputy chief constable;

(7) 'court of appeal' includes,

- (a) in the province of Ontario, the Court of Appeal for Ontario,
- (b) in the province of Quebec, the Court of King's Bench, appeal side,
- (c) in the provinces of Nova Scotia and New Brunswick, the Supreme Court in banc,
- (c1) in the province of British Columbia, the Court of Appeal,
- (d) in the province of Prince Edward Island, the Supreme Court,
- (e) in the province of Manitoba, the Court of Appeal,
- (f) in the provinces of Saskatchewan and Alberta, the Supreme Court of the Northwest Territories in banc, until the same is abolished, and thereafter such court

as is by the legislature of the said provinces respectively substituted therefor;

(g) in the Yukon Territory, the Supreme Court of Canada;

(8) 'copper coin' includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver;

(9) 'deputy chief constable' includes deputy chief of police, deputy or assistant marshal or other deputy head of the police force of any city, town, incorporated village, or other municipality, district or place, and, in the province of Quebec, the deputy high constable of the district;

(10) 'district, county or place,' includes any division of any province of Canada for purposes relative to the administration of justice in the matter to which the context relates;

"District" or "county"]—As to summary conviction matters, see also sec. 705.

(11) 'document of title to goods' includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to;

"Document"]—See secs. 73, 705 (c).

(12) 'document of title to lands' includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title;

(13) 'every one,' 'person,' 'owner,' and other expressions of the same kind include His Majesty and all other public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to such acts and things as they are capable of doing and owning respectively;

"*Everyone*"; "*person*."]—"Everyone" is an expression of the same kind as "person," and therefore includes bodies corporate unless the context requires otherwise. *Union Colliery Co. v. R.* (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81. The expression "everyone" is, whether in a legal or popular sense, a wider term than the word "person," and in the case of *Pharmaceutical Society v. London and Provincial Supply Association*, 5 App. Cas. 857, Lord Selborne says: "There can be no question that the word "person" may, and I should be disposed myself to say *prima facie* does, in a public statute include a person in law; that is, a corporation as well as a natural person. That if a statute provides that no person shall do a particular act except on a particular condition, it is *prima facie*, natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called "person" in law, have no capacity to do so at any time, by any means, or under any circumstances, whatsoever."

(14) 'explosive substance' includes any materials for making an explosive substance; also any apparatus, machine, implement or materials, used or intended to be used, or adapted for causing or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement;

(15) 'form' means a form in Part XXV. of this Act, and 'section' means a section of this Act;

(16) 'indictment' and 'count' respectively include information and presentment as well as indictment, and also any plea, replication or other pleading, any formal charge under sec. 873A, and any record;

"*Count*" ]—By sec. 951 every "count" shall be divisible. This includes an information on a summary trial. *R. v. Coolen*, 36 N.S.R. 510, 8 Can. Cr. Cas. 157.



(17) 'intoxicating liquor' means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or any mixed liquor a part of which is spirituous or vinous, fermented or otherwise intoxicating, and any such liquor shall be presumed to be intoxicating if it contains more than two and one-half per cent. of proof spirits.

(18) 'justice' means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also a police magistrate, a stipendiary magistrate and any person having the power or authority of two or more justices of the peace;

(19) 'loaded arms' includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, or slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material;

(20) 'military law' includes the Militia Act and any orders, rules and regulations made thereunder, the King's Regulations and Orders for the Army; any Act of the United Kingdom or other law applying to His Majesty's troops in Canada, and all other orders, rules and regulations of whatsoever nature or kind to which His Majesty's troops in Canada are subject;

(21) 'municipality' includes the corporation of any city, town, village, county, township, parish or other territorial or local division of any province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose;

"*Municipality*" ]—By the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (17), the name commonly applied to any country, place, body, corporation, society, officer, functionary, person or thing, means such country, place, body, corporation, society, officer, functionary, person or thing, although such name is not the formal and extended designation thereof.

(22) 'newspaper,' in the sections of the Act relating to defamatory libel, means any paper, magazine or periodical containing public news, intelligence or occurrences, or any remarks

or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and also any paper, magazine or periodical printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding thirty-one days, and containing only or principally advertisements;

(23) 'night' or 'night time' means the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day, and 'day' or 'day time' includes the interval between six o'clock in the forenoon and nine o'clock in the afternoon of the same day;

(24) 'offensive weapon' or 'weapon' includes any gun or other firearm, or air-gun, or any part thereof, or any sword, sword blade, bayonet, pike, pike-head, spear, spear-head, dirk, dagger, knife, or other instrument intended for cutting or stabbing, or any metal knuckles, or other deadly or dangerous weapon, and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon;

(25) 'Part' means a Part of this Act;

(26) 'peace officer' includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, deputy warden, instructor, keeper, guard, or any other officer or permanent employee of a penitentiary and the gaoler or keeper of any prison and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process;

(27) 'public department' includes the Admiralty and War Department, and the Ministry of Munitions of His Majesty and also any public department or office of the Government of Canada, or of the public or civil service thereof, or any branch of such department or office;

[As amended by Order-in-Council, February 24, 1917, under the War Measures Act, 1914.]

(28) 'public stores' includes all stores under the care, superintendence or control of any public department as herein defined, or of any person in the service of such department;

(29) 'public officer' includes any inland revenue or customs officer, officer of the army, navy, marine, militia, Royal North-west mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada;

*Public officer*—The phrase "public officer" may be traced to the Fifth Report (1840) of the Commissions on Criminal Law (Eng.), pp. 40, 47 and to Stephen's Digest of Criminal Law, 3rd ed., 82.

A "public officer" is one who discharges any duty in which the public are interested, for which he is paid out of moneys provided for the public service, and must either be a "judicial" or a "ministerial" officer. *R. v. Whitaker* (1914), 10 Cr. App. R. 245.

(30) 'prison' includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or other place in which persons charged with the commission of offences are usually kept or detained in custody;

(31) 'prize fight' means an encounter or fight with fists or hands, between two persons who have met for such purpose by previous arrangement made by or for them;

"*Prize-fight*"—See secs. 104, 105.

(32) 'property' includes

- (a) every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods.
- (b) not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise,

## DEFINITIONS

[§2]

- (c) any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, for the payment to the Crown or any corporate body of any fee, rate or duty, and whether still in the possession of the Crown or of any person or corporation;
- (33) 'shipwrecked person' includes any person belonging to, on board of, or having quitted any vessel wrecked, stranded or in distress at any place in Canada;
- (34) 'stores' includes all goods and chattels, and any single store or article;
- (35) 'superior court of criminal jurisdiction' means and includes,
- (a) in the province of Ontario, the High Court of Justice for Ontario,
  - (b) in the province of Quebec, the Court of King's Bench,
  - (c) in the provinces of Nova Scotia, New Brunswick, and British Columbia, the Supreme Court,
  - (d) in the province of Prince Edward Island, the Supreme Court of Judicature,
  - (e) in the province of Manitoba, the Court of Appeal or the Court of King's Bench (Crown side),
  - (f) in the provinces of Saskatchewan and Alberta, the Supreme Court of the Northwest Territories, until the same is abolished, and thereafter such court as is by the legislatures of said provinces respectively substituted therefor,
  - (g) in the Yukon Territory, the Territorial Court;
- (36) 'territorial division' includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies;
- (37) 'testamentary instrument' includes any will, codicil, or other testamentary writing or appointment, as well during the

life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both;

(38) 'trade combination' means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service:

"Trade Combination"]—See secs. 496-504, 581, 1012.

(39) 'trustee' means a trustee on some express trust created by some deed, will or instrument in writing, or by parole, or otherwise, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, whether by appointment of a court or otherwise, and also an executor or administrator, and an official manager, assignee, liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the province of Quebec, an *administrateur* or *fidéicommissaire*; and 'trust' includes whatever is by that law an *administration* or *fidéicommis*;

(40) 'valuable security' includes any order, exchequer acquittance or other security entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada or of any province thereof, or of the United Kingdom, or of Great Britain or Ireland, or of any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom, or of any British colony or possession, or of any foreign state, and any document of title to lands or goods wheresoever such lands or goods are situate, and any stamp

or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge or other instrument, evidencing payment of money, or the delivery of any chattel personal;

*Valuable security*—The true criterion as to whether a document is an order for payment of money or only a request, is, whether, if the instrument were genuine, and the person to whom it was directed paid it, he could recover the amount from the party by whom the order was given, or charge it to him, for if such be the case it is an order. *R. v. Carter*, 1 Cox 172; *R. v. Ferguson*, 1 Cox 241; *R. v. Dawson*, 3 Cox 220; *R. v. Vivian*, 1 Den. C.C. 35; *R. v. Steel*, 13 U.C.C.P. 619. *R. v. Tuke*, 17 U.C.Q.B. 296.

A lien note is a "valuable security," *R. v. Wagner*, 6 Can. Cr. Cas. 113. Where the value of the security is material to the offence, Code sec. 4 fixes a mode of determining it, for the purposes of the offence.

A document may be a "valuable security" within sec. 90 of 24 and 25 Vict., c. 96, the Larceny Act, 1861 (Imp), although invalid as the instrument it purported to be; it is not open to persons to obtain an acquittal on the ground that there was a defect in the document which might have made that document invalid if they had attempted to make use of it. *R. v. Graham* (1913), 8 Cr. App. R. 149.

In *R. v. Prentice*, 23 Can. Cr. Cas. 436, 7 A.L.R. 479, the charge was of fraud in obtaining a "valuable security" to wit, a cheque or order on a bank not shown to be for the entire fund. It was argued for the accused that whereas the opening words of sub-sec. 40 are "any order, exchequer, acquittance or other security entitling or evidencing the title of any person to *any share or interest* in any public stock or funds, etc., or in any fund of any body corporate, company or society, etc." and it then says: "Or to any *deposit* in any savings bank or other bank," the use of the words "any share or interest in" in the first case go to show that, these words not being repeated before the word "deposit," the intention was not to cover any share or interest in a deposit, but a deposit as a totality. Beck, J., held this argument not sound. (23 Can. Cr. Cas. at 447). He said: "The expression 'share or interest' does not mean merely any kind of an interest, share being taken in the sense of an interest only coupled with the idea of proportion, but means a share—in the sense in which it is used in speaking of a share in the capital stock of a company—or other interest of a like nature, such as stock, funded exchequer bills, or funded securities guaranteed by the Government. In this view the comparison or contrast is between 'deposit' and 'share or interest,' not 'any public stock or fund'; and 'any share or' other 'interest' of a like nature is then seen to be in the same category as 'any deposit,' and each is a totality in the same sense, and then, as the greater includes the less,



and the whole includes all its parts, to both 'any share or interest' and to 'any deposit' may be added the words 'or any part thereof or interest therein.'"

(41) 'wreck' includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons;

(42) 'writing' includes any mode in which, and any material on which, words or figures, whether at length or abridged, are written, printed or otherwise expressed, or any map or plan is inscribed.

"*Writing*"—See also the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34.

(43) 'in Part XII and in Parts XXII, XXIII and XXIV of this Act 'Part III' means such section or sections of the said Part as are in force by virtue of any proclamation in the place or places with reference to which the Part is to be construed and applied; and 'a commissioner' means a commissioner under Part III.

**Post card a chattel.—Value.**

3. For the purpose of this Act a postal card or any stamp referred to in the last preceding section shall be deemed to be a chattel, and to be equal in value to the amount of the postage, rate or duty expressed on its face in words or figures or both.

*Origin*—Code of 1892, sec. 3, sub-sec. (V).

*Postal offences generally*—See Code secs. 3. 207, 209, 265, 364, 365, 366, 407, 451, 510D, 516, 538, 850, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

**Valuable security.**

4. Valuable security shall, where value is material, be deemed to be of value equal to that of the unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable or to that of such money or chattel personal, the

payment or delivery of which is evidenced by such valuable security.

*Origin*].—Code of 1892. sec. 3.

*“Valuable security”*].—Sec. 4 is specially referred to in Part XVI, dealing with summary trials, and it is declared in sec. 771, sub-sec. (2), that where the value of any valuable security is necessary to be determined (for the purposes of Part XVI) it shall be reckoned in the manner prescribed by sec. 4. Sec. 773 gives special jurisdiction to certain tribunals where the value of the property stolen, unlawfully received, or obtained by false pretenses, does not exceed \$10. A similar condition applies to jurisdiction under sec. 777 (5) and see sec. 782.

Value is also important under sec. 387, where the charge is of theft of something worth more than \$200, and it is sought to make the accused liable for the added punishment which sec. 387 provides for such cases.

As to what is a “valuable security” see sec. 2, sub-sec. (40).

**Finding indictment.—Possession.—Joint possession.**

**5.** In this Act, unless the context otherwise requires,—

- (a) finding the indictment includes also exhibiting an information and making a presentment;
- (b) having in one’s possession includes not only having in one’s own personal possession, but also knowingly
  - (i) having in the actual possession or custody of any other person, and
  - (ii) having in any place (whether belonging to or occupied by one’s self or not) for the use or benefit of one’s self or of any other person.

**2.** If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

*“Having in possession”*].—As to the offence of receiving stolen property. see secs. 399-403, 993, 994. As to unlawful possession of posts, gates, underwood, etc., see sec. 395.

**Meaning of expressions in other Acts.**

**6.** In every case in which the offence dealt with in this Act relates to the subject treated of in any other Act the words and

expressions used herein in respect to such offence shall have the meaning assigned to them in such other Act.

*Origin*—Sec. 4, Code of 1892.

**Carnal knowledge.**

7. Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed.

*Origin*—See 4A in Code of 1892 as amended 1893; R.S. 1886, ch. 174, sec. 226.

*Carnal knowledge*—For offences involving unlawful carnal knowledge, see secs. 298 *et seq.*

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## PART I.

### GENERAL.

#### *Application of this Act.*

**This Act not to affect H. M. forces.**

8. Nothing in this Act shall affect any of the laws relating to the government of His Majesty's land or naval forces.

*Origin*—Code of 1892, sec. 983.

*Canadian Jurisdiction over extra-territorial Admiralty offences*—See 12-13 Vict., Imp. ch. 96. sec. 1 and 2; 18-19 Vict., Imp. ch. 91, sec. 21; 23-24 Vict., Imp., ch. 122; 28-29 Vict., Imp., ch. 63; Merchant Shipping Amendment Act, 30-31 Vict. (Imp.), ch. 124, sec. 11; Courts (Colonial) Jurisdiction Act, 1874; 37 Vict., Imp., ch. 27; Territorial Waters Jurisdiction Act, 1878, 41-42 Vict., Imp., ch. 73; 53-54 Vict., Imp., ch. 37; Merchant Shipping Act, 57-58 Vict., Imp., ch. 60, secs. 687 and 688; Merchant Shipping Acts, 1894-1914, Imp.

**Application of Act to Saskatchewan, Alberta and the Territories.**

9. Except in so far as they are inconsistent with the North-west Territories Act and amendments thereto as the same existed immediately before the first day of September, one thousand nine hundred and five, the provisions of this Act extend to and are in force in the provinces of Saskatchewan and Alberta, the Northwest Territories, and, except in so far as inconsistent with the Yukon Act, the Yukon Territory.

*Origin*—Code of 1892, sec. 983.

*Yukon and North-West Territories*—In the Yukon the provisions of the Yukon Act are to prevail, see R.S.C. 1906, ch. 63, amended 1907, ch. 53, 1908, ch. 76; 1909, ch. 37; 1912, ch. 56.

By sec. 105 of the Yukon Act, ch. 63, R.S.C. 1906, it is provided that certain persons, including "every commissioned officer of the Royal North-West Mounted Police shall, *ex officio*, have, possess and exercise all the powers of a justice of the peace or of two justices of the peace under any laws or ordinances, civil or criminal, in force in the Territory."

By sec. 89 of the said Act, authority is given to the Governor-in-council to appoint police magistrates for Dawson and Whitehorse in the Territory, who shall reside at those places respectively and shall ordinarily exercise their functions there, but who shall have jurisdiction respectively in such portions of the Territory as are defined in their commissions.

By sec. 777. of the Criminal Code, sub-sec. (2), the provisions of the section are made to apply to police magistrates in the Yukon and to judges of the Territorial Court.

• But the extended jurisdiction so given by Criminal Code, sec. 777, sub-sec. (2), to "police and stipendiary magistrates of cities and incorporated towns" to try with the consent of the accused, is intended to apply only to a special kind of police or stipendiary magistrate whose official capacity is designated in terms conforming to the statute, and not to magistrates for a whole province or judicial district with merely consequent jurisdiction for a city or incorporated town within the territorial limits. A commissioned officer of the R.N.W. mounted police, not being a police magistrate in the Yukon Territory, has no jurisdiction to try an offence of theft of over \$10, and the consent of the accused could not confer such jurisdiction: *The King v. Breckenridge*, 7 Can. Cr. Cas. 116. *R. v. Kolember*, 22 Can. Cr. Cas. 341.

The speedy trials clauses, Part XVIII, secs. 822-842, do not apply to the Yukon Territory or to the North-West Territory. Sec. 822.

For special provisions governing the practice in the present North-West Territories, with the exception of the Yukon Territory, see the N.W.T. Act, R.S.C., ch. 62, secs. 36-59.

*R.N.W. Mounted Police*—The Royal North-West Mounted Police force exercises jurisdiction in Alberta and Saskatchewan and the northern part of Manitoba as regards police duties and the enforcement of both Federal and Provincial laws by special arrangement with these provinces. In the Yukon Territory and the North-West Territories the R.N.W. police force is under the direct authority of the Government of Canada, which has charge of the enforcement of the criminal law in these Territories.

*Application of the Criminal Law of England.***Criminal law of England applicable to Ontario.**

**10.** The criminal law of England, as it existed on the seventeenth day of September, one thousand seven hundred and ninety-two, in so far as it has not been repealed by any Act of the Parliament of the United Kingdom having force of law in the province of Ontario, or by any Act of the Parliament of the late province of Upper Canada, or of the province of Canada, still having force of law, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of the province of Ontario.

*Origin*—R.S.C. 1886, ch. 144, sec. 1; 40 Geo. III (Upper Canada), ch. 1.

*Adoption of English Criminal law in Ontario*—After the Treaty of Paris in 1763, by which the French possessions in North America were ceded to Great Britain, a Royal Proclamation was issued on 7th October, 1763, introducing the law of England, both civil and criminal, into the whole of the ceded territory, and forming a portion of it, lying towards the East, into the Province of Quebec. The Governor of the new colony received power and direction "so soon as the state and circumstances of the colony would admit thereof, to summon and call a General Assembly," but until this was done, the Governor and council were invested with "authority to make such rules and regulations as should appear to be necessary for the peace, order and good government of the Province." In 1774 the Quebec Act, 14 Geo. III, c. 83, was passed, by which French law was re-introduced in civil matters and the limits of the Province of Quebec were enlarged, so as to include the whole of the territory afterwards formed into Upper Canada. The Quebec Act produced dissatisfaction, especially among the British colonists, and in 1791, the Imperial Act, 31 Geo. III, ch. 31, was passed by which the Province of Quebec as it then existed was divided into the two provinces of Upper Canada and Lower Canada; the powers of the legislation of the Governor-in-council were taken away; and a legislature was granted to each Province, consisting of a Governor, a Legislative Council, and a Legislative Assembly. R.S.O. 1914, vol. 3, p. CXL. 11.

The Legislature of Upper Canada, in 1800, by the statute 40 Geo. III, c. 1, affirmed the introduction of the criminal law of England, as it stood on the 17th day of September, 1792, "and as the same has since been repealed, altered, varied, modified or affected by any Act of the Imperial Parliament having force of law in Upper Canada, or by any Act of the Parliament of the late Province of Upper Canada, or of the Province of Canada, still having force of law, or by the

Consolidated Statutes relating to Upper Canada exclusively, or to the Province of Canada." See *B. v. Malloy*, 4 Can. Cr. Cas. 116. That enactment was consolidated in the R.S.C., 1886, c. 144, s. 1 (now Code sec. 10). A similar provision of the Legislature of British Columbia introducing into that Province the English criminal law as it stood on the 19th day of November, 1858, became s. 2 of R.S.C., 1886, ch. 144, (now Code sec. 11).

The Ontario law dealt with by the Upper Canada statute of 1800 and by the present sec. 10 of the Code makes no mention of ordinances passed by the old Province of Quebec in the few years' interval between the Quebec Act, 1774, and the institution of the Province of Upper Canada, and these ordinances are presumably excluded.

In the Royal Proclamation issued in 1763 it was declared that power had been given the governors of the colonies therein referred to (Quebec, as it was then called, being one) "to enact and constitute, with the advice of our said councils respectively, courts of judicature and public justice within our said colonies for the hearing and determining all causes, as well criminal as civil, according to law and equity, and as near as may be agreeable to the laws of England with liberty to all persons who may think themselves aggrieved by the sentences of such courts in all civil cases to appeal under the usual limitations and restrictions to us in our Privy Council."

The Quebec Act of 1774 (14 Geo. III, ch. 83), it was by s. 11 contained the following: "And whereas the certainty and lenity of the criminal law of England, and the benefit and advantages resulting from the use of it, have been sensibly felt by the inhabitants from an experience of more than nine years, during which it has been uniformly administered. Be it therefore further enacted by the authority aforesaid, that the same shall continue to be administered and shall be observed as law in the Province of Quebec, as well in the description and quality of the offence, as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted to the exclusion of every other rule of criminal law or mode of proceeding thereon which did or might prevail in the said province before the year 1764 anything in this Act to the contrary thereof in any respect notwithstanding."

The "Province of Quebec" in 1774 meant the territory afterwards known as Upper and Lower Canada, and what is known now as the Provinces of Ontario and Quebec.

By this legislation the criminal law of England, at least so far as adapted to the circumstances of the colony, became the law of the then Province of Quebec. This law included not only the common law, but a considerable body of the statute law scattered through various statutes passed from the time of Henry III to the time of George III.

Many Imperial statutes relating to the criminal law which were in force in England in 1764 or the later date of 1792, adopted for Ontario, have since been repealed by the Imperial Parliament; but it would seem that the repeal as to Ontario must be under Canadian law sub-

sequent to the Quebec Act or by an Imperial statute expressly applying to this country.

Vankoughnet, C., in an Ontario case, said: "While I admit the power of the Imperial Legislature to apply by express words their enactments to this country, I will never admit that without express words they do apply or are intended to so apply." *Penley v. Beacon Assurance Co.*, 10 Gr. at p. 428.

In view of the origin of Code sec. 10, it is submitted that the section is to be construed in a like manner as the Quebec Act and the Upper Canada statute of 1880, from which it originates. The words "criminal law of England" will not cover everything which was indictable in 1792 as a crime in England, but will be interpreted in the general way in which the term originally used and so as to exclude statutes, and possibly a part of the common law also, the provisions of which were (to use the words of Robinson, C. J., in *Shea v. Choat*, 2 U.C.Q.B. 211, "inapplicable to any state of things that ever existed here." And see *R. v. McCormick*, 18 U.C.Q.B., 131; Code sec. 589, and note to same.

In *Shea v. Choat*, 2 U.C.Q.B. 211, it was held that the statute 5 Eliz., c. 4, is not in force in Ontario, but the statute 20 Geo. II, c. 19, is, though both statutes are of a date long anterior to the introduction of the English law in this Province. In giving judgment, Robinson, C. J., said, in reference to the 5 Eliz., c. 4, that "it cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here. A clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions, but that is not sufficient to make such a statute part of our law, when the main object and tenor of it is wholly foreign to the nature of our institutions, and is, therefore, incapable of being carried substantially and as a whole into execution." (*Ibid.* at 221.)

In *Reg. v. Mercer*, 17 U.C.Q.B. 602, it was held that 5 and 6 Edw. VI, c. 16, against buying and selling public offices, is in force in Ontario, under 40 Geo. III, c. 1, as part of the criminal law of England, as well as by virtue of the Imperial statute 49 Geo. III, ch. 126. See now Code sec. 162.

The statute 32 Hy. VIII, ch. 9, prohibiting the buying of disputed titles subject to adverse possession, was held to be operative in Ontario. *Beasley v. Cahill*, 2 U.C.Q.B. 320.

Criminal prosecutions for champerty and maintenance are obsolete in England, and it was recommended by the English Criminal Law Commissioners who drafted the Code upon which the Canadian Code was based, that a statute should be passed declaring them no longer indictable. (*Fifth Report*, pp. 34-39).

No criminal prosecution of the kind appears in contemporary law reports in Canada, nor is the offence dealt with by the Canadian Criminal Code. But it is a common law offence, and the invalidity of agree-

ments on the ground of champerty and maintenance has been frequently set up on the ground both of the criminality and as being against public policy. See *Meloche v. Deguire*, 34 Can. S.C.R. 24, 8 Can. Cr. Cas. 89.

*Pre-Confederation provincial statutes*—A pre-Confederation criminal law of a province becomes, after Confederation, subject to repeal only by the Dominion Parliament; but the distinction between what is federal "Criminal law" and what is a regulation of a local provincial evil to be still dealt with by the province primarily as a matter of civil rights, is to be drawn by reference to the B.N.A. Act, 1867. *R. v. Halifax Tramway Co.* (1898), 30 N.S.R. 468, Can. Cr. Cas. 424. It does not follow that it remains criminal law for federal purposes because the pre-Confederation statute had treated it as a matter of criminal law at a time when the province enacting it had complete legislative power over criminal as well as civil matters. *Ex parte Green*, 35 N.B.R. 137, 4 Can. Cr. Cas. 182. So also there may be subjects of police regulation which may properly be dealt with by the province until the Dominion Parliament deals with them as part of the criminal law and so overrides the provincial legislation in so far as the two statutes may conflict. *Hudson v. South Norwich* (1885), 24 Can. S.C.R. at 160; *Blouin v. City of Quebec* (1880), 7 Que., L.R., at 22.

"Criminal law" as a subject of legislative authority under the B.N.A. Act includes "laws purporting to deal with public wrongs; that is to say, with offences against society rather than against the private citizen" and not being merely a local, municipal, or police regulation. *Onimet v. Basin* (1912), 46 Can., S.C.R. 502; 20 Can. Cr. Cas. 458. *Quong Wing v. The King*, 6 W.W.R. 270, 49 Can. S.C.R. 440; 23 Can. Cr. Cas. 113.

Statutes passed by a province prior to its admission into Confederation and which created new criminal offences would remain in effect in that province if not inconsistent with Dominion legislation until repealed by the Dominion Parliament. See *R. v. Strong* (1915), 43 N.B.R. 190, 24 Can. Cr. Cas. 430, holding a pre-Confederation statute of New Brunswick making adultery an indictable offence, to be still operative in New Brunswick, although the Dominion Parliament had, in 1886, repealed the pre-Confederation statute of the province which dealt with the procedure on prosecution for the offence.

*English criminal law in Quebec*—The Quebec Act, 1774, followed the cession made by the Treaty of Paris in 1763, and declared that the criminal law of England should be operative. This introduced the English common law as to crimes so far as adaptable in a ceded territory and also the prior statutory English criminal law with the like limitation, but as to the statute law, sec. 589 now, in effect, provides that no prosecution shall take place under the English Acts (either before or subsequent) unless made applicable in express terms to British possessions so as to include Canada.



A decision of the Supreme Court of Canada in 1903 in the civil case of *Meloche v. Deguire*, 34 Can. S.C.R. 24, 8 Can. Cr. Cas. 89, affirms the introduction of the offence of champerty in the Province of Quebec as part of the criminal law under the Quebec Act, 1774. See also *Price v. Mercier*, 18 Can. S.C.R. 303; *Giegerich v. Flentot*, 35 Can. S.C.R. 327; *Newswander v. Giegerich*, 39 Can. S.C.R. 354; *Craig v. Thompson*, 42 N.S.R. 150. Champerty is not obsolete as a ground for setting aside the champertous contract. *Power v. Phelan*, 4 Dorion (Que.) 57; *Hopkins v. Smith*, 1 O.L.R. 659; *Colville v. Small*, 22 O.L.R. 33, and 22 O.L.R. 426. It has been doubted whether a corporation can be guilty of the common law offence of "Maintenance."

In *Oram v. Hutt* [1914], 1 ch. 98, Lord Parker, of Waddington, said: "It may well be that a corporation cannot commit the common law offence of maintenance. . . . I cannot doubt, however, that an agreement which if entered into by an individual would be void as an agreement to commit an illegal act would if entered into by a corporation be similarly void, and if this is so, payments made pursuant to any such agreement would be *ultra vires* unless they could be justified on other grounds." In that case it was held that the payment of certain costs out of the funds of a trade union was, in the circumstances, obnoxious to the law of maintenance, and *ultra vires*.

*Nova Scotia, New Brunswick and Prince Edward Island*—There are no statutes, either Imperial or Canadian, expressly dealing with the introduction of English criminal law in the Maritime Provinces. The English common law as to crime became operative on the settlement of these provinces so far as it was applicable to local conditions. *Uniacke v. Dickson*, James, 287; *Emerson v. Maddison* [1906], A.C. 569; *R. v. Burdell*, 1 Old, 126; *R. v. Porter*, 20 N.S.R. 352.

For the purposes of introduction of English law, the Provinces of Nova Scotia and New Brunswick are considered as acquired by settlement rather than by cession of Acadia under the Treaty of Utrecht in 1713. *Uniacke v. Dickson*, James (Nova Scotia), 287.

An English colony instituted at a place which was practically unoccupied does not, on being peacefully annexed to the British Dominions, absorb the law of England further than the latter is reasonably applicable to the circumstances of the colony. *Cooper v. Stuart*, 58 L.J.P.C. 93. As to English statutes not expressly adopted in the colony and not expressly made applicable by any Imperial statute, see Code sec. 589.

Prince Edward Island was admitted into the union by the Imperial Order-in-Council of June 26th, 1873; see Vol. 4, R.S.C., 1906, p. 3175.

### **Criminal law of England applicable to British Columbia.**

**11.** The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-

eight, in so far as it has not been repealed by any ordinance or Act—still having the force of law—of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the province of British Columbia.

*Origin*—R.S.C. 1886, ch. 144, sec. 2.

*Introduction of English criminal law in British Columbia*—By Royal Proclamation the English criminal law had been expressly proclaimed in the colony of British Columbia as of November 19, 1858. English criminal law continued the law of British Columbia except as varied by its colonial statutes down to the union with the Dominion of Canada in 1871. Sec. 11 of the Code is a declaration of its further continuance.

British Columbia was admitted into the union by the Imperial Order-in-Council of May 16th, 1871; see Vol. 4, R.S.C. 1906, p. 3165.

The Sunday Observance Act, 1863, as contained in the Laws of British Columbia Revised 1871, was the law in British Columbia at the time of the union, sec. 1 of that Act reading as follows:—"1. The law, statutory and otherwise, and the penalties for the enforcement thereof, as at present existing and in force in England for the proper observance of the Lord's Day, commonly called Sunday, as referred to in the schedule hereto, shall be deemed and taken to have been included in the proclamation made and passed on November 19, A.D. 1858, and to be of full force and effect in the said colony, with and under the same penalties *mutatis mutandis* in all respects as if the said laws had been specially mentioned and enacted in the said proclamation of the 19th day of November, A.D. 1858."

In the schedule to the Act the following appears:—"29 Car. II., ch. 7, so far as the same is applicable to the said colony." Sec. 53, sub-sec. 130, of the Municipal Act (ch. 170, 2 Geo. V, R.S.B.C. 1911), being held to be in its nature criminal law and *ultra vires*, as beyond the competency of the British Columbia legislature. (*R. v. Waldon*, 19 B.C.R. 539, 6 W.W.R. 850, 20 Cr. Cas. 405), it may follow that in British Columbia 29 Car. II, ch. 7, is in force as well as the Lord's Day Act (Dominion) (ch. 153, R.S.C. 1906), by virtue of sec. 16 of the latter statute.

The offence of breaking into a counting-house and stealing money therefrom as declared by the English statute 7-8 Geo. IV, c. 29, s. 15, was a part of the criminal law of British Columbia prior to its admission into Confederation, and remains in force under Cr. Code, s. 11, subject to the change made by the Criminal Code as to the nature of

the punishment. See Cr. Code, s. 460, *re* Dean, 48 Can. S.C.R. 235, 3 W.W.R. 1037.

*Champerty and maintenance*—The laws of maintenance and champerty as they existed in England on 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void. The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement. *Briggs v. Fleutot*, 10 B.C.R. 309, affirmed sub nom. *Giegerich v. Fleutot*, 35 Can. S.C.R. 327; *Newswander v. Giegerich*, 39 Can. S.C.R. 354; and see cases cited under sec. 10 *supra* "English criminal law in Quebec," and cases cited under sec. 12, *infra*.

As to English statutes not expressly adopted in the province and not expressly made applicable by any Imperial legislation, see Code sec. 589.

#### **Criminal law of England applicable to Manitoba.**

**12.** The criminal law of England as it existed on the fifteenth day of July, one thousand eight hundred and seventy, in so far as it is applicable to the province of Manitoba, and in so far as it has not been repealed, as to the Province, by any Act of the Parliament of the United Kingdom, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected, as to the Province, by any such Act, shall be the criminal law of the province of Manitoba.

*Origin*—51 Vict. Can. ch. 33, sec. 1.

*Introduction of English criminal law in Manitoba*—Champerty as a criminal offence is to be considered as having become obsolete in England prior to 1870, and the older English criminal law of champerty consequently did not become part of the law of Manitoba under the English Law Introduction Act. *Thompson v. Wishart* (1910), 19 Man. L.R. 340; but see *Meloche v. Deguire*, 34 Can. S.C.R. 24, 8 Can. Cr. Cas. 89.

The latter case was discussed in *Thompson v. Wishart*, and emphasis laid on the words "in so far as it applicable" which appear in Code sec. 12. It will be observed that these words do not appear in secs. 10 and 11, which were consolidated from a different statute.

The Imperial Order-in-Council admitting Rupert's Land (by which name the territories of the Hudson's Bay Company were called) into the union was made on June 23, 1870, and sets forth the deed of surrender made by the Hudson's Bay Company to the Crown, dated November 19, 1869, the text of which is to be found in Vol. 4, R.S.C. 1906, pp. 3143-3163; and see *The Rupert's Land Act 1868*, Imp., 31-32 Viet., ch. 105.

The Manitoba Act 1870 (33 Vict., Can., ch. 3) made provision for the organization of the Province of Manitoba from part of the territory so surrendered and the establishment of its local government from and after the passing of the Order-in-Council of June 23, 1870. The boundaries were extended by the statute 44 Vict., Can., ch. 14, and Canadian statutes 1912, ch. 32.

*Alberta and Saskatchewan*].—When the Provinces of Saskatchewan and Alberta were formed by the Saskatchewan and Alberta Acts, the North-West Territories Act ceased to apply to them, as by the North-West Territories Amendment Act passed at the same session of the Parliament of Canada, and which came into force on the same day as the Saskatchewan and Alberta Acts, namely, 1st September, 1905, the words "North-West Territories" used in that Act were changed to mean only the territory north of those Provinces and the Province of Manitoba, excepting the Yukon Territory, but it was by the Saskatchewan and Alberta Acts expressly provided that all laws, so far as they were not inconsistent with anything contained in those Acts, or where those Acts contained no provision intended as a substitute therefor existing immediately before the coming into effect of those Acts in the Territories thereby established into Provinces, should continue in those Provinces as if those Acts had not been passed. *R. v. Standard Soap Co.*, 12 Can. Cr. Cas. 290, at 295, 6 W.L.R. 64.

The Provinces of Alberta and Saskatchewan were established out of part of the Canadian territory previously known as the "North-West Territories." This was done by the Statutes of the Dominion of Canada assented to on July 20th, 1905, the "Alberta Act" being ch. 3 of 4-5 Edw. VI. (Can.) and the "Saskatchewan Act" being ch. 42 of the same session. Each of these Acts provides that all Courts of civil and criminal jurisdiction in the new province shall continue, subject to change by competent authority, and that on the abolition of the "Supreme Court of the North-West Territories" and the constitution in either of the Provinces of a Superior Court of criminal jurisdiction, the procedure in criminal matters which then obtained in respect of the Supreme Court of the North-West Territories shall, until otherwise provided by competent authority, continue to apply to such Superior Court, and that the Governor-in-Council may at any time and from time to time declare all or any part of such procedure to be inapplicable to such superior court.

While the Supreme Court of Alberta has taken the place of the Supreme Court of the N.W.T. in Alberta, it is an entirely different Court, and is not bound by decisions of that Court any more than it would be by the decisions of its sister Court of the Province of Saskatchewan which occupies the same relation to the earlier Court. *R. v. Thompson*, 1 W.W.R. 277, 21 Can. Cr. Cas. 81; per Harvey, C. J.

*Effect of Act on Remedies.***Civil remedy not suspended.**

**13.** No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.

*Origin*—Code of 1892, sec. 534.

*Criminal torts*—This section was probably intended to separate the criminal consequences of a criminal tort from the civil consequences, and to abrogate the rule which prevailed prior to the Code that public justice must first be vindicated before a civil action could be brought for a felonious act. *Walsh v. Nattress*, 19 U.C.C.P. 453; *Pease v. McAloon*, 1 Kerr (N.B.), 111; *Brown v. Dalby*, 7 U.C.Q.B. 162; *Livingstone v. Massey*, 23 U.C.Q.B. 156; *Williams v. Robinson*, 20 U.C.C.P. 255; *Taylor v. McCullough*, 8 Ont. R. 330; *E. v. F.*, 11 O.L.R. 582.

The effect which the criminal law had upon the tort could be removed only by the Federal Parliament having jurisdiction over the criminal law; but it would still remain for the provincial legislature to decide whether or not there should be any "civil remedy" under a particular state of facts. Sec. 13 does not declare that there shall be a civil remedy immediately exercisable notwithstanding the crime, although that result may follow in most provinces because of their existing civil law. Sec. 13 deals only with the effect of a crime upon whatever civil remedy the provincial law may allow. It still remains for the provincial legislature to declare, if it chooses, the conditions precedent to any civil remedy or to declare that there shall be no civil remedy for a criminal tort. In that view of the matter there is no attempted infringement of provincial constitutional rights such as was suggested in *Paquet v. Lavoie*, 7 Que. Q.B. 277, 6 Can. Cr. Cas. 314.

If however, the enactment had been of wider scope than the present sec. 13, and had declared that notwithstanding any provincial law to the contrary, the person wronged by a criminal act should have a claim for damages whether or not the wrongdoer were otherwise prosecuted, it seems probable that the federal authority would be held to override the provincial law to that extent. See *re Location plans and City of Regina* 5 W.W.R. 413. The provincial legislative authority as to "property and civil rights" is necessarily subject to such federal legislation which brings a particular civil right within the ambit of the subject "Criminal law and procedure" which the B.N.A. Act assigns exclusively to the Federal Parliament. Compare Code sec. 223 as to the separation of civil and criminal matters and see *Toronto Ry. Co. v. The King* 29 Can. Cr. Cas. 29, reversing 34 O.L.R. 589, 25 Can. Cr. Cas. 183 (as to civil and criminal nuisances). See also secs. 23-26, 29-36, 41-43, 46-64, sec. 314 (2), 734. 1131, 1143-1151.

In Manitoba the question of the constitutionality of Code sec. 13 was raised in *Attorney-General v. Kelly*, 9 W.W.R. 243, affirmed 9 W.W.R. 492, but it did not become necessary for the court to decide the point. It was there held that it is not a positive rule of law or practice that a stay of proceedings will be granted in a civil action until after the trial of a criminal charge based on the same facts; the matter is one of discretion. *Attorney-General v. Kelly*, supra. If the defendant were within the jurisdiction and willing to be tried by the courts in the regular way on the criminal charge, it might be proper to restrain the civil action at least to the extent of not compelling the defendant to make production or be examined for discovery. *Attorney-General v. Kelly*, 9 W.W.R. 492; per Richards, J. A.; but the fact that a defendant is out of the jurisdiction and is resisting extradition on the criminal charge will ordinarily be a ground for refusing a stay of the civil action. *Ibid.*

**Distinction between felony and misdemeanour abolished.**

14. The distinction between felony and misdemeanour is abolished, and proceedings in respect of all indictable offences, except so far as they are herein varied, shall be conducted in the same manner.

*Origin*—Code of 1892, sec. 535.

*Felony and misdemeanor*—As to provisions of the former law which remain unaffected by the Code, the former distinction is still important. So, if a practice as to bail is limited to misdemeanors and the case is not specifically covered by the bail provisions of the Code, such practice will not apply to an offence which but for sec. 14 would be termed a felony. *R. v. Fox*, 2 O.W.R. 728, 7 Can. Cr. Cas. 457; *Ex parte Fortier*, 13 Que. K.B. 251, 6 Can. Cr. Cas. 191.

But a provision in a pre-Confederation Habeas Corpus Act for the prisoner's discharge on failure to prosecute for the felony for which he was committed, has been held to apply equally to a charge of an indictable offence which was formerly a misdemeanor. *R. v. H. B. Cameron*, 1 Can. Cr. Cas. 169 (Que.).

And the consent of counsel for the accused to the use of evidence previously given on the hearing of a charge against another person will be equally effective whether the offence which is the subject of the trial was formerly a misdemeanor or a felony, although before the Code such a consent was legal in misdemeanor only. *R. v. Fox*, 2 O.W.R. 728, 7 Can. Cr. Cas. 457.

Calling the offence a misdemeanor in the statute creating it will not affect a jurisdiction to try the same clearly conferred on magistrates. *R. v. Kennedy*, 6 Can. Cr. Cas. 29, 35 N.S.R. 266.

**When offence punishable under more than one Act or law.**

**15.** Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

*Origin*—Code of 1892, sec. 933.

*Prosecutions at Common law*—The Code of 1906 amplified sec. 933 of the Code of 1892 in making express mention of the retention of common law offences. Matters of defence at common law had been retained by sec. 7 of the former Code, now sec. 16, but the question of punishment for offences declared by statute without express mention of a penalty, and the question of possible common law offences not covered by the penal clauses of the Code were left open for judicial determination. The English draft Criminal Code had contained a clause expressly abrogating the common law with respect to criminal offences so that, if it had passed, a prosecution could not be laid if it should develop that some class of common law offence had not been provided for in the Code. The draft Code did not become law in England, there being strong opposition on the part of the judges who were asked to report on it, to this proposed abrogation of the common law. Pollock, C.B., said he had "no such confidence in the sagacity of any man or any set of men as to expect that every contingency be provided for." The Canadian Parliament left out this objectionable clause of the English draft Code in formulating the Canadian Criminal Code of 1892 and furthermore enacted what is now sec. 16 as to matters of defence or of justification or excuse under the rules and principles of common law. This was followed by several judicial decisions on the point.

In *Union Colliery Co. v. The Queen*, 31 Can. S.C.R. 81, 4 Can. Cr. Cas. 400, it was said that Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in an indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; and even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force. *Union Colliery Co. v. The Queen*, per Sedgewick, J.

In Ontario it was held that the common law jurisdiction as to crime was still operative, notwithstanding the Code of 1892, and even in cases provided for by the Code, unless there was such repugnancy as to give

prevalence to the latter law. *R. v. Cole* (1902), 5 Can. Cr. Cas. 330, 3 O.L.R. 389.

In Nova Scotia it was held that the Code of 1892 was intended to make complete and exhaustive provision as to the subjects with which it dealt, in so far, at all events, as its provisions related to procedure. *R. v. Snelgrove*, 16 Can. Cr. Cas. 189, 39 N.S.R. 400.

As to common law offences not included in the Code, the right of prosecution is founded on the omission from the Code of any clause abrogating the common law in such manner as was proposed by the English draft Code. Sec. 15 refers in terms only to such common law offences as are provided for in the Code or in some other statute, and this for the purpose of declaring that the offender may be punished either at common law or under the particular statute dealing with it. But an important qualification is added and that is that the alternative remedy shall not apply if a contrary intention appears. The Code will prevail over the common law wherever there is a repugnancy. *R. v. Cole* (1902), 3 O.L.R. 389, 5 Can. Cr. Cas. 330; *R. v. Walkem*, 14 B.C.R. 7, 14 Can. Cr. Cas. 122. And as between different statutes, the law which is later in date, as well as later in position in the statute book, must, in case of inconsistency or repugnancy, prevail against the earlier in time and place; per Boyd, C., in *R. v. Rose*, 27 O.R. 195.

The criminal common law of England is still in force in Canada except in so far as repealed either expressly or by implication. *Brousseau v. The King* (1917), 56 S.C.R. 22.

*Defences available at common law*—See sec. 16.

*For the same offence*—In *R. v. Pope*, 5 W.W.R. 1070, 7 A.L.R. 169, 22 Can. Cr. Cas. 327, Stuart, J., said:

"With respect to sec. 15 of the Code which says that a man shall not be punished twice for the same offence we have the high authority of Archbold (24th ed., p. 177), for the view which, I think, is the correct one, that this means, 'for the same act or omission.' Referring to the parallel English statute Archbold says: 'Perhaps the enactment would have been clearer if, for the word 'offence' at the end had been substituted the words 'act or omission.' But it does no more than extend to statutory offences the common law rule laid down in *The Queen v. Miles*, 24 Q.B.D. 423.' And see *Beg. v. Grimwood*, 60 J.P. 809, Code sec. 907.

Sec. 1079 declares that when any person convicted of any offence has paid the penalty or undergone the punishment awarded he shall be released from all "further or other" criminal proceedings for the same "cause."

*Defences of antrefois convict or antrefois acquit for substantially the same offence*—See Code secs. 906 and 907.



*Justification or Excuse.***Common law rule in force.**

**16.** All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith.

*Origin*—Sec. 7, Code of 1892.

*Except in so far as altered, etc.*—The exception at the end of Code sec. 16 is specially referred to in *R. v. Bonner* (1913), 21 Can. Cr. Cas. 442, 447, per Martin, J. A., in support of the proposition that dangerous explosions otherwise within Code sec. 111 are not excused by the fact that the property injured belonged to the accused.

*"Without lawful excuse."*—Some offences under the Code are expressly qualified in the enacting clauses by appending the limitative words "without lawful excuse" to the description of the act or neglect which is to be penalized. Were the jurisdiction in civil and criminal matters vested in the same legislature such a limitation would appear superfluous for an act could not be lawful and criminal at the same time. But with the division of legislative authority under the Canadian constitution it will be seen that the matters of justification or excuse referred to under Code sec. 16 and following sections may not cover certain matters which may be justified under provincial law and which it is not desired to make crimes under the supervening powers of the Dominion Parliament as to criminal law. As to such the limitation of the offence by the words "without lawful excuse" would involve a consideration of provincial statutory law. Under Code sec. 229, for example, it is an offence to be found in a disorderly house "without lawful excuse." The defence may presumably set up not only circumstances which would at common law justify his presence in the house but show that he was rightfully there in pursuance of a duty imposed under municipal or provincial authority, for example, a sanitary officer on inspecting the premises under a Public Health law or ordinance. The words "without lawful excuse" will be found in Code secs. 229, 237, 241, 242, 243, 244, 246, 247, 248, 252. Compulsion from necessity arising from hunger does not excuse a crime. *R. v. Dudley* (1884), 14 Q.B.D. 273; compare *R. v. Stratton*, 21 St. Trials, 1040 at 1223, 1230.

*Common law jurisdiction*—The common law jurisdiction as to crime is still operative notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the latter law. *R. v. Cole*, 3 O.L.R. 389, 5 Can. Cr. Cas. 330; *R. v. Walkem*, 14 B.C.R. 7.

See also note to sec. 15.

*Defence of res judicata*—See note to sec. 906.

*Mens rea*—See secs. 69-72.

#### Children under seven.

**17.** No person shall be convicted of an offence by reason of any act or omission of such person when under the age of seven years.

*Origin*—Sec. 9, Code of 1892.

*Legal incapacity for crime*—This is in accordance with the common law under which a child under the age of seven years is *doli incapax* and no evidence was admissible to rebut that presumption. Marsh v. Loader, 14 C.B.N.S. 535.

#### Children between seven and thirteen.

**18.** No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.

*Origin*—Sec. 10, Code of 1892.

*Child between seven and fourteen*—Sec. 18 deals only with the mental capacity of the child to distinguish between right and wrong. R. v. Hartlen, 2 Can. Cr. Cas. 12 (N.S.). Sec. 298 specially provides that no one under the age of fourteen can be guilty of rape. As to other sexual offences, see secs. 202-206, 292-294.

The evidence of malice, which is to supply age should be strong and clear beyond all doubt and contradiction; but if it appear to the Court and jury that the offender was *doli capax* and could discern between good and evil, he may be convicted. 1 Russell on Crimes, 6th ed., 115; Roscoe's Crim. Evidence, 12th ed., 856; R. v. Waite [1892], 2 Q.B. 600.

A charge of perjury cannot be sustained against a child under fourteen without proof of guilty knowledge of wrong doing. Code sec. 18 has not changed the common law which presumed against guilty knowledge where the accused was under the age of fourteen. R. v. Carvery, 11 Can. Cr. Cas. 381.

*Juvenile Courts*—Where Juvenile Courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40 as amended by 1912, ch. 30 and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age.

*Theft by juveniles under sixteen*—See secs. 800-821.

**Insanity.—Delusions.—Presumption of sanity.**

**19.** No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

*Origin*—Sec. 11, Code of 1892.

*Defence of insanity*—It is for the defence to prove that the accused was not sane at the time of committing the acts. *R. v. Coelho* (1914), 10 Cr. App. R. 210; *R. v. Hawkes*, 9 W.W.R. 445, 32 W.L.R. 720, 25 Can. Cr. Cas. 29; *McNaughten's case*, 10 Clark & F., 200.

The proof is to be by a preponderance of evidence to the satisfaction of the jury. *R. v. Anderson*, 22 Can. Cr. Cas. 455; *R. v. Jefferson*, 1 Cr. App. R., 95.

It is misdirection to say that the defence must be made out beyond a reasonable doubt. *R. v. Anderson*, *supra*; and see *R. v. Myshrahl*, 8 Can. Cr. Cas. 474.

The rule laid down by the judges in reply to a question put to them by the House of Lords, in *McNaghten's Case* (1843), 4 St. Tr. N.S. 847, 10 Clark & F. 200, 1 Car. & K. 130, was as follows: "Notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we mean, the law of the land." And this rule was followed and applied in *R. v. Riel* (No. 2) (1885), 1 Terr. L.R. 23. Leave to appeal was refused by the Privy Council. *Riel v. The Queen*, 10 A.C. 875, 16 Cox C.C. 48.

The words "the nature and quality of the act" in the second and third answers of the judges in *McNaghten's Case* (1843) 10 Cl. & Fin. 200, 210, refer only to the physical character of the act in question,

and are not meant to distinguish between its physical and moral aspects. *Rex v. Georges Codere*, 12 Cr. App. R. 21.

In *Reg. v. Ross Tuckett*, 1 Cox C.C. 103, where the defence was insanity, counsel for the accused tendered evidence that the accused's maternal grandfather had been confined in a lunatic asylum. Maule, J., said: "I know that these questions are generally admitted. It is a matter of fact, and not a matter of law, that insanity is often hereditary in a family, but I think you should prove that *in the first instance*, by the testimony of medical men and *then* your question will be legitimate."

The Court in its discretion will read a doctor's report of the mental state of an appellant founded on an examination made before, but drawn up after, the date of the act charged, and not put in at the trial. *R. v. Coelho*, 10 Cr. App. R. 210.

It is not a good defence that defendant, though he can distinguish between right and wrong, is so affected by disease that he is incapable of controlling his actions. *Rex v. Coelho*, 10 Cr. App. R. 210; 30 T.L.R. 535; *B. v. Creighton*, 14 Can. Cr. Cas. 349; but see contra *R. v. Hay*, 22 Cox, C.C. 268; *R. v. Fryer*, 24 Cox C.C. 403. For a discussion of the question of insanity see Mercier on Criminal Responsibility and McNaghten's Case, 10 Clark & F., 200, 4 St. Tr. N.S. 847.

A warrant may be issued by the Lieutenant-Governor of the province for the detention in an asylum of a prisoner acquitted on account of insanity at the time of the offence, (Code, sec. 969), although found sane at the time of trial. *Re Duclos*, 8 Que. P.R. 372, 12 Can. Cr. Cas. 278, 32 Que. S.C. 154.

*Insanity of prisoner*—No person can be rightly tried, sentenced or executed while insane. If there be sufficient reason to doubt whether an accused person is unable, on account of insanity, to conduct his defence, the question whether by reason of such insanity he is unfit to take his trial should first be tried. *Rex v. Leys*, 16 O.W.R. 544. ;

Whether there was any evidence of insanity to support the acquittal on that ground is properly reserved as a "question of law" at the instance of the prosecution. *R. v. Phinney*, 36 N.S.R. 264, 6 Can. Cr. Cas. 460.

*Drunkenness as affecting sanity and questions of intent*—Drunkenness is not a good defence to murder unless it can be positively proved that it was of such a nature that the accused did not know the difference between right and wrong. *R. v. Galbraith* (1912), 8 Cr. App. R. 101; *R. v. Davis*, 14 Cox C.C. 563.

A man is not excused from crime by reason of his drunkenness. But, although drunkenness is not to be taken as any excuse for crime, yet where the crime is such that the intention of the party committing it is one of the constituent elements, the fact that a man was in drink is to be looked at in considering whether he formed the intention

necessary to constitute the crime. If his drunkenness prevented his forming such an intention in a homicide case, he would be guilty of manslaughter and not murder; though such an act in a sober man would prove an intention to do grievous bodily harm. *R. v. Doherty*, 16 Cox C.C. 306; *R. v. Wilson*, 46 N.S.R. 59, 21 Can. Cr. Cas. 448.

In *The King v. Meade* [1909], 1 K.B. 895, the trial of a prisoner for murder, evidence was given that he was in drink at the time of the commission of the act charged, and the judge gave the following direction to the jury, which was upheld by the Court of Criminal Appeal:

"In the first place, everyone is presumed to know the consequences of his acts. If he be insane the knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned, and the man is incapable, therefore, of forming that intent, it justifies the reduction of the charge from murder to manslaughter."

And see *R. v. Studdard*, 25 Can. Cr. Cas. 81; *R. v. Jessamine*, 19 Can. Cr. Cas. 214, 3 O.W.N. 753; *R. v. Moke* [1917], 3 W.W.R. 575.

So drunkenness is not an excuse for attempted suicide, but may be a material fact on the question of intent. *R. v. Doody*, 6 Cox C.C. 403.

*Procedure and defence of insanity*—See secs. 966-970.

*Instruction to jury on insanity defence*—An instruction to the jury on a plea of insanity in a case in which evidence is adduced under Code sec. 19, sub-sec. (2), as to specific delusions, should not be limited so as to exclude from them the right to find on competent evidence that the accused could apart from that sub-section be acquitted on the ground of insanity. *R. v. Moke* [1917], 3 W.W.R. 575 (Alta.).

### Compulsion by threats.

**20.** Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy, the being a party to which rendered him subject to compulsion, of any offence other than treason as defined by this Act, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson.

*Origin*—Sec. 12, Code of 1892.

"*Except as hereinafter provided*"—This refers to the special exception made by sec. 131 as regards taking an unlawful oath to commit a crime or the taking of a seditious oath.

*Compulsion as a defence or matter of mitigation*—Upon the subject of sec. 20, it is said in Note A of the English Royal Commissioners upon codification of the criminal law (p. 43):

"There can be no doubt that a man is entitled to preserve his own life and limb; and, on this ground, he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not one of a heinous character. But killing an innocent person, according to Lord Hale, can never be justified. He lays down the stern rule: 'If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself than kill an innocent man.'"

The commissioners pointed out that the rule appeared to have been relaxed in the high treason cases in 1746, but they conclude by saying:

"We have framed sec. 23 of the draft code (Eng.) to express what we think is the existing law, and what at all events we suggest ought to be the law."

And Cross, J., delivering the opinion of the court in *R. v. Farduto* 21 Can. Cr. Cas. 144, 19 Rev. Leg. 165, said, in quoting from the commissioners' report:

"That must mean, I take it, that the view of Lord Hale has received the approval of the high authority of the English commissioners upon whose report our code is based. Hence the rule of sec. 20. It does not follow that compulsion is never an excuse for killing, but the compulsion must be such as to make the accused person a mere inert physical instrument." Thus it is said in Russell (Can. ed.), p. 90:

"Persons are properly excused from those acts which are not done of their own free will, but in subjection to the power of others. Actual physical force upon the person and present fear of death may in some cases excuse a criminal act. . . . Thus, if A. by force takes the arm of B. in which is a weapon, and therewith kills C., A. is guilty of murder, but B. is not; but if it is only a moral force put upon B. as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. . . . Sir J. Stephen expresses the opinion that in most, if not all cases, the fact of compulsion is matter of mitigation of punishment, and not matter of defence."

*Wife's crime committed in husband's presence*—See sec. 21.

**Compulsion of wife.**

**21.** No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband.

*Origin*—Sec. 13, Code of 1892.

*Compulsion of wife not presumed from husband's presence*—Referring to the legal presumption still in effect in England but negatived by Code sec. 21, Alverstone, L.C.J., in *R. v. Court* (1912), 7 Cr. App. R. 127, said he was not certain that this rule of law is beneficial in the administration of justice, and that it certainly ought not to be extended. In that case it was unsuccessfully urged that the accused woman should have the benefit of the presumption as regards the coercion of the man with whom she was living as his wife, or at least that the jury should have been invited to acquit, if they thought that she was acting under the man's influence.

In *Brown v. Attorney-General for New Zealand* (18 Cox, 658; [1898] A.C. 234; 67 L.J.P.C.), Halsbury, L.C., said: "The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time, if the wife was voluntarily a party to the commission of a crime, her coverture furnished no excuse."

In *R. v. Baines*, 69 L.J.Q.B. 681; 19 Cox, 524, husband and wife were jointly indicted for feloniously receiving stolen property, and were convicted. Russell, L.C.J., in his judgment, said that "the mere fact of the marriage does not raise any presumption of coercion by the husband. If the wife has taken an independent part, even if the husband is in the neighborhood, she is guilty."

See also *R. v. Green*, 24 Cox C.C. 41, 9 Cr. App. R. 228; *R. v. Williams* 42 U.C.Q.B. 462; *R. v. McGregor*, 26 Ont. R. 115; *R. v. Howard*, 45 U.C.Q.B. 346; *R. v. Torpey* 12 Cox C.C. 45.

As to theft or receiving by husband or wife of property belonging to the other, see Code sec. 354 amendment of 1913.

*Accessory after the fact*—See sec. 71.

**Ignorance of the law.**

**22.** The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

*Origin*—Sec. 14, Code of 1892.

*Ignorance of the law*—The maxim *ignorantia juris non excusat* has long been applied in English criminal law. See *Regina v. Crawshaw* (1860), 8 Cox C.C. 375; *Rex v. Bailey* (1800), R. & R. 1; *McNaghten's Case* (1843), 10 Cl. & F. 200, at p. 210. The rule is put thus in Archbold's *Criminal Pleading*, 23rd ed., at p. 33:

"Ignorance of the law will not excuse from the consequences of guilt any person who has capacity to understand the law."

The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shown that he had a guilty mind. In *Cundy v. LeCoeq* (1884), 13 Q.B.D. 207, at p. 210, Stephen, J., however, says: "In old time, and as applicable to the common law or to earlier statutes, the maxim (*actus non facit reum, nisi mens sit rea*) may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now. . . to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created." And see *Bank of N.S.W. v. Piper* [1897], A.C. 383.

Where the defendant was well aware of the facts, and his only mistake was as to the law, that is no defence. *R. v. Brinkley* 12 Can. Cr. Cas. 454 at 469, per MacLaren, J.A., distinguishing *Macleod v. Attorney-General of N.S.W.* [1891], A.C. 455.

All persons are bound to know and obey the laws. *R. v. Mailloux*, 3 Pugsley (N.B.) 493; *R. v. Moodle*, 20 U.C.Q.B. 399. Although ignorance of the law is not a defence, it constitutes a ground for an application to the Executive for mercy. *R. v. Madden*, 10 L.C. Jur. 344.

But a person acting under a bad warrant or process is protected under the circumstances stated in Code sec. 29, which expressly declares that ignorance of the law shall in such case be an excuse. Sec. 29 thus forms an express exception to the general rule declared in sec. 22.

It seems that this section does not cover ignorance of foreign law; the question of the validity of a divorce under the foreign law of the state where granted would be a question, of fact, but the question whether or not the foreign decree was valid in Canada as a defence to a bigamy charge laid in Canada is one of law. *Meredith, J.A., in H. v. Brinkley*, 12 Can. Cr. Cas. 455 at 477, 14 O.L.R. 434.

As to the doctrine of *mens rea* see note to sec. 72.

#### Execution of sentence.

**23.** Every ministerial officer of any court authorized to execute a lawful sentence, and every gaoler, and every person lawfully assisting such ministerial officer or gaoler, is justified in executing such sentence.

*Origin*—Sec. 15, Code of 1892.

*Execution of erroneous sentence or sentence without jurisdiction*—See secs. 26 and 27.



**Execution of process.—Gaoler.**

**24.** Every ministerial officer of any court duly authorized to execute any lawful process of such court, whether of a civil or criminal nature, and every person lawfully assisting him, is justified in executing the same.

2. Every gaoler who is required under such process to receive and detain any person is justified in receiving and detaining him.

*Origin*—Sec. 16, Code of 1892.

*"Any lawful process"*—The third resolution in *Semayne's Case*, 5 Coke 91, 1 Sm. L. Cases, 11th ed., p. 105, was:

"In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house either to arrest him or to do other execution of the King's process if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming and to make requests to open the doors.*"

It was pointed out in *Wah Kie v. Cuddy* (No. 2), 23 Can. Cr. Cas. 383 at 386, 8 A.L.R. 111, that this resolution refers to process, for example, a warrant which does not expressly give the right to enter, as does a search warrant. Again he refers to a house—a dwelling house, not a room for occasional or habitual assembly only.

And see *Hodder v. Williams* [1895], 2 Q.B. 663, and Code sec. 39.

*Erroneous process or process without jurisdiction*—See secs. 26 and 27.

**Execution of warrants.—Gaoler.**

**25.** Every one duly authorized to execute a lawful warrant issued by any court or justice of the peace or other person having jurisdiction to issue such warrant, and every person lawfully assisting him, is justified in executing such warrant.

2. Every gaoler who is required under such warrant to receive and detain any person is justified in receiving and detaining him.

*Origin*—Sec. 17, Code of 1892.

*Force used in arrests*—See secs. 39-47.

*Arrest of wrong person*—See sec. 28.

*Warrants without jurisdiction or erroneous*—See secs. 27 and 29.

**Execution of erroneous sentence or process.**

**26.** If a sentence is passed or process issued by a court having jurisdiction under any circumstances to pass the sentence or issue such process, or if a warrant is issued by a court, justice or person having jurisdiction under any circumstances to issue the warrant, the sentence passed or process or warrant issued shall be sufficient to justify the officer or person thereby authorized, to execute the same, and every gaoler and person lawfully assisting in executing or carrying out such sentence, process, or warrant, although the court passing the sentence or issuing the process had not in the particular case authority to pass the sentence or to issue the process, or although the court, justice or other person in the particular case had no jurisdiction to issue, or exceeded its or his jurisdiction in issuing, the warrant, or was, at the time when such sentence was passed or process or warrant issued, out of the district in or for which such court, justice or person was entitled to act.

*Origin*—Sec. 18, Code of 1892.

*Erroneous warrant or process*—The officer is justified under the circumstances stated in 26 although the warrant or process was in the particular case made without jurisdiction and was afterwards set aside. *Sleeth v. Hurlbert*, 25 S.C.R. 620; *Mott v. Milne*, 31 N.S.R. 372.

A warrant of commitment issued by justices having jurisdiction over the offence may afford justification to the constable although it required as a condition of release payment of certain costs beyond the jurisdiction of the justices to award. *R. v. King* (1889), 18 Ont. R. 566.

But the magistrate who unlawfully issues a warrant of arrest without a sworn information may himself be civilly liable for false arrest. *McOatherin v. James*, 41 N.B.R. 367, 21 Can. Cr. Cas. 116. And he may be liable for issuing a warrant wholly unjustified if he signed it without making any inquiry of the complainant as to the causes of suspicion upon which the warrant was applied for. *Murfin v. Sauv  *, 19 Que. S.C. 51.

*Defective process or warrant*—See sec. 29.

*Court or justice not regularly constituted or appointed*—See sec. 27.

*Resisting or obstructing peace officer*—See secs. 169, 608.

**Sentence or process without jurisdiction.**

**27.** Every officer, gaoler or person executing any sentence, process or warrant, and every person lawfully assisting such officer, gaoler or person, shall be protected from criminal respon-

sibility if he acts in good faith under the belief that the sentence or process was that of a court having jurisdiction, or that the warrant was that of a court, justice or other person having authority to issue warrants, and if it be proved that the person passing the sentence or issuing the process acted as a court under colour of having some appointment or commission lawfully authorizing him to so act, or that the person issuing the warrant acted as a court, justice or other person having such authority, although in fact such appointment or commission did not exist or had expired, or although in fact the court or the person passing the sentence or issuing the process was not the court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act.

*Origin*].—Sec. 19, Code of 1892

**Arresting wrong person.—Assisting in such arrest.—Gaoler.**

**28.** Every one duly authorized to execute a warrant to arrest, who thereupon arrests a person, believing in good faith and on reasonable and probable grounds that he is the person named in the warrant, shall be protected from criminal responsibility to the same extent and subject to the same provisions as if the person arrested had been the person named in the warrant.

2. Every one called on to assist the person making such arrest, and believing that the person in whose arrest he is called on to assist is the person for whose arrest the warrant is issued, and every gaoler who is required to receive and detain such person, shall be protected to the same extent and subject to the same provisions as if the arrested person had been the person named in the warrant.

*Origin*].—Sec. 20, Code of 1892.

*Justifying arrest without warrant*].—See sec. 30, 32 and 33. *R. v. Sabears*, 7 Can. Cr. Cas. 498, 37 N.S.R. 223; *Hoye v. Bush*, 1 M. & G. 785; *Jordan v. McDonald*, 31 N.S.R. 129; *McGuinness v. Dafeo*, 23 A.R. (Ont.), 714; *Thomas v. C.P.R.* 14 O.L.R. 55.

**Irregular warrant or process.—Question of law.**

**29.** Every one acting under a warrant or process which is bad in law on account of some defect in substance or in form

apparent on the face of it, if he in good faith and without culpable ignorance and negligence believes that the warrant or process is good in law, shall be protected from criminal responsibility to the same extent and subject to the same provisions as if the warrant or process were good in law, and ignorance of the law shall in such case be an excuse.

2. It shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in the belief of such person that the warrant or process is good in law.

*Origin*—Sec. 21, Code of 1892.

*Defect in substance or in form appearing on the face of the warrant or process*—The person acting under the writ of a superior court is protected from criminal responsibility if the writ does not appear to be outside the scope of its jurisdiction and the officer in good faith believes it valid without culpable ignorance and negligence. *R. v. McGuire*, 34 N.B.R. 430, 4 Can. Cr. Cas. 15.

An amendable irregularity in civil process, for example, an error in the date of the judgment as stated therein, does not make the process bad in law. *R. v. Monkman*, 8 Man. R. 509.

*Protection order as condition of quashing justice's conviction*—See sec. 1131.

*Civil liability for executing defective process*—See *Pon Yin v. Edmonton*, 8 W.W.R. 809; *McCleave v. Moncton*, 32 S.C.R. 106; *Robinson v. Morris*, 19 O.L.R. 633, 23 Can. Cr. Cas. 209, overruling *R. v. Robinson* 14 O.L.R. 519, 12 Can. Cr. Cas. 447; *McCatherin v. James* 41 N.B.R. 367; *Murfin v. Sauv  *, 19 Que. S.C. 51; *Woodforde v. Chatham*, 37 N.B.R. 21; *McGuinness v. Dafoe*, 23 A.R. (Ont.) 714; *Gaul v. Township of Ellice*, 3 O.L.R. 438; and the provincial statutes dealing with the protection of justices and peace officers.

#### Arrest by peace officer.

**30.** Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

*Origin*—Sec. 22, Code of 1892.

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47, 649, 652, 652A.

*Arrest without warrant*—See Code secs. 646 to 653 inclusive for schedule of offences for which arrest without warrant is authorized in certain contingencies and with certain restrictions as to the parties exercising the power.

For any of the offences scheduled in 646, the person "found committing" may be arrested by "any person"; a "peace officer" (see Code sec. 2 (26) as amended 1913) may arrest without warrant any person whom he "finds committing" any criminal offence. Code sec. 648. And any person may arrest without warrant any one whom he finds committing any criminal offence "by night." Code sec. 648 (2).

So also any person may assist arresting the criminal on fresh pursuit by those lawfully authorized to arrest from whom the accused is escaping. Code sec. 649. Peace officers have additional powers of arresting a loiterer at night on suspicion for good cause that the accused has committed an indictable offence or is about to do so, Code sec. 652. If a person is found committing a criminal offence in respect of any property real or personal, Code sec. 2 (32), its owner may arrest without warrant. For the offence of procuring, Code sec. 216 (as amended 1913) a peace officer may arrest without a warrant any person whom he has good cause to suspect of having committed or being about to commit any of the offences mentioned in sec. 216. Code sec. 652A added by the Code amendment of 1913.

*Belief on reasonable and probable grounds as justification*—The protection afforded by sec. 30, applies only where the officer stands indifferent, so that he may act without bias or partiality in deciding whether or not there are reasonable and probable grounds for the arrest. *R. v. Belyea*, 43 N.B.R. 375, 24 Can. Cr. Cas. 395; and see *Trebeck v. Cronduce*, 34 Times, L.R. 59.

The officer may be held liable for false imprisonment if there was no warrant where a warrant is required and he had no reasonable ground of belief that the person arrested was one of the guilty parties. *Mack Sing v. Smith*, 1 Sask., L.R. 454; *Pon Yin v. Edmonton*, 8 W.W.R. 809, 24 Can. Cr. Cas. 327, 31 W.L.R. 402; but where the officer has acted in good faith and on information which excuses him to some extent, these facts will be taken into consideration in assessing the damages. *Mousseau v. City of Montreal*, 12 Que. S.C. 61.

The justification of sec. 30 applies to relieve the officer from both civil and criminal proceedings in cases to which it applies; it makes the arrest lawful where its conditions exist. *R. v. Cloutier*, 12 Man. R. 183, 2 Can. Cr. Cas. 43.

There may be a justification under sec. 30, although there was a defective warrant which was produced and read to the accused, if the constable honestly believed, on reasonable and probable grounds, that the accused was one of the guilty parties. *R. v. Sabean*, 37 N.S.R. 223,

7 Can. Cr. Cas. 498; R. v. Cloutier, 12 Man. R. 183; Jordan v. McDonald, 31 N.S.R. 135.

The question whether a peace officer, under s. 30 of the Criminal Code, on reasonable and probable grounds believed that an offence for which the offender might be arrested without a warrant had been committed and whether the officer, on reasonable and probable grounds, believed that a fugitive had committed that offence, is one for the jury and not for the judge to decide. Rex v. Smith, 17 Man. L.R. 282, 13 Can. Cr. Cas. 326.

*Arrests flagrante delicto*—Unless there is statutory authority for so doing, neither a magistrate nor a constable should act officially in his own case except *flagrante delicto* while there is otherwise danger of escape, or to suppress an actual disturbance and enforce the law when it is in the act of being resisted. Powell v. Williamson, 7 U.C.Q.B. 154; *Ex parte McCleave*, 3 O.L.R. 438, 6 Can. Cr. Cas. 15; R. v. Hefferman, 13 Ont. R. 616; R. v. Belyea, 24 Can. Cr. Cas. 395, 43 N.B.R. 375.

He is not justified in personally arresting without warrant several months after an assault upon him, the person who committed the assault. R. v. Belyea, 43 N.B.R. 375, 24 Can. Cr. Cas. 395.

*Breach of the peace in view of a justice*—If a justice sees a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon. And he may also by word command any person to apprehend him, and such a command is a good warrant without writing. But if the same be done in his absence then he must issue his warrant in writing. 5 Burn's Justice of the Peace, 30th ed., p. 1114.

If the justice is not himself personally arresting the offender on view or upon suspicion, or calling in some one to assist him in doing so, he can only act by issuing a warrant to apprehend the offender in the manner authorized by law. It is the former case to which secs. 30 and 31 are applicable, the actual personal interference of the justice and those whom he calls to his assistance in making the arrest. There is no authority for saying that as peace officer he has any authority to send B. as a constable to arrest anywhere in his county a person whom he suspects of having committed an offence for which he may be arrested without warrant. B. may as constable or private person be in a position to justify the arrest by reason of his own suspicion. He cannot, in such a case, justify under A.'s (the justice's) command, and if he cannot justify by reason of his own suspicion, both A. and B. are wrongdoers, for A. cannot justify under sec. 30. If the constable can justify the arrest as upon his own suspicion it may perhaps be said that it was his arrest alone and not that of A. the defendant upon his command. But where the constable was acting under the defendant's warrant alone, and was not professing to assist the defendant (the justice) in making a personal arrest upon suspicion, the warrant, and not any suspicion of his own as to the commission of the

crime, must be his justification. If that warrant turns out to be illegal, the justice cannot claim that the arrest was ministerial only. *McGuiness v. Dafoe*, 3 Can. Cr. Cas. 139, 23 Ont. App. R. 704; *Appleton v. Lepper*, 20 U.C.C.P. 138.

**Persons assisting peace officer.**

**31.** Every one called upon to assist a peace officer in the arrest of a person suspected of having committed such offence is justified in assisting, if he knows that the person calling on him for assistance is a peace officer, and does not know that there is no reasonable ground for the suspicion.

*Origin*—Sec. 23, Code of 1892.

*Peace officer*—See definition in sec. 2, sub-sec. 26, as amended 1913, ch. 13.

*Force in assisting peace officer*—Sec. 30 of the Code being read with sec. 31, it seems plain that what both point at is the personal or individual act of the peace officer. Sec. 30 justifies the officer—justice or constable—in personally arresting a suspected person under certain circumstances without warrant; that is to say, just as if he had a warrant in his possession authorizing him to do it; and sec. 31 justifies everyone who is called upon to assist the peace officer in making the arrest, if he knows that he is a peace officer, and does not know that there are no reasonable grounds for the suspicion which justifies the latter in acting. These sections are merely a codification of the common law. *McGuiness v. Dafoe*, 3 Can. Cr. Cas. 139, 23 Ont. App. R. 704.

Sec. 169 makes it an offence to resist or wilfully obstruct any peace officer in the execution of his duty, or “any person acting in aid of such officer.”

If a person is lawfully called upon to assist a peace officer in the execution of his duty, he is bound to go to the officer's assistance, and will be justified in using force to the same extent as the officer himself.

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47, 649, 652, 652A.

**Arrest of persons found committing offence.**

**32.** Every one is justified in arresting without warrant any person whom he finds committing any offence for which the offender may be arrested without warrant, or may be arrested when found committing.

*Origin*—Sec. 24, Code of 1892.

*Person found committing certain offences*—Where a provincial statute authorized a constable finding people peddling to arrest them

without warrant, it was held that the magistrate who issued a warrant without the necessary information being laid before him was responsible in damages for false arrest thereunder and was not entitled to rely upon the fact that the constable might have arrested without a warrant. *McCatherin v. Jamer* (1912) 41 N.B.R. 367, 21 Can. Cr. Cas. 116, 11 F.L.R. 527.

*Arrest without warrant*—See secs. 35, 36, 47, 646 to 652A, inclusive.

#### **Arrest after commission of certain offences.**

**33.** If any offence for which the offender may be arrested without warrant has been committed, any one who, on reasonable and probable grounds, believes that any person is guilty of that offence is justified in arresting him without warrant, whether such person is guilty or not.

*Origin*—Sec. 25, Code of 1892.

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47, 649, 652, 652A.

*Offence actually committed by someone*—Sec. 33 cannot be invoked in justification merely because there was reasonable and probable cause for suspicion, if the party making the arrest cannot show that the particular offence for which he arrested the other, was in fact committed by someone. *McKenzie v. Gibson*, 8 U.C.Q.B. 100; *Walters v. W. H. Smith & Son, Limited* [1914], 1 K.B. 595, 83 L.J.K.B. 335, 30 Times L.R. 158; but see sec. 30.

#### **Arrest during night.**

**34.** Every one is protected from criminal responsibility for arresting without warrant any person whom he, on reasonable and probable grounds, believes he finds committing by night any offence for which the offender may be arrested without warrant.

*Origin*—Sec. 26, Code of 1892.

*"By night"*—See sec. 2, sub-sec. (23).

*Arrest without warrant*—See secs. 646-652, and 652A.

#### **While committing offence.**

**35.** Every peace officer is justified in arresting without warrant any person whom he finds committing any offence.

*Origin*—Sec. 27, Code of 1892.

*Protection of officer making an arrest*—



The powers of a constable to make arrests without warrant depend either on the common law or on statute. At common law, speaking generally, a constable may arrest a person whom he finds committing a felony, a misdemeanor, or breach of the peace, or whom, on reasonable grounds, he suspects of having committed a felony: Russell on Crimes, p. 724. And by the Criminal Code he may arrest any person whom he finds committing a criminal offence: Criminal Code sec. 648. But neither at common law nor by the Code is there any authority for arresting a person without warrant found committing a breach of a city by-law. Section 648 of the Code uses the words "criminal offence," showing clearly that the right to arrest given there is in the case of the committing of an offence under that Act which would include offences punishable on summary conviction as well as indictable offences. Sec. 35 of the Code says that every peace officer is justified in arresting without warrant any person whom he finds committing any offence. This section is not for the purpose of authorizing the arrest but is for the protection of the officer making the same from the consequences of his act either in a criminal or civil proceeding. It would only protect him in cases in which he was authorized to make the arrest, i.e., in the case of a person found committing a criminal offence. This section is merely a codification of the common law.

In the report of the Commissioners on the English Draft Code, referring to this and other similar sections, they state that the word "justified" is used when there is no change in the law as it previously existed, while in other cases the words "protected from criminal responsibility" are used. These words were used because in cases where an enactment extended the existing law for the purpose of protecting a person from criminal proceedings they did not think it right to deprive the person injured of his right to damages, and where it was doubtful whether the enactment extended the law or not they thought it better not to prejudice the decision of the civil Courts by the language used. *Plested v. McLeod* (1910), 3 Sask. R. 374, at pp. 377, 378; 15 W.L.R. 533; *R. v. McMurrer*, 18 Can. Cr. Cas. 385; *R. v. Pollard* [1917] 3 W.W.R. 754, 29 Can. Cr. Cas. 35.

In *Kelly v. Barton*, 26 Ont. R. 608, Boyd, C., said: "The officer was not bound or required as a matter of duty to arrest the plaintiff, although he was violating the provisions of a city by-law in that he was driving a city omnibus without having a license so to do. That conduct was merely the infraction of a police regulation, which falls far short of being a crime. There was no state of law or of facts which did exist that could justify this summary arrest, though the officer may have *bona fide* believed that he had such a legal right, and that such was his official duty."

The right to regulate the procedure for enforcing the penalties provided for the infraction of a provincial statute, including the right

to arrest without a warrant for its breach, is a matter for the province and not for the Dominion. The offences under sec. 35 of the Code for which an offender may be arrested without a warrant are therefore limited to those within the legislative competence of the Parliament of Canada, that is to say, to criminal offences. *Plested v. McLeod* (1910), 3 Sask. R. 374, 15 W.L.R. 533. *Lamont, J.*, added: "This view seems to be supported by sec. 38 of the Code, which provides, 'nothing in this Act shall take away or diminish any authority given by any Act in force for the time being to arrest, detain, or put under restraint any person.' Here it seems to me that Parliament expressly recognizes the right of a province to authorize an arrest for an infraction of a provincial statute. If a provincial enactment provides that for an infraction of a provincial Act a person may be arrested without a warrant, a peace officer would be justified in so arresting, as was held in *Rex v. Sweeney* (1910), 8 Eastern L. Reporter 16."

See also *R. v. Wason*, 17 A.R. (Ont.), 221, 233; *ex parte Duncan*, 2 Cartw. 297.

*Statutory powers of arrest*—See sec. 38.

*Authority to arrest without warrant*—See secs. 646-652, and 652A.

#### **By night.—Loitering by night.**

**36.** Every one is justified in arresting without warrant any person whom he finds by night committing any offence.

2. Every peace officer is justified in arresting without warrant any person whom he finds lying or loitering in any highway, yard or other place by night, and whom he has good cause to suspect of having committed or being about to commit any offence for which an offender may be arrested without warrant.

*Origin*—Sec. 28, Code of 1892.

*Authority to arrest without warrant*—See secs. 646-652, and 652A.

"*By night*"—See sec. 2, sub-sec. (23).

*Loitering in highway*—See also the vagrancy sections, 238, 239, and as to arrest of loiterers by night, sec. 652.

*Arrest during flight*—See sec. 37.

#### **Arrest during flight.**

**37.** Every one is protected from criminal responsibility for arresting without warrant any person whom he, on reasonable and probable grounds, believes to have committed an offence and to be escaping from and to be freshly pursued by those

whom he, on reasonable and probable grounds, believes to have lawful authority to arrest that person for such offence.

*Origin*—Sec. 29, Code of 1892.

*Fresh pursuit*—See sec. 649. It is not a "fresh pursuit" for an officer to go to another province for the accused several weeks after the alleged offence. *R. v. Shyffer*, 15 W.L.R. 323, 15 B.C.R. 338, 17 Can. Cr. Cas. 191

*Reasonable and probable grounds*—See secs. 30 and 33.

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47, 649, 652, 652A.

### Statutory power of arrest.

**38.** Nothing in this Act shall take away or diminish any authority given by any Act in force for the time being to arrest, detain or put any restraint on any person.

*Origin*—Sec. 30, Code of 1892.

*Arrest without warrant*—See secs. 646-652, 652A.

*Arrest on warrant for preliminary enquiry*—See secs. 655, 659-664.

*Arrest on warrant in summary conviction matters*—See secs. 711, 712, 718, 722 (5).

*Arrest in default of finding surties to keep the peace*—See sec. 748, Code form 50.

*Arrest under search order or warrant*—See sec. 641 (disorderly house or lottery); gaming (secs. 641, 642); opium joints (641, 642, 642A); vagrants (36, 643, 652); enticement of girl to house of ill-fame (216, 640, 652A).

*Arrest under Juvenile Delinquents Act*—Can. Stat., 1908, ch. 40, sec. 5.

### Force in executing warrant, process or sentence.

**39.** Every one executing any sentence, warrant or process, or in making any arrest, and every one lawfully assisting him, is justified, or protected from criminal responsibility, as the case may be, in using such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, process or warrant can be executed or the arrest effected by reasonable means in a less violent manner.

*Origin*—Sec. 31, Code of 1892.

*When demand necessary before breaking into dwelling on search order*—*Launock v. Brown* (1819), 2 B. & Ald. 593, 106 E.R. 482, was a case of a search warrant under a statute (22-23 Car. II., ch. 25, sec.

2) which empowered game keepers and other persons, authorized by warrant under the hand and seal of any justice of the peace for the county in the day time to search the houses, outhouses or other places of certain persons for guns, bows, greyhounds, etc., and to seize, detain and keep the same, etc. The Court *en banc* of four Judges, affirming the decision of the trial Judge, held that a search warrant under the statute was unlawfully executed inasmuch as no demand of admittance had been made before breaking open the outer door of the dwelling house of the plaintiff's house. This rule is applicable to all search warrants or orders for search unless it is clear from the statute authorizing the search warrant that a demand to open is not necessary when the place is to be searched is a dwelling house. *Wah Kie v. Cuddy* (No. 2), 23 Can. Cr. Cas. 383, 30 W.L.R. 167.

In *Hodder v. Williams* [1895] 2 Q.B. 663, the statement made in *Smith's Leading Cases* in the notes to *Semayne's Case* is approved: "The maxim that 'a man's house is his castle' only extends to his dwelling house; therefore a barn or outhouse, not connected with the dwelling house, may be broken open in order to levy an execution (*Ponton v. Brown*, 1 Sid. 181, 186), but not to make a distress for rent: *Brown v. Glenn*, 16 Q.B. 254."

*Excess in force used*—See sec. 66.

*Resisting or obstructing peace officer*—See sec. 169.

**Duty of person arresting.—Notice.—Failure in duty.**

40. It is the duty of every one executing any process or warrant to have it with him, and to produce it if required.

2. It is the duty of every one arresting another, whether with or without warrant, to give notice, where practicable, of the process or warrant under which he acts, or of the cause of the arrest.

3. A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants, or the person arresting, of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed, or the arrest effected, by reasonable means in a less violent manner.

*Origin*—Sec. 32, Code of 1892.

*Manner of arrest*—Where a constable tells a person given into his charge that he must go with him before a magistrate, and such person, in consequence, goes quietly, and without force being used, it is an arrest. *Chinn v. Morris*, 2 C. & P. 361; *Joyce v. Perrin*, 3 U.C.O.S. 300.

And where the constable said to the plaintiff, "You must go with me," on which the plaintiff said he was ready to go, and went with the constable towards a police office, without being seized or touched, this was ruled to be an imprisonment. *Pocock v. Moore*, Ry. & M. 321; *Forsyth v. Goden*, 32 C.L.J. 499.

If the party is under restraint and the officer manifests an intention to make a captive, it is not necessary that there should be an actual contact. *Grainger v. Hill*, 4 Bing. N.C. 212, *Vaughan, J.*; *McIntosh v. Demeray*, 5 U.C.Q.B. 343; *Wilson v. Brecker*, 11 U.C.C.P. 268; *R. v. O'Hearon*, 5 Can. Cr. Cas. 531.

Defendant was convicted of a fourth offence under The Canada Temperance Act. A warrant was placed in the hands of a constable, who after keeping it for some time went to defendant to execute it, and told him he would have to come to gaol with him. Defendant, complaining of the great inconvenience he would be put to if placed in custody at that time, induced the constable to hold off for a week or two longer by agreeing to deposit \$100 with him. Later on, the constable arrested the defendant on the same warrant and lodged him in gaol. It was held on an application for his discharge by habeas corpus on the ground that he had been twice arrested on the same warrant, that even if an arrest had been effected on the first occasion when the constable agreed to hold off, it was called off by defendant's own request and he was therefore estopped, and the application was refused. *Ex parte Doherty* (1899), 5 Can. Cr. Cas. 94 (N.B.); and see *R. v. O'Hearon*, 5 Can. Cr. Cas. 531.

*Right of search on arrest*—The right of an officer to search the person of one arrested for felony has always been assumed, as well as the right to keep the goods found on him if necessary for the purposes of the trial. See *Tomlin's Law Dictionary*, sub-tit. Constable, IV, "A constable must keep goods found on a felon till trial, and then return them according to the directions of the court;" see also *Mayer v. Vaughan*, 11 Que. K.B. 340 (search of letter-carrier on arrest for alleged post-office offence). In the case of *Dillon v. O'Brien*, 16 Cox C.C., at p. 245, the Irish Exchequer Division extended the rule to cases of misdemeanor. *Palles, C. B.*, says: "If, then, the right here claimed, does not exist, even in treason and felony, it would follow upon the arrest of a murderer caught in the act and on the moment lawfully arrested whilst the weapon with which the crime had been committed was in his hand it would be illegal for the constable to detain that weapon for the purpose of evidence; so also would it be illegal for the officers of the law to take possession of poisons found in the possession of one who had caused death by poison, and even in treason letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor, would be safe from capture upon his arrest, although from the earliest times it has been the settled and unvarying practice to seize such proofs of guilt and give them in evidence at the

trial." The case of *Leigh v. Cole*, 6 Cox C.C. 329 (cited with approbation by the Ontario Court of Appeal in *Gordon v. Denison*, 22 A.R., p. 326), was a charge to the jury by Mr. Justice Vaughan Williams on the subject of the right of constables to search and handcuff persons in custody for breaches of the peace, and the learned judge made use of the following language: "With respect to searching a prisoner there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend on all the circumstances of the case." In the case of persons in custody not accused of an indictable offence no general rule can be applied, and it would always be for a jury to say whether the case is one in which a search should have been made.

#### **Peace officer preventing escape.**

**41.** Every peace officer proceeding lawfully to arrest, with or without warrant, any person for any offence for which the offender may be arrested without warrant, and every one lawfully assisting in such arrest, is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner.

*Origin*—Sec. 33, Code of 1892.

*Shooting at person fleeing from arrest*—When a peace officer, pursuing a fugitive whom he had a right to arrest without a warrant, found that the fugitive was, in his opinion, likely to escape for the time being owing to superior speed, it is a question for the jury, on the trial of the officer for manslaughter in killing the fugitive by a shot from his revolver intended only to wound and so stop his flight, whether, under all the circumstances, the officer was justified under s. 41 of the Code in such shooting in order to prevent the escape of such fugitive, or whether such escape could not have been prevented by reasonable means in a less violent manner. *Rex. v. Smith*, 17 Man. R. 292, 13 Can. Cr. Cas. 326.

*Private person preventing escape*—See sec. 42.

*Duty to assist peace officer*—See sec. 167.

*Arrest without warrant*—See Code secs. 646 to 652A, inclusive.

**Private person preventing escape.**

**42.** Every private person proceeding lawfully to arrest without warrant any person for any offence for which the offender may be arrested without warrant is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grievous bodily harm.

*Origin*—Sec. 34, Code of 1892.

*Person lawfully assisting peace officer*—See secs. 41, 167; *R. v. Smith*, 17 *Man. R.* 282.

**Preventing escape in other cases.**

**43.** Every one proceeding lawfully to arrest any person for any cause other than an offence in the last section mentioned is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grievous bodily harm.

*Origin*—Sec. 35, Code of 1892.

*Offences of escape and rescue*—See secs. 185-196.

**Preventing escape or rescue of arrested person.**

**44.** Every one who has lawfully arrested any person for any offence for which the offender may be arrested without warrant is protected from criminal responsibility in using such force in order to prevent the rescue or escape of the person arrested as he believes, on reasonable grounds, to be necessary for that purpose.

*Origin*—Sec. 36, Code of 1892.

*Offences of escape and rescue*—See secs. 185-196.

**Force to prevent escape.**

**45.** Every one who has lawfully arrested any person for any cause other than an offence for which the offender may be arrested without warrant is protected from criminal responsi-

bility in using such force in order to prevent his escape or rescue as he believes, on reasonable grounds, to be necessary for that purpose, if such force is neither intended nor likely to cause death or grievous bodily harm.

*Origin*—Sec. 37, Code of 1892.

*Offences of escape and rescue*—See secs. 185-196.

**Preventing breach of peace.**

**46.** Every one who witnesses a breach of the peace is justified in interfering to prevent its continuance or renewal and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer, if the person interfering uses no more force than is reasonably necessary for preventing the continuance or renewal of such breach of the peace, or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of such breach of the peace.

*Origin*—Sec. 38, Code of 1892.

*Peace officer*—See sec. 2, sub-sec. (26).

**Arrest in such case.—Giving person in charge.**

**47.** Every peace officer who witnesses a breach of the peace, and every person lawfully assisting him, is justified in arresting any one whom he finds committing such breach of the peace, or whom he, on reasonable and probable grounds, believes to be about to join in or renew such breach of the peace.

**2.** Every peace officer is justified in receiving into custody any person given into his charge as having been a party to a breach of the peace by one who has, or whom such peace officer, upon reasonable and probable grounds, believes to have, witnessed such breach of the peace.

*Origin*—Sec. 39, Code of 1892.

*Person "found committing" the offence*—See secs. 32, 35, 36, 47, 646, 648, 650, 651, and as to the offence of being "found in a disorderly house" see sec. 229 as amended in 1913.

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47, 649, 652, 652A.

*Breach of the peace*—As to common assault, see secs. 290-291; assault occasioning actual bodily harm; sec. 295; aggravated assault, sec. 296; affray, sec. 100; riotous injury, secs. 96-97; riot, 87-97.



**Suppression of riot by magistrate.**

**48.** Every sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, and every magistrate and justice of the peace, is justified in using, and ordering to be used, and every peace officer is justified in using, such force as he, in good faith, and on reasonable and probable grounds, believes to be necessary to suppress a riot, and as is not disproportioned to the danger which he, on reasonable and probable grounds, believes to be apprehended from the continuance of the riot.

*Origin*—Sec. 40, Code of 1892.

*Excess in force used*—See sec. 66.

*Aid in suppressing riot*—See secs. 48-51, 88, 90-95, 167, and the Militia Act, R.S.C. 1906, ch. 41, secs. 80-90.

**Suppression of riot by persons commanded thereto.—Question of law.**

**49.** Every one, whether subject to military law or not, acting in good faith in obedience to orders given by any sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, or by any magistrate or justice, for the suppression of a riot, is justified in obeying the orders so given unless such orders are manifestly unlawful, and is protected from criminal responsibility in using such force as he, on reasonable and probable grounds, believes to be necessary for carrying into effect such orders.

2. It shall be a question of law whether any particular order is manifestly unlawful or not.

*Origin*—Sec. 41, Code of 1892.

*Unless "manifestly unlawful"*—Where the imprisonment and other acts complained of were done by a military officer in the ordinary discharge of his military duty and under orders from his superior officers, it was held that they were not "manifestly unlawful," as the officer was bound to obey the orders of his superiors. *Keighley v. Bell*, 4 F. & F. 763.

*"Military law"*—See note to sec. 51.

*Aid in suppressing riot*—See secs. 48-51, 88, 90-95, 167, and the Militia Act, R.S.C. 1906, ch. 41, secs. 80-90.

**Suppression of riot by persons apprehending serious mischief.**

**50.** Every one, whether subject to military law or not, who in good faith and on reasonable and probable grounds believes that serious mischief will arise from a riot before there is time to procure the intervention of any of the authorities aforesaid, is justified in using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and as is not disproportioned to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot.

*Origin*—Sec. 42, Code of 1892.

*Common duty to suppress riot*—By the common law, a private individual might lawfully endeavour, of his own authority and without any warrant or sanction from a magistrate, to suppress a riot by every means in his power; he might disperse or assist in dispersing those assembled and stay those engaged in it from executing their purpose, as well as stop and prevent others whom he saw coming up from joining the rest. *Phillips v. Eyre*, L.B. 6 Q.B. 15. If the occasion demanded immediate action and no opportunity occurred for procuring the advice or sanction of a magistrate, it was the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly, and the law protected him in all that he honestly did in the prosecution of that purpose. *Ibid*, per Willes, J., approving the charge of Tindal, C.J., to the grand jury of Bristol (1832), 5 C. & P. 261 (n).

*Aid in suppressing riot*—See secs. 48-51, 88, 90-95, 167, and the Militia Act, R.S.C. 1906, ch. 41, secs. 80-90.

**Protection of persons subject to military law.—Question of law.**

**51.** Every one who is bound by military law to obey the lawful command of his superior officer is justified in obeying any command given him by his superior officer for the suppression of a riot, unless such order is manifestly unlawful.

2. It shall be a question of law whether any particular order is manifestly unlawful or not.

*Origin*—Sec. 43, Code of 1892.

*"Military law"*—See Code sec. 1 (20), the Militia Act R.S.C. 1906, ch. 41, and the Army Act (Imp.) referred to in secs. 74 and 75 of the Militia Act; also the War Office Official Manual of Military Law (Imp.) 1914.

*Aid in suppressing riot*—See secs. 48-51, 88, 90-95, 167, and the Militia Act, R.S.C. 1906, ch. 41, secs. 80-90.

**Use of force.—To prevent commission of offence.—Act amounting to offence.**

**52.** Every one is justified in using such force as may be reasonably necessary in order—

- (a) to prevent the commission of any offence for which, if committed, the offender might be arrested without warrant, and the commission of which would be likely to cause immediate and serious injury to the person or property of any one; or,
- (b) to prevent any act being done which he, on reasonable grounds, believes would, if committed, amount to any such offence.

*Origin*—Sec. 44, Code of 1892.

*Excess in force used*—See sec. 66.

*Force in defence of person under protection of defending party*—See secs. 55, 59, 60.

*Justification of manslaughter*—In his dissenting opinion in *B. v. Moke* [1917], 3 W.W.R. 575, Beck, J., said that the prisoner would be justified in killing the deceased if on reasonable grounds he believed that was necessary to prevent the deceased from killing him; that is the effect of sec. 52 of the Code. "Justification on this ground," said Beck, J., "is not precisely the same as justification on the ground of self-defence. (Stephen's History of Cr. Law, vol. 3, p 14). In the course of centuries the defence of self-defence has accumulated about it more or less technicality. The defence of justification in prevention of crime is free of these. Such a defence calls for a most careful consideration of all the particular circumstances of the particular case under consideration and necessitates a careful direction upon them by the trial judge."

**Repelling assault.—Extent justified.**

**53.** Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence.

2. Every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assail-

ant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

*Origin*—Sec. 45, Code of 1892.

*"Not having provoked such assault"*—See sec. 54, sub-sec. (2).

*Belief "on reasonable grounds"*—The previous conduct of the assaulting party towards the person assaulted may be shown by the accused in support of his defence that he had reasonable grounds in defending as he did. *R. v. Drouin*, 15 Can. Cr. Cas. 205. *R. v. Hopkins*, 10 Cox C.C. 229; *R. v. Rose*, 15 Cox C.C. 540; *R. v. Ritter*, 36 N.S.B. 417, 8 Can. Cr. Cas. 31; *R. v. Scott*, 15 Can. Cr. Cas. 442.

**Self defence in case of aggression.—Provocation.**

**54.** Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the person first assaulted or provoked, and in the belief, on reasonable grounds, that it is necessary for his own preservation from death or grievous bodily harm, if he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavor, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm, and if before such necessity arose, he declined further conflict, and quitted or retreated from it as far as was practicable.

2. Provocation, within the meaning of this and the last preceding section, may be given by blows, words or gestures.

*Origin*—Sec. 46, Code of 1892.

*Where violence expected by defending party*—

The violence which the defending party had reason to expect may also be shown by proving the violent temper of the assaulting party and knowledge of this by the defender. *R. v. Scott*, 15 Can. Cr. Cas. 442.

**Prevention of insulting assault.—Disproportionate hurt not justified.**

**55.** Every one is justified in using force in defence of his own person, or that of any one under his protection, from an assault accompanied with insult, if he uses no more force than is necessary to prevent such assault, or the repetition of it.

2. This section shall not justify the wilful infliction of any hurt or mischief disproportionate to the insult which the force used was intended to prevent.

*Origin*].—Sec. 47, Code of 1892.

*Defence of brother*].—See *R. v. Callahan* (1915), 26 Can. Cr. Cas. 93.

*From assault "accompanied with insult"*].—In the absence of statute (in some of the United States, there are such statutes) no words, however approbrious, disgraceful, annoying or vexatious, will justify an assault or battery, though they may mitigate the punishment. *Evans v. Bradburn*, 9 W.W.R. 281, 32 W.L.R. 585; 3 Cyc., tit., "Assault and Battery," p. 1051, 2 Am. & Eng. Ency. of Law, tit., "Assault and Battery," p. 957; *Abbot's Trial Evidence*, 2nd ed., p. 821; *Addison on Torts*, 8th ed., p. 63; *Watson v. Christie*, 2 Bos. & Pul. 224; *Short v. Lewis*, 3 U.C.Q.B. (O.S.), 385; *Percy v. Glasco*, 22 U.C.C.P. 526 (where the English decisions are discussed); *Murphy v. Dundas*, 38 N.B.R. 563; *Slater v. Watts*, 16 B.C.R. 36; *Wentzell v. Winacht*, 41 N.S.R. 406.

**Defence of movable property.—Assault by trespasser.**

**56.** Every one who is in peaceable possession of any movable property or thing, and every one lawfully assisting him, is justified in resisting the taking of such thing by any trespasser, or in retaking it from such trespasser, if in either case he does not strike or do bodily harm to such trespasser.

2. If, after any one, being in peaceable possession as aforesaid, has laid hands upon any such thing, such trespasser persists in attempting to keep it or to take it from the possessor, or from any one lawfully assisting him, the trespasser shall be deemed to commit an assault without justification or provocation.

*Origin*].—Sec. 48, Code of 1892.

*Defence of movable property with or without claim of right*].—See sec. 57, 58.

**Defence with claim of right.**

**57.** Every one who is in peaceable possession of any movable property or thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending such possession, even against a person entitled

by law to the possession of such property or thing, if he uses no more force than is necessary.

*Origin*.—Sec. 49, Code of 1892.

*Where no claim of right*].—See sec. 58.

*Defence of goods against trespasser*].—See sec. 56.

*Defence of real property*].—See secs 59-62.

#### **Defence without claim of right.**

**58.** Every one who is in peaceable possession of any movable property or thing, but neither claims right thereto nor acts under the authority of a person claiming right thereto, is neither justified nor protected from criminal responsibility for defending his possession against a person entitled by law to the possession of such property or thing.

*Origin*].—Sec. 50, Code of 1892.

#### **Defence of dwelling house against person entering with intent.**

**59.** Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house, either by night or day, by any person with the intent to commit any indictable offence therein.

*Origin*].—Sec. 51, Code of 1892.

*"Breaking and entering a dwelling house."*].—For the purposes of Part VII of the Code a definition of the phrase "dwelling house" is given in sec. 335, sub-sec. (e), supplemented by sec. 339. As the offence referred to in sec. 59, of "breaking and entering" is dealt with by Part VII, it seems that reference should be made to it to interpret not only the phrase "breaking and entering" but the word "dwelling house" which is the subject of the breaking and entering. See Code secs. 335 (c), 335 (e), 339, 340, 457 (burglary), 458 and 459 (house-breaking).

*Assembly for protection of dwelling house, not unlawful*].—See sec. 37, sub-sec. 3.

#### **Defence of dwelling house at night on reasonable belief of attempted entry with intent.**

**60.** Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his

authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house by night by any person, if he believes, on reasonable and probable grounds, that such breaking and entering is attempted with the intent to commit any indictable offence therein.

*Origin*—Sec. 52, Code of 1892.

*Breaking and entering a dwelling house*—See secs. 59, 335, 339, 340, 457-459.

*Attempted breaking and entering of dwelling*—The mere threat of parties standing outside of a dwelling house that they will break in, without any overt act to that end, does not justify the householder in shooting at and wounding them, unless the householder has first warned them to desist and depart or that he would fire. *Spires v. Barrick*, 14 U.C.Q.B. 420.

**Defence of real property.—Assault by trespasser.**

**61.** Every one who is in peaceable possession of any house or land, or other real property, and every one lawfully assisting him or acting by his authority, is justified in using force to prevent any person from trespassing on such property, or to remove him therefrom, if he uses no more force than is necessary.

2. If such trespasser resists such attempt to prevent his entry or to remove him such trespasser shall be deemed to commit an assault without justification or provocation.

*Origin*—Sec. 53, Code of 1892.

*Resisting removal*—The refusal of a mere trespasser on land to leave the land on which he was trespassing is not constituted an assault by sub-sec. (2). There must have been some overt act of force towards his removal and force in resistance thereof by the trespasser. *Pockett v. Poole*, 11 Man. R. 275, and see *Pockett v. Poole*, 11 Man. R. 508.

*Common assault*—See secs. 290, 291.

*Defence against forcible breaking in*—See secs. 59, 60.

**Assertion of right to house or land.—Assault in case of lawful entry.—Trespasser provoking.**

**62.** Every one is justified in peaceably entering in the day-time to take possession of any house or land to the possession of which he, or some person under whose authority he acts, is lawfully entitled.

2. If any person, not having or acting under the authority of one having peaceable possession of any such house or land with a claim of right, assaults any one peaceably entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be without justification or provocation.

3. If any person having peaceable possession of such house or land with a claim of right, or any person acting by his authority, assaults any one entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be provoked by the person entering.

*Origin*—Sec. 54, Code of 1892.

*Forcible entry or detainer of real property*—See Code sec. 102.

*Common assault*—See secs. 290, 291.

#### **Correction of child by force.**

**63.** It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances.

*Origin*—Sec. 55, Code of 1892.

*"Provided such force is reasonable"*—This may depend upon the age of the child. *R. v. Griffin*, 11 Cox C.C. 402. It must not be of a nature which would endanger life, limb or health, or cause any permanent injury. *R. v. Robinson*, 7 Can. Cr. Cas. 52; *R. v. Hopley*, 2 F. & F. 201.

*Cleary v. Booth* [1893], 1 Q.B. 465, 62 L.J.M.C. 87.

Unreasonably severe chastisement is criminally punishable as an assault, although there may have been no permanent injury. *R. v. Gaul*, 8 Can. Cr. Cas. 178, 36 N.S.B. 504.

In the case of a school pupil, the effect of his misconduct upon the school discipline is to be considered. *R. v. Zinc*, 18 Can. Cr. Cas. 456.

If chastisement was inflicted through malice, it would not fall under the protection of sec. 63, which applies to force by way of correction, i.e., discipline. See *R. v. Gaul*, 36 N.S.B. 504.

Chastisement of the pupil from motives of caprice, anger or bad temper, is unlawful; the chastisement permitted under Quebec civil law must be reasonable in proportion to the offence and must have been justifiable as necessary for the maintenance of school discipline. *Brisson v. Lafontaine*, 8 L.C.J. 173.

*Excess in force used*—See sec. 66.



**Master of ship.**

**64.** It is lawful for the master or officer in command of a ship on a voyage to use force for the purpose of maintaining good order and discipline on board of his ship, provided that he believes, on reasonable grounds, that such force is necessary, and provided also that the force used is reasonable in degree.

*Origin*—Sec. 56, Code of 1892.

*Discipline of seamen*—See also, as to discipline of seamen, the Canada Shipping Act, R.S.C. 1906, ch. 113, secs. 286, *et seq.*; 6-7 Edw VII, ch. 46.

**Surgical operations.**

**65.** Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

*Origin*—Sec. 57, Code of 1892.

*Duty of persons undertaking to administer surgical treatment*—See sec. 246.

**Excess of force.**

**66.** Every one authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.

*Origin*—Sec. 58, Code of 1892.

*Excess in chastisement of minor*—See sec. 63.

*Excess of force in resisting assault*—See secs. 53, 54, 55.

**Consent to death.—Causing death with consent.**

**67.** No one has a right to consent to the infliction of death upon himself.

2. If such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused.

*Origin*—Sec. 59, Code of 1892.

*Culpable homicide*—See secs. 259-268.

*Aiding and abetting a suicide*—See sec. 269.

*Attempting suicide*—See sec. 270.

**Condonation**—The person physically injured in the commission of a crime cannot by any act of condonation excuse the criminal offence against the King so as to make the condonation a defence to an indictment for the crime. *R. v. Strong*, 43 N.B.R. 190, 24 Can. Cr. Cas. 430.

**Obedience to de facto law.**

**68.** Every one is protected from criminal responsibility for any act done in obedience to the laws for the time being, made and enforced by those in possession *de facto* of the sovereign power in and over the place where the act is done.

*Origin*—Sec. 60, Code of 1892.

*Parties to Offences.*

**Who parties to offence.—Aiding and abetting.—Counselling.—Procuring another to commit offence.—Common intent of several persons.**

**69.** Every one is a party to and guilty of an offence who,—

- (a) actually commits it; or,
- (b) does or omits an act for the purpose of aiding any person to commit the offence; or,
- (c) abets any person in commission of the offence; or,
- (d) counsels or procures any person to commit the offence.

2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

*Origin*—Sec. 61, Code of 1892; The Accessories Act, 1861, Imp. 24-25 Vict., ch. 94; 31 Vict., Can. ch. 72; 7-8 Geo. IV., Imp. ch. 30, sec. 26; 9 Geo. IV, Imp. ch. 56, sec. 33.

**Inoitement to commit a crime is indictable**—It is an offence at common law to counsel another person to commit an offence; inoiting another person to commit a misdemeanor was itself a misdemeanor. *R. v. Ransford*, 13 Cox C.C. 9; *R. v. Higgins*, 2 East 5. The commission of the offence is another mode of infraction of the law. *R. v. Brousseau*, 26 Que. K.B. 164, 28 Can. Cr. Cas. 435, 439. In the latter case sub-sec. (d) of sec. 69 was interpreted as covering the unsuccessful solicitation by a municipal councillor of an offer to bribe him, and while such unsuccessful solicitation would not be an offence under

sec. 161, it was thought to be a substantive offence under sec. 69, differing from the offence solicited. Archambeault, C.J., said, in reference to sec. 69, that if the offence itself is not committed, it cannot be pretended that the person counselling it is guilty of *that* offence. Sec. 72 was also considered, and it was held that the councillor could not be convicted of "attempting" the offence of which the other party would have been guilty had he offered to bribe the councillor as suggested. It is arguable, however, that sec. 69 is intended, as is outlined by the heading "principals," to declare what participants in a crime actually committed are to be chargeable as principals and to abolish former distinctions as to principals in the first degree or in the second degree, or accessories before the fact. It will be noted that it is declared by sub-sec. (d) that every one is a party to and guilty of an offence who "counsels or procures any person to commit the offence." Does the language there used extend to the solicitation of an offence, neither committed nor attempted; or do the words "the offence" mean only the offence participated in by the counselling or procuring, and which may be either a completed offence or an attempt to commit it? If the offence counselled is neither executed nor attempted, the counselling or procuring is still a substantive offence whether it be under sec. 69 or at common law, which still applies in cases to which the Code does not extend; *R. v. Cole*, 5 Can. Cr. Cas. 330, 3 Ont. R. 389; *R. v. Union Colliery Co.*, 31 S.C.R. 81, 4 Can. Cr. Cas. 400; *Brousseau v. The King* (1917), 56 S.C.R. 22; and see Code 15 as to offences punishable both by statute and at common law.

*Responsibility for natural consequences of act*—The general rule is that a person is responsible for the natural consequences of his acts, but there are many cases in which it would be obviously unfair to make a person criminally responsible for doing a particular act, though under ordinary circumstances such an act would undoubtedly be an offence. A child is considered to be incapable of committing an offence before the age of seven years; Code, sec. 17; and any act of a child between the ages of seven and fourteen can only be held to be an offence if it is shown affirmatively that the child had sufficient capacity to know the nature and consequences of his act, and to appreciate that he was doing wrong. Code, sec. 18.

*Mental deficiency*—A person cannot be convicted on a criminal charge in respect of an act done by him while labouring under such unsoundness of mind as made him incapable of appreciating the nature and quality of the act he was doing, or that such an act was wrong. Code, sec. 19.

*Drunkenness as affecting intent*—If a person is accused of wounding another with intent to murder him, the fact that the accused was very drunk at the time ought to be taken into account in considering whether the intent is established; though even in such a case the intent may be

proved by evidence of premeditation, or other facts. See *R. v. Meade* [1909], 1 K.B. 875.

*Acts of omission*].—A person is not ordinarily considered to cause injury to another by the mere omission of an act; thus, if a man sees another drowning and is able to save him by holding out his hand, but omits to do so, even in the hope that the other may be drowned, still he is not criminally responsible.

On the other hand, where the law imposes upon a person the duty of performing some particular act, he is held responsible if he omits to do so. For example, every person who has charge of another, *e.g.*, a lunatic, an invalid, or a prisoner, is bound to provide him with necessities if he is so helpless as to be unable to provide himself: and if death results from a neglect of such duty, the person in charge is held responsible unless he can show some good excuse. See Code, secs. 241 and 244.

So, in the case of an animal known to be dangerous, the person in charge is bound to take such precautions as will safeguard the public from danger. Code, sec. 247.

Similarly, if a person undertakes to do any act, the omission of which may endanger human life, and without lawful excuse omits to discharge that duty, he is responsible for the consequences. Code, sec. 248. Again, if a person undertakes (except in extreme cases of necessity) to administer surgical or medical treatment, or to do any other act which may be dangerous to human life, he is responsible if death results from a want of reasonable care and skill on his part. Code, sec. 246.

*Accident*].—A person is not criminally responsible for the result of a pure accident which is not to be attributed in any way to any carelessness, or negligence, or to an unlawful act on his part.

Thus, if a woodcutter is lawfully cutting down a tree and the head of his axe flies off, or if a man is lawfully riding down a road and his horse is whipped by another person and caused to start off, or if a man is lawfully shooting at game or any other object, and in any of these cases there result to a bystander injuries which cannot be attributed to negligence on the part of the woodcutter, rider, or shooter, as the case may be, he will not be responsible for the injuries caused. As to culpable and non-culpable homicide, see Code, sec. 252.

*Assisting the principal offender*].—If a person assists another in the commission of an offence, he is responsible as though he had committed it himself; and even if such assistance is indirectly given, as, for instance, if two or three men go out together to commit a burglary, and one waits at the corner of the street to keep watch while the others commit the burglary, the watcher will be guilty of burglary equally with the others. *R. v. Lloyd*, 19 Ont. R. 352. On the other hand, if the offence charged involves some special intent, it must be shown that the assistant was cognizant of the intentions of the person whom he assisted; thus, on a charge of wounding to murder, it must be

shown that an assistant not only assisted the principal offender in what he did, but also knew what his intention was, before the former can be convicted on the full charge. *R. v. Smith*, 38 U.C.Q.B., 218; and see *R. v. Esmonde*, 26 U.C.Q.B., 152 (attempt to steal).

Mere non-interference when a person sees that a crime is about to be committed by another in his presence, is not enough to constitute aiding or abetting. *R. v. Curtley*, 27 U.C.Q.B., 613; but see sec. 71 as to assisting the escape of the criminal. Other aid rendered "after the crime" is not sufficient to make the aiding party liable as a principal under sec. 69. *R. v. Graham*, 2 Can. Cr. Cas. 388.

An aider and abettor of a misdemeanor was liable as a principal at common law, and the declarations in this respect contained in the Accessories Act, 1861, Imp., are to that extent merely declaratory of the common law. *Du Cros v. Lambourne* [1907], 1 K.B. 40, 43; *R. v. Greenwood*, 1 Den. C.C. 453; *R. v. Harkness* (No. 2), 10 Can. Cr. Cas. 199, 207, 10 O.L.R. 555.

Mere knowledge that the principal intends to commit crime does not constitute an accessory before the fact: there must be some particular crime in view. *R. v. Lomas*, 9 Cr. App. R. 226; *R. v. Bernard*, 1 F. & F., 240.

A man who procures a woman, not his wife, to sign as his wife, to bar dower in a conveyance of his real estate, while she knows that the true wife is still living, is punishable as a principal under secs. 69 and 466. *United States v. Ford* (1916) 10 W.W.R. 1042, 34 W.L.R. 912, 26 Can. Cr. Cas. 430.

In *ex parte Baird*, 34 N.B.R. 213, it was held that the president of an incorporated company may be convicted for a violation of the second part of the Canada Temperance Act, where the sale is made by a clerk under general instructions received by him from the president.

A clerk or manager in a money-lender's office, who takes part in an act which amounts to the offence of usury, is guilty as a principal, and it is no defence to the charge that he acted merely as an agent. *Lalonde v. The King*, 18 Que. K.B. 267, 15 Can. Cr. Cas. 72; Money-lenders' Act, R.S.C., 1906, ch. 122; *R. v. Kehr* (No 3), 18 Can. Cr. Cas. 202, 2 O.W.N. 133, 17 O.W.R. 213. But, presumably, the act of the clerk must be such that knowledge that the transaction is usurious can be imputed to him and not merely to the principal. *Ibid.*

The employee or agent is liable if he aids and abets in the illegal transactions negotiated by his employer or principal. *R. v. Smith and Luther*, 17 Can. Cr. Cas. 445; *Lalonde v. The King*, 18 Que. K.B. 267.

A person in the employment of another person, not a resident of Canada, whose money is lent, acting as the manager of his business, although paid by salary and having no share in the excessive interest charged, may be convicted as a money-lender under the Money-Lenders' Act, R.S.C. 1906, c. 122, and s. 69 of the Criminal Code. *Rex v. Glynn*, 19 Man. L.R. 63, 15 Can. Cr. Cas. 243.

The continuous supply of goods with knowledge that they were being illegally sold in contravention of a criminal law, is an aiding and abetting of the criminal sales. *Cook v. Stockwell*, 84 L.J.K.B. 2187; but whether the buyer of intoxicating liquors can be said to be an aider or abettor of the offence of the seller in contravening a federal law, *e.g.*, the Canada Temperance Act, is a question not free from doubt. See *R. v. Heath*, 13 Ont. R. 471; *ex parte Armstrong*, 30 N.B.R. 425; *ex parte Barker*, 30 N.B.R. 406; *Fairburn v. Evans* [1916], 1 K.B. 218, 85 L.J.K.B. 479. In the latter case the person who purchased goods on a Sunday from a shopkeeper whom he knew to be contravening a Sunday observance statute, and whom he knew to have been convicted several times for such offence, was held guilty of aiding and abetting.

Sec. 69 of the Code expressly declares that every one is a party to and guilty of an offence who (b) does or omits an act for the purpose of aiding any person to commit the offence; or (c) abets any person in commission of the offence. That is to say, by aiding or abetting in the commission of an offence he becomes a party to and guilty of the same offence. Thus he becomes a party principal, and there appears to be no reason why he should not be indicted or charged as a principal under the Code. *R. v. Harkness* (No. 2) 10 Can. Cr. Cas. 199 at 207, 10 O.L.R. 555; *R. v. Gregory*, L.R. 1 C.C.R. 77; *Benford v. Sims* [1898] 2 Q.B. 641; *R. v. Holley*, 4 Can. Cr. Cas. 510; see *The Queen v. Campbell* (1899), 2 Can. Cr. Cas. 357.

The shooting of a constable in charge by one of the conspirators in the prosecution of the common design of escaping from custody may be under such conditions as to justify the conclusion that it was or ought to have been known to be a possible consequence of the prosecution of such common purpose. Criminal Code, s. 69 (2); each of them would then be a party to such offence, and the offence, being murder in the actual perpetrator thereof was murder in the prisoner, even if he were not the actual perpetrator thereof, and he was properly found guilty by the jury of that offence. *Rex v. Rice*, 4 O.L.R. 223, 5 Can. Cr. Cas. 509.

Any person who before the commission of an offence does something to aid in its being committed, or to help or to facilitate its commission, or to furnish the means to accomplish its commission, although he may not be present when the offence is actually perpetrated, may be treated and dealt with as a principal, and such a person falls directly under sec. 69 of the Code as having done an act for the purpose of aiding any person to commit an offence. *R. v. Roy*, 9 Que. Q.B. 312.

But mere acquiescence by a director of a company in illegal acts of the company will not alone make him an aider or abettor. *R. v. Hendrie*, 11 O.L.R. 202, 10 Can. Cr. Cas. 298.

A spectator who had paid for admission to a Sunday show held in contravention of law, has been held liable to a penalty expressly enacted for those "taking part and assisting" in such shows. *Tremblay v.*

City of Quebec (No. 1), 16 Can. Cr. Cas. 253; Tremblay v. City of Quebec (No. 2), 16 Can. Cr. Cas. 487.

If the owner of a house leases it to another person for the purpose of keeping a disorderly house, or does so with the knowledge and with his concurrence that it is to be so used and kept, he, in leasing the house would aid the lessee to commit the offence of keeping a disorderly house, and he consequently would become liable equally with the actual offender for the offence committed and he would be prosecuted, tried, convicted and punished as a principal. In such cases, the indictment, or the information, may either simply charge the accessory or aider with the offence committed by the person aided, or may state the aid which was given and charge the accessory's or aider's participation by reason thereof in the offence committed. *R. v. Roy*, 9 Que. Q.B. 312; and see also sec. 238A as to the liability of the landlord for knowingly permitting such use of his premises.

Where the alleged abettor and the alleged principal are jointly indicted as principals, there may be a conviction of the abettor for counselling the crime, although the alleged principal is acquitted. *R. v. Burton*, 13 Cox, C.C. 71.

A person is not an accessory if, without any guilty knowledge, he acts as broker for the parties entering into stock transactions which as between them were gambling transactions, prohibited by Code, sec. 231. *R. v. Dowd*, 17 Que. S.C. 67; 4 Can. Cr. Cas. 170.

An act done which may enter into the offence, although the crime may be complete without it, may be considered as a continuation of the criminal transaction so as to make the participator an aider and abettor, although his participation occurs only after such acts have been done as in themselves would constitute the crime. *R. v. Campbell*, 2 Can. Cr. Cas. 357.

To establish a conviction for "counselling and procuring" another to bribe a peace officer, it is essential to prove that the peace officer had in fact been bribed. *R. v. Ryan*, 22 Can. Cr. Cas. 115.

But if an official offers himself as a man to be bribed he thereby "counsels" those to whom he makes the offer and may be convicted, although they do not respond to the advances by making him any offer. *Brousseau v. The King* (1917), 56 S.C.R. 22, affirming 26 Que. K.B. 164, 28 Can. Cr. Cas. 435, in the result.

A statutory prohibition may be so wide in its terms that non-compliance by the employee with the conditions without which a transaction of the principal could not legally be completed, will make the employer liable under a penal law, *e.g.*, the illegal sale of wood alcohol without a proper label under the Inland Revenue Act, R.S.C. 1906, ch. 51, and 7-8 Edw. VII, ch. 34, sec. 27; *R. v. Russill*, 29 O.L.R. 367, 22 Can. Cr. Cas. 131.

And the employer may be liable to conviction under liquor laws for illegal sales made by his employee without his knowledge or connivance,

if the sales were made in the course of the employment. *R. v. Conrod*, 5 Can. Cr. Cas. 414. Compare *Caldwell v. Bethell* [1913], 1 K.B. 110; *Strutt v. Cliff* [1911], 1 K.B. 1; *R. v. Williams* 42 U.C.Q.B. 464.

*Aiding under compulsion*—See. secs. 20, 21.

*Place of trial for aiding and abetting a crime punishable on summary conviction*—See sec. 707.

*Extra-territorial offence*—Counselling a woman in Canada to submit in a foreign jurisdiction to an operation which, if performed in Canada, would be a crime, is not an offence against the criminal law of Canada. *R. v. Walkem* 14 Can. Cr. Cas. 122, 14 B.C.R. 1.

*Attempt to solicit another to attempt a crime*—See sec. 72 as to attempts generally. It is an offence to attempt to solicit a person to attempt or conspire to commit an offence. *R. v. Brousseau*, 28 Can. Cr. Cas. 435, 26 Que. K.B. 164; *R. v. Ransford*, 13 Cox C.C. 9; *R. v. De Kromme*, 17 Cox C.C. 492. So there may be a conviction for the attempt to incite to an attempted crime by sending a letter which might not amount to a solicitation because of the receiver not reading the letter but handing it over to others without being made aware of its contents. *R. v. Ransford*, 13 Cox C.C. 9.

And see *Brousseau v. The King* (1917), 56 S.C.R. 22, affirming in the result, 26 Que. K.B. 164.

*Special provision as to servant's liability for trade mark offences*—See sec. 495.

*Variance from the offence which was counselled*—See sec. 70.

*Accessories after the fact*—See sec. 71.

*Person counselling theft and afterwards receiving the goods*—One who is a principal to a theft cannot be convicted of receiving the goods knowing them to have been stolen, upon evidence merely showing that he stole the goods. The offence of theft must have been completed before the separate offence of receiving can be committed. *R. v. Hodge* 12 Man. R. 319, 2 Can. Cr. Cas. 350. The same doctrine has been held to apply to a principal in the second degree; i.e., to an aider and abettor, but not to the case of one who counsels or procures the theft without becoming a principal in the second degree. Such an accessory before the fact is liable under sec. 69 as "a party to and guilty of" the theft and if he afterwards becomes a receiver of the goods he may be convicted also of that offence under Code sec. 399. *R. v. Hodge*, 12 Man. R. 319, 2 Can. Cr. Cas. 350.

*Offence committed in furtherance of common intention of conspirators*—See secs. 444, 573.

### **Persons counselling offence.**

**70.** Every one who counsels or procures another person to be a party to an offence of which that person is afterwards



guilty, is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.

2. Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring.

*Origin*—Sec. 62, Code of 1892.

*Principals and accessories to criminal offence*—See sec. 69.

**Accessory after the fact.—Husband or wife.**

**71.** An accessory after the fact to an offence is one who receives, comforts or assists any one who has been a party to such offence in order to enable him to escape, knowing him to have been a party thereto.

2. No married person whose husband or wife has been a party to an offence shall become an accessory after the fact thereto by receiving, comforting or assisting the other of them, and no married woman whose husband has been a party to an offence shall become an accessory after the fact thereto, by receiving, comforting or assisting in his presence and by his authority any other person who has been a party to such offence in order to enable her husband or such other person to escape.

*Origin*—Sec. 63, Code of 1892.

*"Receives, comforts or assists"*—There must be an act to assist the criminal personally in order to constitute an accessory after the fact; mere failing to notify the authorities of the crime is not usually enough, except as to treason. *R. v. Chapple*, 9 C. & P. 35; see sec. 76 as to accessories after the fact to treason. But to "conceal" or procure the concealment of a felony was a common law misdemeanor known as misprision of felony. *Burbidge Cr. Law (Can.)* 508.

Acts intended to destroy or conceal things which may be produced in evidence against a prisoner on his trial, make the doer an accessory after the fact. *R. v. Levy*, 7 Cr. App. R. 61; *R. v. Butterfield*, 1 Cox C.C. 39; 2, *Hawkins Pl. Cr.*, ch. 29, sec. 26.

*Punishment of accessory after the fact*—See secs. 574 and 575, and as to treason, sec. 76; and murder, sec. 267; concealment of deserter, sec. 82.

*Accessory both before and after the fact*—A defendant may be charged as an accessory before the fact in one count, and as accessory after the fact in another count, and may be convicted on both counts *R. v. Blackson*, 8 C. & P. 43; *R. v. Mitchel*, 6 St. Tr., N.S. 599, 620, 621.

*Joint or separate trial of accessory*—See sec. 849.

*Wife's crime committed in husband's presence*—See sec. 21.

*Receiving stolen goods*—See secs. 399-403.

#### Attempts.—Question of law.

**72.** Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

*Origin*—Sec. 64, Code of 1892; English Draft Code, 1879, article 74 (part).

*Act done with intent to commit crime*—An attempt implies an intent; but intending to commit a crime is not the same as attempting to commit it. *R. v. McCarthy*, 41 O.L.R. 153; *R. v. Snyder* (1915), 34 O.L.R. 318, 24 Can. Cr. Cas. 101; and see sec. 949, as to convicting for an attempt on a charge of the completed offence, "if the evidence establishes an attempt." *R. v. Weiss and Williams* (No. 1), 4 W.W.R. 1358, 21 Can. Cr. Cas. 438 (No. 2), 5 W.W.R. 48 and 400, 22 Can. Cr. Cas. 42.

Mental intentions may be changed at any time before being carried out. When not accompanied by overt acts in the direction of a crime they do not constitute even an attempt at crime. *Pockett v. Pool* (1896), 11 Man. R. 275, at 286.

An assault with intent to commit an offence involving violence will ordinarily be held to be an attempt to commit that offence. *R. v. Johns*, 15 S.C.R. 394.

In some instances, some preliminary act as to which it might be doubtful whether or not it was too remote to constitute an "attempt" may, by statute, be created into a substantive offence. So under Code sec. 397, a trader concealing his own goods for a fraudulent purpose, *ex. gr.* to defraud insurance companies, commits an offence although the fraud was not carried out and no claim was ever made by him against the companies. *R. v. Goldstaub* (1895) 10 Man. R. 497, 5 Can. Cr. Cas. 357.

There must be a connection between the act done for the purpose of an intended crime and the crime itself. Sub-sec. (2) indicates that an act done with intent may be too remote to constitute an "attempt." The question of remoteness is declared to be a question of law, but the doctrine of law governing this is left undefined by the Code and is left in an unsettled state by the many cases in which it has been discussed. It is said, however, that it is material to consider whether there is any further act "on the defendant's part" remaining to be done before the completion of the crime. *R. v. Eagleton*, Dears, 515, 538; *Dugdale v. The Queen*, Dears, 64, 22 L.J.M.C. 50; *R. v. Hensler*, 11 Cox C.C. 570, *R. v. Bosbuck*, Dears, & B. 24, 23 L.J.M.C. 101; *R. v. Cheeseman*, L. & C. 140, 31 L.J.M.C. 89; *R. v. Ring*, 61 L.J.M.C. 116, 17 Cox C.C. 491; *R. v. Linneker* [1906], 2 K.B. 99, applied in *R. v. Snyder* (1915), 34 O.L.R. 318, 24 Can. Cr. Cas. 101; *R. v. Robinson* [1915], 2 K.B. 342, 84 L.J.K.B. 1149.

There is an obvious distinction between doing a thing with intent to commit an offence and attempting to commit the offence. For instance, A. may load his gun with the declared intention of shooting B. whenever he may meet him, but if he does not take his gun with him, it would be vain to pretend that he had attempted to shoot B., or if he bought poison with the intention of killing B, but did nothing more, it would be impossible to say that he attempted to poison B. So, if a prisoner conceals himself with the intention of escaping, that may, or may not, be sufficient evidence of an attempt according to the circumstances, but it is not the offence in itself. For instance, if the prisoner (while locked up in his cell) hid himself under his bed with the intention of escaping, it would be an extraordinary thing to say that he had attempted to escape; while, on the other hand, if he were found concealed near an open gate awaiting a chance to slip past the guard, that would be enough to warrant a conviction for an attempt. *R. v. Labourdette* (1908), 13 B.C.R. 443, 8 W.L.R. 402 (B.C.), per Hunter, C.J.; *R. v. Button* [1900], 2 Q.B. 597, 69 L.J.Q.B. 901; *R. v. Robinson* [1915], 2 K.B. 342, 11 Cr. App. B. 124.

Although an attempt implies the intent, an intent does not necessarily imply an attempt. There may be cases very near the line as regards the attempt although there is no doubt as to the intent. It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence. *R. v. Mooney*, 15 Que. K.B. 57, 11 Can. Cr. Cas. 333; *R. v. Linneker* [1906], 2 K.B. 99, 103; *R. v. Robinson* [1915], 2 K.B. 342. The interruption is not necessarily that of an outside cause or of a third party; it may be due to a change of mind on the part of the accused. *R. v. Goodman*, 22 U.C.C.P. 338 (arson); *R. v. Esmonde*, 26 U.C.Q.B. 152 (theft).

The physical impossibility of completing the crime is no defence to a charge of attempting to commit it. Code sec. 72; *R. v. Williams*

[1893], 1 Q.B. 320, 62 L.J.M.C. 29; *R. v. Duckworth* [1892], 2 Q.B. 83, 17 Cox 495; *R. v. Ring*, 61 L.J.M.C. 116 (pocket picking); *R. v. Brown*, 24 Q.B.D. 357, overruling *R. v. Collins*, 33 L.J.M.C. 177 (pocket picking).

Under sec. 69 (*d*) every one is a party to and guilty of an offence who counsels any person to commit the offence. This has been held to create a substantive offence even where the offence counselled, i.e., advised or recommended, was neither committed nor attempted. *Brousseau v. The King* (1917), 56 S.C.R. 22, 39 D.L.R. 114, affirming 28 Can. Cr. Cas. 435, 26 Que. K.B. 164.

It has been said that where the solicited party does nothing for the purpose of accomplishing the solicited offence, the party guilty of the soliciting is not guilty of an "attempt" of that offence. *Brousseau v. The King*, 28 Can. Cr. Cas. 435, 26 Que. K.B. 164. The solicitation is in such case punishable either as a substantive offence under sec. 69 (*d*), or the solicitation itself although unsuccessful may in some cases be a common law offence and, except in so far as the common law of England has been repealed either expressly or by implication, be the subject of an indictment at common law. *Brousseau v. The King* (1917), 56 S.C.R. 22, 39 D.L.R. 11, per Fitzpatrick, C.J.; *Union Colliery v. The Queen*, 31 S.C.R. 81, 87; and see Code secs. 10-12, 15, 16. It is an indictable misdemeanor at common law for any person in an official position corruptly to use the power of his position by asking for a bribe. *Brousseau v. The King*, supra; compare Code sec. 161.

*Drunkenness as affecting intent*—See note to sec. 19. The presumption of a criminal intention which would otherwise arise from an act may be rebutted by showing that the prisoner's mind was so affected by drink that he was incapable, at the time, of knowing that what he was doing was dangerous or wrongful. *R. v. Meade* [1909], 1 K.B. 895. *R. v. Doody*, 6 Cox C.C. 403; *R. v. Jessamine*, 19 Can. Cr. Cas. 214; *R. v. Stoddart*, 25 Can. Cr. Cas. 81; *R. v. Kane*, 25 Can. Cr. Cas. 443; *R. v. Wilson*, 46 N.S.R. 59, 21 Can. Cr. Cas. 448.

*Proof of complete offence on charge of attempt*—See sec. 950.

*Proof only of attempt on charge of complete offence*—See secs. 949-951.

*Punishment of attempts to commit crime*—See secs. 570-572, as to offences generally, and as to certain crimes, sec. 74 (treason); sec. 75 (treasonable conspiracy); sec. 77 (levying war); sec. 80 (assaults on the King); sec. 188 (attempt to break prison); sec. 203 (buggery); sec. 216 (procuring); sec. 219 (sexual offence with idiot); sec. 234 (gambling in public conveyance); sec. 235 (betting offences); sec. 236 (lottery offences); sec. 264 (attempts to murder); sec. 266 (attempt to procure another to commit murder); secs. 269-270 (suicide); sec. 271 (concealment of birth); sec. 273 (attempt to shoot at person); secs. 276-278 (disabling or drugging with intent); sec. 280 (injury by explosives); sec. 281 (setting spring guns); secs. 282-289 (endangering

personal safety of others); secs. 300-305 (sexual crimes); sec. 448 (assault with intent to rob); secs. 459-464 (breaking in, etc., with intent); sec. 467 (uttering forgery with intent); sec. 479 (counterfeiting offences); sec. 512 (arson); 514 (firing crops); 524 (attempt to wreck); sec. 536 (attempt to injure cattle).

*Intent may be material ingredient of completed offence*—In some cases the intention with which an act is committed becomes essential. Where this is the case, the intention may either be proved by independent evidence, as, for instance, by words proved to have been used by the offender or by a previous course of conduct. *R. v. Sutton*, 2 Str. 1074; *R. v. Bailey*, L.R. 1 C.C.R. 374; or may be presumed from the act itself, according to the maxim that a man intends the natural consequences of his own act. *R. v. Prince*, L.R. 2 C.C.R. 154; *R. v. Jolson*, 23 Q.B.D. 168. In other words, the mode of discovering a man's intention is to consider what were at the time of his act the natural consequences of that act. *R. v. Ford*, 13 B.C.R. 109, 12 Can. Cr. Cas. 555. Thus, if A. sets fire to B.'s mill, the intent of A. to injure B. is inferred as being a natural consequence of the act of A. setting fire to the mill. Intention in this context means the immediate intention as distinguished from motive or ulterior intention. If a man bound by law to perform any duty does an act which necessarily causes, or most probably will cause, a failure in the performance of that duty, he will be held in law, to have intended to fail, and therefore to have wilfully failed, to perform that duty. *R. v. Birmingham & Gloucester Ry.*, 3 Q.B. 223; *R. v. Great West Laundry Co.*, 13 Man. B. 66.

*The doctrine of mens rea*—

*Mens rea* is a necessary ingredient in a criminal offence, unless the statute either expressly or by necessary implication from its language dispenses with it. *Strutt v. Clift* [1911], 1 K.B. 1. *R. v. Bussill*, 29 O.L.R. 367, 22 Can. Cr. Cas. 131 at 139; *Coppen v. Moore* [1898], 2 Q.B. 306; *R. v. Newcombe* (1918), 29 Can. Cr. Cas. 249 (N.S.); *Patenaude v. Thivierge*, 26 Can. Cr. Cas. 138.

In *R. v. Bussill*, 29 O.L.R. 367, 22 Can. Cr. Cas. 131, Hodgins, J.A. speaking for the court said: "It cannot be doubted that the intention of the section of the Inland Revenue Act (Can.) cited was to prohibit absolutely the sale of wood alcohol, a poison, except in labelled bottles. It would fritter away the statute to hold that the sale of the article proved in this case, if made by a servant, absolved the employer, because he did not actually conduct the sale. The prohibition is explicit; the sale was in law the sale of the master; and there is no saving clause, such as is found in *Coppen v. Moore*, enabling the employer to free himself. It seems to fall fairly within the exceptions quoted. And, as stated by Hagarty, C.J., in *Regina v. King*, 20 U.C.C.P. 246: "If it be contrary to law to sell liquor or any other article in a shop, the keeper of that shop is, we think, responsible for any sale made by any clerk or assistant in his shop; *prima facie* it would be his act."

There was a clear delegation of authority or of the master's power to prevent a sale contrary to the statute, by putting the servant in charge of the store and of the vessel of wood alcohol from which the quantity sold was taken. Moreover, the statute in question is one of a class to which the construction given in this case is most readily applied, as recognised even by Brett, J., in his dissenting judgment in *Regina v. Prince*, L.R. 2 C.C.R. 154; *R. v. Russill*, 29 O.L.R. 367, *per curiam*.

Osler, J.A., in *R. v. Brinkley*, 12 Can. Cr. Cas. 454, at 462. 14 O.L.R. 434 said: "In the recent case of *Sherras v. De Rutzen* (1895) 1 Q.B. 918, Wright, J., speaking of the presumption that a knowledge of the wrongfulness of the act is an ingredient in every offence, says (at page 921), "that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered: *Nichols v. Hales* (1873), L.R. 8 C.P. 322. One of the most remarkable exceptions was in the case of bigamy. It was held by all the Judges on the Statute of 1 Jac. 1, ch. 11 that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt: *Lolley's Case* (1812), R. & R. 237. The dictum in that case that no sentence or Act of any foreign country can dissolve an English marriage *a vinculo matrimonii* for grounds on which it is not liable to be dissolved *a vinculo matrimonii* in England, was afterwards overruled in *Harvey v. Farnie* (1880), 6 P.D. 35, 44, but in other respects the decision is not affected."

See sec. 22 of the Code as to the doctrine that ignorance of the law is no excuse.

On a charge of unlawfully and maliciously killing cattle it appeared that the animal was killed by the prisoners, when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it:—it was held that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, *a mens rea* on the part of the prisoners being disapproved. *The Queen v. Mennell*, 1 Terr. L.R. 487.

Where intent is an ingredient of a crime there is no onus on defendant to prove that the act alleged was accidental. *R. v. Davies*, 8 Cr. App. R. 211, 29 T.L.R. 350.

Where there is a question whether a person committed an offence, evidence may be given of any fact supplying a motive or constituting preparation for the offence, of any subsequent conduct of the person accused which is apparently influenced by the commission of the offence, and of any act done by him, or by his authority, in consequence of the offence. *R. v. McBerny*, 3 Can. Cr. Cas. 339. Thus, evidence may be given that, after the commission of the alleged offence, the accused absconded, or was in possession of the property, or the proceeds of the property acquired by the offence, or that he attempted to conceal things

which were or might have been used in committing the offence, or as to the manner in which he conducted himself when statements were made in his presence and hearing. *R. v. Barrett*, 9 C. & P. 387. *R. v. Letain* [1918], 1 W.W.R. 505, 29 Can. Cr. Cas. 389 (Man.).

The motive may in some cases ameliorate the crime; so, where the loser in a card game took by force from the winner money out of which he thought he had been defrauded, it was held that the *bona fide* belief, whether mistaken or not, negatived the charge of theft, but a conviction might be made for assault under the indictment for robbery. *R. v. Ford* (1907), 13 B.C.R. 109.

While it is not always necessary to show a guilty knowledge in order to convict a person of an offence, where the words of the statute creating it impose an absolute prohibition, on the other hand, when by the language of the statute a guilty knowledge is made an essential element of the offence, then in order to ensure a conviction the guilty knowledge must be clearly shown. The Act of the legislature must be looked to in order to see when knowledge is necessary to complete the offence. *Ex parte Murchie* (*R. v. Gloucester*), 24 Can. Cr. Cas. 228, at 236; *R. v. Ritchie*, *ex parte* Blaine, 27 N.B.R. 213, 11 Can. Cr. Cas. 193; *ex parte* Baird, 34 N.B.R. 213; *R. v. Quirk*, 44 N.S.R. 244. *R. v. Verdi* (1914), 23 Can. Cr. Cas. 47 (N.S.); *R. v. Irish*, 18 O.L.R. 351, 14 Can. Cr. Cas. 458; *R. v. Labbe*, 17 Can. Cr. Cas. 417; *R. v. Perras*, 6 Terr. L.R. 58, 9 Can. Cr. Cas. 364; *Brown v. Foot*, 61 L.J.M.C. 110; *Bank of New South Wales v. Piper* [1897] A.C. 383; *Sherras v. De Rutzen* [1895] 1 Q.B. 918; *R. v. Taylor*, 12 Can. Cr. Cas. 244; *Robinson v. Morris*, 19 O.L.R. 633; *R. v. Vachon*, 3 Can. Cr. Cas. 558; *R. v. Potter*, 20 A.R. (Ont.) 516; *R. v. Dias*, 1 Can. Cr. Cas. 534 (N.B.); *Commissioners v. Cartman* [1896] 1 Q.B. 655; *Cundy v. Lecocq*, 13 Q.B.D. 207; *Emery v. Nolloth* [1903] 2 K.B. 264; *R. v. Labrie* (1914) 23 Can. Cr. Cas. 349 (Sask.); *R. v. Gee*, 5 Can. Cr. Cas. 148; *R. v. Law*, 19 Man. R. 259; *Somerset v. Wade* [1894] 1 Q.B. 576; *Chisholm v. Doulton*, 22 Q.B.D. 736; *Baldwin v. Snook* [1918], 2 W.W.R. 314.

It is impossible to apply the maxim as to "*mens rea*" generally to all statutes and it is necessary to look at the object and terms of each Act to see whether and how far knowledge or a particular intent is of the essence of the offence created. *R. v. Law*, 19 Man. R. 259, 275; *Nickle v. Harris*, 3 Sask. L.R. 200, 14 W.L.R. 515; *Baldwin v. Snook* [1918], 2 W.W.R. 314; *R. v. Newcombe* (1918), 29 Can. Cr. Cas. 249 (N.S.), 40 D.L.R. 85.

## PART II.

### OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

#### *Interpretation.*

#### **As to information illegally obtained or communicated.—Definitions.**

**73.** In the sections of this Part relating to information illegally obtained or communicated, unless the context otherwise requires,—

- (a) any reference to a place belonging to His Majesty includes a place belonging to any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, whether the place is or is not actually vested in His Majesty;
- (b) expressions referring to communications include any communication, whether in whole or in part, and whether the document, sketch, plan, model or information itself or the substance or effect thereof only be communicated;
- (c) ‘document’ includes part of a document;
- (d) ‘model’ includes design, pattern and specimen;
- (e) ‘sketch’ includes any photograph or other mode of expression of any place or thing;
- (f) ‘office under His Majesty’ includes any office or employment in or under any department of the Government of the United Kingdom, or of the Government of Canada or of any province.

*Origin*—Code of 1892, sec. 76; 53 Vict. Can. ch. 10; the Official Secrets Act 1889, 52-53 Vict. (Imp.) ch. 52, since re-enacted and amended by the Official Secrets Act 1911, 1 and 2 Geo. V. (Imp.) ch. 28.

*Illegally obtaining or communicating information of military value*]  
—See secs. 85, 86.



*Treason and other Offences against the King's Authority and Person.***Treason.—Definition.—Penalty.****74. Treason is,—**

- (a) the act of killing His Majesty, or doing him any bodily harm tending to death or destruction, maim or wounding, and the act of imprisoning or restraining him; or,
- (b) the forming and manifesting by any overt act an intention to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or to imprison or to restrain him; or,
- (c) the act of killing the eldest son and heir apparent of His Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or,
- (d) the forming and manifesting, by an overt act, an intention to kill the eldest son and heir apparent of His Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or,
- (e) conspiring with any person to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or conspiring with any person to imprison or restrain him; or,
- (f) levying war against His Majesty either
  - (i) with intent to depose His Majesty from the style, honor and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland or of any other of His Majesty's dominions or countries, or
  - (ii) in order, by force or constraint, to compel His Majesty to change his measures or counsels, or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada; or,
- (g) conspiring to levy war against His Majesty with any such intent or for any such purpose as aforesaid; or.

- (h) instigating any foreigner with force to invade the said United Kingdom or Canada or any other of the dominions of His Majesty; or,
- (i) assisting any public enemy at war with His Majesty in such war by any means whatsoever; or,
- (j) violating, whether with her consent or not, a Queen consort, or the wife of the eldest son and heir apparent, for the time being, of the King or Queen regnant.

2. Every one who commits treason is guilty of an indictable offence and liable to suffer death.

*Origin*—Sec. 65, Code of 1892; 57-58 Vict. ch. 57, sec. 1; the Statute of Treasons 1351 Eng., 25 Edw. 3, statute 5, chapter 2.

*Assisting alien enemies to leave Canada*—Inciting or assisting an alien enemy to leave Canada may under certain circumstances be treason punishable under sec. 74, and under less serious circumstances an offence punishable under sec. 75A which was introduced into the Code in 1915. Compare *R. v. Ahlers*, 84 L.J.K.B. 901, 11 Cr. App. R. 63.

*Assisting any public enemy at war*—It has been held in England that on a true construction of 25 Edw. 3, st. 5, c. 2, the Statute of Treasons 1351, to "be adherent to the King's enemies in his realm," which is one of the subjects of treason therein specified, the adherence need not be that of a person within the King's "realm." *Rex v. Casement*, 12 Cr. App. R. 99, 115 L.T. 267.

*Corroboration*—A conviction for treason cannot be had upon the evidence of one witness unless such witness is "corroborated in some material particular by evidence implicating the accused." Code sec. 1002.

*Aliens levying war and British subjects assisting*—See sec. 77.

*Overt acts must be stated in the indictment*—When a man is charged with treason the law gives him every opportunity to make his defence. The indictment is required to state the particular overt acts complained of: the power of amending indictments is expressly stated not to extend to authorise the Court to add to the overt acts set out in the indictment (sec. 847, sub-sec. 2), and 10 days before his arraignment there must be delivered to him a copy of the indictment, a list of the witnesses to be produced on the trial to prove the indictment, and a copy of the panel of the jurors who are to try him returned by the sheriff (sec. 897). It is further provided that the list shall mention the names, occupations and places of abode of the said witnesses and jurors and that all the documents mentioned shall be given to the accused at the same time and in the presence of two witnesses. These

provisions clearly are intended to enable the accused to know exactly what is charged and what is intended to be proven against him. The indictment will be quashed if it does not set forth with precision the offence charged and does not in sufficient terms state any overt act of treason. *R. v. Fehr*, 26 Can. Cr. Cas. 245 (N.S.).

*Overt act expressed by "open and advised speaking."*—See the limitation provided by sec. 1140 (2).

*Conspiracy to assist enemy*—To conspire with any person to commit an indictable offence is indictable under Code sec. 573 and punishable with seven years' imprisonment. See note to sec. 573.

*Attempting to assist public enemy*—It seems to have been assumed in *R. v. Snyder*, 34 O.L.B. 318, 24 Can. Cr. Cas. 101, that an attempt of the offence under sub-sec. (i) would be indictable; sec. 72 relating to attempts is in general terms as to any offence under the Code. The indictment was for a completed offence but the Crown asked a conviction for the attempt to commit treason and such was the verdict. On a reserved case it was held that a conviction for an attempt to assist a public enemy was not shown by his agreeing to convey certain alien enemies out of Canada when the transportation was never begun and it appeared that they had no intention of leaving Canada but were being used by the police to entrap the accused. *R. v. Snyder* (1915) 34 O.L.B. 318, 24 Can. Cr. Cas. 101. The *Snyder* case occurred prior to the passing of Code sec. 75A in the year 1915, and it will be noted that the latter makes it an offence either to "incite" or "assist" an alien enemy to leave Canada, while sub-section (i) of sec. 74 relates only to "assisting." An attempt of the offence created by sec. 75A would it seems, be indictable and punishable under sec. 571 with imprisonment up to half the maximum term for the completed offence; but neither of the secs. 570, 571 and 572 are applicable to an offence punishable with death as is treason under sec. 74. Sec. 72 seems merely to amplify the definition of an attempt and not to declare the attempt an offence. Sec. 949, however, declares that "When the complete commission of an offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly." But even this seems to imply that there must exist elsewhere some provision whereby the attempt is in itself made indictable otherwise sec. 949 would not apply. Certain treasonable offences consist of the treasonable intent manifested by an overt act (sec. 74, sub-sections (b) and (d) and sec. 78); but it seems at least doubtful whether there is such an offence as "attempting" to assist any public enemy (sec. 74 (i)) either under the Code or at common law.

*Treasonable conspiracy*—See also sec. 75.

*Treason by levying war; insurrection*—See *R. v. Riel*, 1 Terr. L.R. 23 and 2 Man. L.R. 321, and same case on motion for leave to appeal.

*Riel v. the Queen*, 10 A.C. 675, 16 Cox C.C. 48; *R. v. Slavin*, 17 U.C.C.P. 205, *R. v. Marais* [1902] A.C. 51.

An insurrection differs from a riot in this—that a riot has in view some enterprise of a private nature (see sec. 91) while an insurrection savours of high treason, and contemplates some enterprise of a general and public nature. *R. v. Vincent*, 9 C. & P. 95. See also Lord Mansfield's charge on the trial of Lord George Gordon in 1781. *R. v. Gordon*, 21 State Trials, 485 at 644. *R. v. Frost*, 9 C. & P. 129.

*Failure to inform justice of the peace on learning of intended treasonable act*—See sec. 76.

*Espionage and war treason*—Although any person who makes or endeavours to make unauthorized or secret communication to the enemy or to collect information secretly for him, is ordinarily spoken of as a spy, the Hague Rules provide a definition of a spy as regards land warfare which does not cover all such cases.

According to No. 29 of the Hague Rules a person can only be considered a spy when, acting clandestinely or on false pretences, he obtains, or endeavours to obtain, information in the zone of operations of a belligerent with the intention of communicating it to the hostile party.

The fact that a person acting as a spy is in the naval or military service of his State, does not screen him from punishment should he be apprehended by the enemy. Nor does the fact that he is in uniform make it impossible for him to be a spy.

If the act of espionage is committed by anyone in the home territory the laws of the land usually provide for its punishment. Thus in England a person can be tried for high treason on the counts of traitorously compassing, imagining and intending the deposition and death of the Sovereign and of traitorously adhering to, aiding and comforting the Sovereign's enemies. The leading case is that of the French Colonel De la Motte who was resident in London, and was, in 1781, tried for collecting and forwarding to his Government reports in regard to the number of British ships and forces. It was then laid down that whilst a foreigner is under the protection of the laws of this kingdom, he owes allegiance to it equal to that of any natural-born subject, and that the fact that this allegiance is local and temporary is of no consequence in law. *R. v. De la Motte*, 21 State Trials 687.

*Naturalization in enemy country during war*—A British subject commits a treasonable act by becoming naturalized in the enemy's country during hostilities and is liable in respect of subsequent treasonable acts notwithstanding such attempted naturalization. *R. v. Lynch*, [1903] 1 K.B. 144, 72 L.J.K.B. 167.

*Ball*—It was held in *Rex v. Rowens* (1914) 23 Can. Cr. Cas. 340, 7 O.W.N. 467, that a person committed for trial in time of war upon a charge brought before the enactment of sec. 75A for assisting the enemy by aiding the King's enemies to leave Canada, was properly

refused bail. And see sec. 699 restricting the right to bail to Superior Courts.

*Accessory after the fact to treason*—See secs. 71, 76, 583 (a), 849.

*Objections and pleas to indictment*—See sec. 898 *et seq.*

*Assault or attempted assault upon the King*—See sec. 80.

*Jurisdiction of Sessions excluded*—See sec. 583.

### **Overt act of treason.**

**75.** In every case in which it is treason to conspire with any person for any purpose, the act of so conspiring, and every overt act of any such conspiracy, is an overt act of treason.

*Origin*—Sec. 66, Code of 1892.

*Overt acts of treasonable conspiracy*—The conspiracy itself and each overt act of the conspiracy is an overt act of treason where it is treason to conspire for the particular purpose, *ex. gr.*, to conspire to levy war to intimidate Parliament (sec. 74 (g)). The indictment must state the overt acts relied upon, and no evidence is to be admitted of any overt act not stated unless it is otherwise relevant as tending to prove some overt act stated; nor can the court amend the indictment by adding to the overt acts stated. Code sec. 847. As to when evidence of acts of one co-conspirator may be given on a charge against another, see note to sec. 573.

*Defendant charged with treason to be given copy of indictment, list of witnesses, etc.*—See sec. 897.

### **Assisting, etc., alien enemies to leave Canada.**

**75A.** Every one is guilty of an indictable offence and liable to two years' imprisonment who incites or assists any subject of any foreign state or country at war with His Majesty to leave Canada without the consent of the Crown, unless the person accused can prove that assistance to the enemy was not intended, and provided that such inciting or assisting do not amount to treason.

*Origin*—Statutes of Canada, 1915, ch. 12, sec. 2.

*Assisting alien enemies to leave Canada*—As to assistance amounting to treason see sec. 74, sub-section (i) of which declares that assisting any public enemy at war with His Majesty in such war by any means whatever is treason.

*Indictment*—Sec. 847 applies only to treason and to offences under sections 76 to 86 inclusive and not to the offence here declared.

*Evidence*].—The fact that a person is a subject of Austria-Hungary may be deduced from the facts that at his earliest recollection he was resident in Austria-Hungary, that he served in the Austrian army or was rejected as unfit, and that he registered as an alien Austrian enemy. *R. v. Oma* (1915) 9 W.W.R. 584, 25 Can. Cr. Cas. 73.

Where the subject of a foreign state at war with His Majesty intends to leave Canada and starts for the boundary line with such intention, he is in the act of leaving Canada on every part of the journey for that purpose, and if any person knowing that the foreign subject had such intention does any act furthering that intention, such person thereby “assists” the foreign subject to leave Canada within the meaning of sec. 75A of The Criminal Code, whether the latter got across the boundary line or not. *Ibid*.

*Internment of alien enemy*].—The Crown is entitled in the exercise of its prerogative to imprison an alien enemy and the court has no jurisdiction to interfere with the exercise of the prerogative when the status of alien enemy is proved. *R. v. Vine Street Superintendent, Ex parte Liebmann* [1916] 1 K.B. 268, 85 L.J.K.B. 210.

*Corroboration*].—Sec. 1002 which is applicable to a charge of treason under sec. 74, does not apply to a charge brought under sec. 75A.

**Accessories after the fact to treason.—Omitting to prevent treason.**

**76.** Every one is guilty of an indictable offence and liable to two years’ imprisonment who,—

- (a) becomes an accessory, after the fact, to treason; or,
- (b) knowing that any person is about to commit treason does not, with all reasonable despatch, give information thereof to a justice of the peace, or use other reasonable endeavours to prevent the commission of the same.

*Origin*].—Sec. 67, Code of 1892.

*Joint or separate trial of accessory*].—See sec. 849.

*Restriction as to bail*].—See Code sec. 699.

*Overt acts must be stated in the indictment*].—See sec. 847.

*Accused to be given copy of indictment, list of witnesses, etc.*].—See sec. 897.

*Jurisdiction of Sessions excluded*].—See sec. 583.

**Levying war by subject of a state at peace with His Majesty.—Subjects assisting.**

**77.** Every subject or citizen of any foreign state or country at peace with His Majesty, who,—

- (a) is or continues in arms against His Majesty within Canada; or,
- (b) commits any act of hostility therein; or,
- (c) enters Canada with intent to levy war against His Majesty, or to commit any indictable offence therein for which any person would, in Canada, be liable to suffer death; and,

every subject of His Majesty who,—

- (a) within Canada levies war against His Majesty in company with any of the subjects or citizens of any foreign state or country at peace with His Majesty; or,
- (b) enters Canada in company with any such subjects or citizens with intent to levy war against His Majesty, or to commit any such offence therein; or,
- (c) with intent to aid and assist, joins himself to any person who has entered Canada with intent to levy war against His Majesty, or to commit any such offence in Canada;

is guilty of an indictable offence and liable to suffer death.

*Origin*—Sec. 68, Code of 1892; R.S.C. 1886, ch. 146, secs. 6 and 7.

*Trial by General Court-martial*—See the Militia Act, R.S.C. 1906, ch. 41, secs. 74, 102, 103.

*Alien resident of Canada assisting invaders*—See *De Jager v Attorney-General of Natal* [1907] A.C. 326, 76 L.J.P.C. 62.

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Jurisdiction of Sessions excluded*—See sec. 583.

#### **Treasonable offences.**

**78.** Every one is guilty of an indictable offence and liable to imprisonment for life who forms,—

- (a) an intention to depose His Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of His Majesty's dominions or countries; or,

- (b) an intention to levy war against His Majesty within any part of the said United Kingdom, or of Canada, in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada; or,
- (c) an intention to move or stir any foreigner or stranger with force to invade the said United Kingdom, or Canada, or any other of His Majesty's dominions or countries under the authority of His Majesty; and manifests any such intention by conspiring with any person to carry it into effect, or by any other overt act, or by publishing any printing or writing.

*Origin*—Sec. 69, Code of 1892; R.S.C. 1886, ch. 146, sec. 3.

*Prosecution to be within three years*—See sec. 1140 (1a).

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Overt act expressed by "open and advised speaking"*—See the limitation provided by sec. 1140 (2).

*Jurisdiction of Sessions excluded*—See sec. 583.

*Treasonable offences generally*—See secs. 74, 75, 75A, 76, 77, 78.

#### **Conspiracy to intimidate a legislature.**

**79.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who confederates, combines or conspires with any person to do any act of violence in order to intimidate, or to put any force or constraint upon, any legislative council, legislative assembly or house of assembly.

*Origin*—Sec. 70, Code of 1892.

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Power to amend indictment restricted*—See secs. 847, 899.

*Jurisdiction of Sessions excluded*—See sec. 583.

#### **Assaults upon the King.—Acts intended to alarm or injure the King.—Other similar acts.**

**80.** Every one is guilty of an indictable offence and liable to seven years' imprisonment, and to be whipped once, twice or thrice as the court directs, who,—



- (a) wilfully produces, or has, near His Majesty, any arm or destructive or dangerous thing with intent to use the same to injure the person of, or to alarm His Majesty; or,
- (b) wilfully and with intent to alarm or to injure His Majesty, or to break the public peace,
  - (i) points, aims or presents, or attempts to point, aim or present, at or near His Majesty, any firearm, loaded or not, or any other kind of arm,
  - (ii) discharges or attempts to discharge at or near His Majesty any loaded arm,
  - (iii) discharges or attempts to discharge any explosive material near His Majesty,
  - (iv) strikes, or strikes at, or attempts to strike, or strike at, His Majesty in any manner whatever,
  - (v) throws, or attempts to throw, anything at or upon His Majesty.

*Origin*—Sec. 71, Code of 1892.

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Overt act showing intention to wound the King*—See sec. 74, subs. (b) and (c).

*Jurisdiction of Sessions excluded*—See sec. 583.

*Punishment by whipping*—See secs. 80, 204, 276, 292, 293, 301, 302, 446, 457, 1060.

#### **Inciting to mutiny.**

**81.** Every one is guilty of an indictable offence and liable to imprisonment for life, who for any traitorous or mutinous purpose, endeavours to seduce any person serving in His Majesty's forces by sea or land from his duty and allegiance to His Majesty, or to incite or stir up any such person to commit any traitorous or mutinous practice.

*Origin*—Sec. 72, Code of 1892; Incitement to Mutiny Act, 37 Geo. III, ch. 70, as amended by 7 Will. IV. and 1 Vict., ch. 91.

*Serving in His Majesty's forces*—A sailor in hospital, and therefore not drawing pay from the Admiralty, was held to be within the corresponding English Act. *R. v. Tierney*, R. & B. 74.

*Mutiny and insubordination*—See the Army Act, 44-45 Vict. (Imp). ch. 58, secs. 7, 8 and 9, as to punishment under Military law of persons subject thereto; and see the Militia Act, R.S.C. 1906, ch. 41, secs. 74 and 75.

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Jurisdiction of Sessions excluded*—See sec. 583.

**Persuading to desert.—Concealing deserter.—Penalty.**

**82.** Every one is guilty of an offence punishable on indictment, or on summary conviction before two justices, who, not being an enlisted soldier in His Majesty's service, or a seaman in His Majesty's naval service,—

(a) by words or with money, or by any other means whatsoever, directly or indirectly, persuades or procures, or goes about or endeavours to persuade, prevail on or procure, any such seaman or soldier to desert from or leave His Majesty's military or naval service; or,

(b) conceals receives or assists any deserter from His Majesty's military or naval service, knowing him to be such deserter;

and is liable, on conviction under indictment, to fine and imprisonment in the discretion of the court, and on summary conviction before two justices, to a penalty not exceeding two hundred dollars, and not less than eighty dollars and costs, and in default of payment to imprisonment for any term not exceeding six months.

*Origin*—Sec. 73, Code of 1892, 52 Vict., ch. 25, sec. 4; R.S.C. 1886, ch. 41, sec. 109; compare secs. 153 and 154 of the Army Act, 44-45 Vict. (Imp.), ch. 58.

*Desertion from military or naval service*—This section applies to desertion from either the military or naval service. Provisions for desertion from merchant ships are to be found in the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, as to ships of Canadian register, and in the Merchants' Shipping Act, Imp., as to ships of British register. The Canadian Naval Service Act, 9-10 Edw. VII, Can., ch. 43, deals with the Canadian Naval Forces.

The offence of desertion—that is to say, of deserting or attempting to desert His Majesty's service—implies an intention on the part of the offender either not to return to His Majesty's service at all, or to

escape some particular important service; and a soldier must not be charged with desertion, unless it appears that some such intention existed. Further, even assuming that he is charged with desertion, the court that tries him should not find him guilty of desertion, unless fully satisfied on the evidence that he has been guilty of desertion as above defined. On the other hand, absence without leave may be described as short absence, unaccompanied by disguise, concealment or other suspicious circumstances, as occurs when a soldier does not return to his corps or duty at the proper time, but on returning is able to show that he did not intend to quit the service, or to evade the performance of some service so important as to render the offence desertion.

*British Manual of Military Law, 1914 edition, p. 18.*

Persons subject to military law may be proceeded against under the Army Act (Imp.), sec. 12, by court-martial for desertion or persuading others to desert, while the civilian who persuades a soldier to desert is to be prosecuted under sec. 82 of the Code.

*Warrant to search for deserter*—See sec. 657.

*Prosecutor's share of fine*—See sec. 1042.

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Aiding and abetting offence*—See sec. 69.

*Militiaman absent during active service without leave*—A summary conviction, offence punishable with imprisonment, with or without hard labor, for a term not exceeding two years. Orders-in-Council, Can. 6 January, 1916, vol. 49, Can. Gazette, 2501.

*Harboring deserters from Militia or R.N.W. Mounted Police*—See sec. 84.

*Unlawfully receiving naval or military stores or equipment*—See secs. 432-441.

### **Resisting execution of search warrant for deserter.**

**83.** Every one who resists the execution of any warrant authorizing the breaking open of any building to search for any deserter from His Majesty's military or naval service is guilty of an offence and liable, on summary conviction before two justices, to a penalty of eighty dollars.

*Origin*—Sec. 74, Code of 1892; R.S.C. 1886, ch. 169, sec. 7. A similar provision is contained in sec. 657, sub-sec. (3).

*Warrant to search for suspected deserter*—See sec. 657.

*Prosecutor's share of fine*—See sec. 1042.

*Bail*—Code sec. 699 makes certain restrictions on the giving of bail in regard to "an offence under any of the sections 76 to 86 inclusive," but, read in conjunction with secs. 696-698, the restriction seems to be

limited to indictable offences and not to apply to an offence such as this which is made punishable only on summary conviction, *i.e.*, proceedings under Part XV of the Code. Sec. 699 is contained in Part XIV, which gives the procedure before justices on a preliminary enquiry for an indictable offence. As to bail on remands under Part XV, see Code sec. 722 (4).

**Persuading men to desert.—Assisting.—Concealing.**

**84.** Every one is guilty of an offence and liable, on summary conviction, to six months' imprisonment with or without hard labour, who,—

- (a) persuades any man who has been enlisted to serve in any corps of militia, or who is a member of or has engaged to serve in the Royal Northwest Mounted Police Force, to desert, or attempts to procure or persuade any such man to desert; or,
- (b) knowing that any such man is about to desert, aids or assists him in deserting; or,
- (c) knowing that any such man is a deserter, conceals him or aids or assists in his rescue.

*Origin*—Code of 1892, sec. 75; 52 Vict., ch. 25, sec. 4; R.S.C. 1886, ch. 41, sec. 109; compare sec. 153 of the Army Act, 44-45 Vict. (Imp.), ch. 58.

*Bail*—See note to sec. 83.

*Non-attendance of militiaman on parade*—See the Militia Act, R.S.C. 1906, ch. 41, sec. 120.

*R.N.W. Mounted Police*—The Royal North-West Mounted Police force exercises jurisdiction in Alberta and Saskatchewan and the northern part of Manitoba as regards police duties and the enforcement of both Federal and Provincial laws by special arrangement between the Federal Government and these provinces. In the Yukon Territory and the North-West Territories the R.N.W. police force is under the direct authority of the Government of Canada which has charge of the enforcement of the law in these Territories.

*Information Illegally Obtained or Communicated.*

**Espionage.**

**85.** Every one is guilty of an indictable offence and liable to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine, who,—

- (a) for the purpose of wrongfully obtaining information,
  - (i) enters or is in any part of a fortress, arsenal, factory, dockyard, camp, ship, office or other like place in Canada belonging to His Majesty, in which part he is not entitled to be, or
  - (ii) when lawfully or unlawfully in any such place as aforesaid, either obtains any document, sketch, plan, model or knowledge of anything, which he is not entitled to obtain, or takes without lawful authority any sketch or plan, or
  - (iii) when outside any fortress, arsenal, factory, dockyard or camp in Canada, belonging to His Majesty, takes, or attempts to take, without authority given by or on behalf of His Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard or camp; or,
- (b) knowingly having possession of or control over any document, sketch, plan, model, or knowledge obtained or taken by means of any act which constitutes an offence against this and the next following section, at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interests of the state, to be communicated at that time; or,
- (c) after having been entrusted in confidence by some officer under His Majesty with any document, sketch, plan, model or information relating to any such place as aforesaid, or to the naval or military affairs of His Majesty, wilfully, and in breach of such confidence, communicates the same when, in the interests of the state, it ought not to be communicated; or,
- (d) having possession of any document relating to any fortress, arsenal, factory, dockyard, camp, ship, office or other like place belonging to His Majesty, or to the naval or military affairs of His Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person

to whom he knows the same ought not, in the interests of the state, to be then communicated.

2. Every one who commits any such offence intending to communicate to a foreign state any information, document, sketch, plan, model or knowledge obtained or taken by him, or entrusted to him as aforesaid, or communicates the same to any agent of a foreign state, is guilty of an indictable offence and liable to imprisonment for life.

*Origin*—Sec. 77, Code of 1892; 53 Vict. (Can.), ch. 10, sec. 1; the Official Secrets Act, 1889, 52-53 Vict. (Imp.), ch. 52, since re-enacted and amended by the Official Secrets Act, 1911, 1 and 2 Geo. V (Imp.), ch. 28.

*"Belonging to His Majesty"*—See definition in sec. 73.

*"Communicates"*—See sec. 73 (b).

*"Document, sketch, plan, model"*—See definitions in sec. 73.

*"Sketch"*—This term includes a photograph. Sec. 73.

*Arrest without warrant if found committing*—See sec. 646 as amended 1913, Can., ch. 13, sec. 22.

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Consent of Attorney-General necessary to prosecution*—See sec. 592, sec. 2, sub-sec. (2). A consent by a "Provincial Deputy Attorney-General" would not be sufficient. *Re* the Criminal Code and the Lord's Day Act, 16 Can. Cr. Cas. 459, 43 Can. S.C.R. 434, and compare *R. v. Duff* (No. 2), 2 Sask. L.R. 388, 15 Can. Cr. Cas. 454; *Abraham v. The Queen*, 6 S.C.R. 10. But the consent of a member of the Executive Council of a province who was at the time the "acting Attorney-General," and gave the consent in that capacity was held sufficient under a similar provision in the Lord's Day Act, R.S.C. ch. 153, sec. 17. *R. v. Thompson*, 5 W.W.R. 157, 22 Can. Cr. Cas. 78; and see, to same effect, *R. v. Faulkner*, 16 B.C.R. 229, 19 Can. Cr. Cas. 47, decided under Code sec. 873; also note to sec. 592.

A count of an indictment is not to be deemed objectionable or insufficient for the reason only that it does not state that the consent has been obtained. Sec. 855 (h).

*Jurisdiction of Sessions excluded*—See sec. 583.

*Attempts*—See secs. 72, 571, 949, 950, 951.

*Conspiracy to commit the offence*—See secs. 69 (2), 573.

*Counselling or abetting the offence*—See sec. 69, 72.

#### **Communicating information acquired in office.**

**86.** Every one who, by means of his holding or having held an office under His Majesty, has lawfully or unlawfully either

obtained possession of or control over any document, sketch, plan or model, or acquired any information, and at any time corruptly, or contrary to his official duty, communicates or attempts to communicate such document, sketch, plan, model or information to any person to whom the same ought not, in the interests of the state, or otherwise in the public interest, to be then communicated, is guilty of an indictable offence and liable,—

(a) if the communication was made, or attempted to be made, to a foreign state, to imprisonment for life; and,

(b) in any other case, to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine.

2. This section shall apply to a person holding a contract with His Majesty, or with any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, or with the holder of any office under His Majesty as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract who is under a like obligation of secrecy, as if the person holding the contract, and the person so employed, were respectively holders of an office under His Majesty.

*Origin*—Sec. 78, Code of 1892; 52 and 53 Vict. (Imp.), ch. 52, since re-enacted and amended by the Official Secrets Act, 1911, 1 and 2 Geo. V (Imp.), ch. 28.

*"Office under His Majesty"*—See sec. 73.

*"Communicates"*—See sec. 73 (b).

*"Document, sketch, plan, model"*—See sec. 73.

*Possession or control of document, etc.*—An indictment under the Official Secrets Act, Imp., 1889, for inciting the commission of an offence in respect of the offence mentioned in sec. 86, alleged as to a document, was quashed for want of an averment that the person incited had obtained possession or control of the document. *R. v. Stuart (1899)*, Central Cr. Court referred to in Archbold Cr. Plead. 22nd ed, 965. But see note to Code sec. 69.

*Consent of Attorney-General necessary to prosecution*—See Code sec. 592, and notes to same and to sec. 85. The count of an indictment is not bad if the consent is not stated in it. Code sec. 855 (h).

*Arrest without warrant if found committing*—See sec. 646 as amended 1913, Can. ch. 13, sec. 22.

*Restriction as to bail*—See Code sec. 699.

*Overt acts must be stated in the indictment*—See sec. 847.

*Jurisdiction of Sessions excluded*—See sec. 583.

*Attempts*—See secs. 72, 571, 949, 950, 951.

*Conspiracy to commit the offence*—See secs. 69 (2), 573.

*Counselling or abetting the offence*—See secs. 69, 72.

### *Unlawful Assemblies and Riots.*

**Definition of unlawful assembly.**—Intention not necessary.—Protecting dwelling house.—Exception.

**87.** An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

2. Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

3. An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

*Origin*—Sec. 79, Code of 1892.

*Indictable offence*—See sec. 89.

*Unlawful assembly*—The commission of an act of violence by any one or more of those assembled is not necessary to make the assembly unlawful, if its character and circumstances are such as to be calculated to alarm, not only foolish or timid people, but persons of reasonable firmness and courage. *R. v. Vincent*, 9 C. & P. 95.

When an unlawful assembly has begun to disturb the peace tumultuously, it becomes a "riot." Code secs. 88 and 90; *R. v. Kelly*,



6 U.C.C.P. 372; *R. v. Corcoran*, 26 U.C.C.P. 134; *Field v. Metropolitan Police* [1907], 2 K.B. 853.

A meeting lawfully convened may become unlawful if seditious words are spoken of such a nature as to be likely to produce a breach of the peace. *R. v. Burns* (1886), 16 Cox, C.C. 355.

Assemblies to obstruct the officers of the law are unlawful. *R. v. McNaughten*, 14 Cox C.C. 576; or to witness a prize fight. *R. v. Billingham*, 2 C. & P. 234 (and see Code sec. 106). *R. v. Perkins*, 4 C. & P. 537.

*Assembly for an otherwise lawful object but provocative of riot by others*—It would appear from sub-sec. (1) that an assembly which is primarily lawful becomes unlawful if by assembling they “needlessly and without any reasonable occasion” provoke a riot. If there is no reasonable occasion for this assembling and they must have had reason to believe that their doing so would cause a riot, the assembly would probably be unlawful under sec. 87. *R. v. Mailloux*, 3 Pugsley, N.B. 493; *R. v. Clarkson*, 17 Cox C.C. 483; *Wise v. Dunning* [1902], 1 K.B. 167; compare *Beatty v. Gillbanks*, 9 Q.B.D. 308, 15 Cox C.C. 138.

*Dispersing an unlawful assembly*—The magistrates and the police are justified in dispersing an assembling which is unlawful. *O’Kelly v. Harvey* (1881), 15 Cox C.C. 435, 10 L.R. Irish, 285; and see secs. 16, 46-52.

#### Definition of riot.

**88.** A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

*Origin*—Sec. 80, Code of 1892.

*Rioting*—To prove a person to be a rioter, it is not sufficient to merely show that the riot took place and that the accused was present among them. It must be shown that he did something by word or act to take part in, help or incite the riotous proceedings. *R. v. Atkinson*, 11 Cox 330; *R. v. Corcoran*, 26 U.C.C.P. 134.

The acts of the rioters may be proved severally, as in conspiracy, before evidence is given to connect their fellow rioters. *R. v. Cooper*, 1 Russ. Crimes, 6th ed., 585.

*Punishment and suppression of riots*—See secs. 90-97, and 48-51.

#### Punishment of unlawful assembly.

**89.** Every member of an unlawful assembly is guilty of an indictable offence and liable to one year’s imprisonment.

*Origin*—Sec. 81, Code of 1892; R.S.C. 1886, ch. 147, sec. 11.

*Joining in unlawful assembly*—See sec. 87.

**Punishment of riot.**

**90.** Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labour.

*Origin*—Sec. 82, Code of 1892; R.S.C. 1886, ch. 147, sec. 13.

*Who is a rioter*—See secs. 87 and 88.

*Rioting during and after reading of proclamation*—See secs. 91 and 92.

*Riotous destruction of property*—See secs. 96 and 97.

*Including charge of assault*—The appellant O'Brien and ten others were indicted for that they "unlawfully, riotously, and routously did assemble and gather together to disturb the peace of . . . the King, and being so assembled . . . in and upon (A. B.) . . . then and there being, unlawfully, riotously, and routously did make an assault," etc. It was held that on this indictment the jury could convict the appellant of an assault.

The statement of the law in Archbold's Criminal Pleading (24th ed.), at p. 228, that "at common law a defendant may be convicted of a less aggravated felony or misdemeanor on an indictment charging a felony or misdemeanor of greater aggravation, provided that the indictment contains words apt to include both offences" was approved. *Rex. v. O'Brien*, 27 Times L.R. 204. See Code sec. 951, as to conviction for lesser offences included in the charge, and sec. 296 as to aggravated assaults.

**Reading the Riot Act.—Proclamation.**

**91.** It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice, of any county, city or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded silence, and after that openly and with loud voice to make or cause to be made a proclamation in these words or to the like effect:—

'Our Sovereign Lord the King charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business, upon

the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life.

‘GOD SAVE THE KING.’

*Origin*].—Sec. 83, Code of 1892; B.S.C. 1886, ch. 147, secs. 1 and 2; 1 Geo. I (Eng.), stat. 2, ch. 5.

*Riot Act proclamation*].—The Riot Act (1 Geo. I, stat., 2 ch. 5), passed in England in 1715, introduced the form of proclamation now contained in Code sec. 91, and the reading of the proclamation is commonly termed “reading the Riot Act.”

The Riot Act does not destroy any power which lawfully existed before its passing for the suppression of riot; but it admits the inference that, as a general rule, it would be extremely imprudent to use armed force against a mob until the proclamation required by the Act has been made and the appointed space of an hour elapsed, except in circumstances where either the proclamation cannot be read owing to the violence of the mob, or the mob, before the expiration of thirty minutes after it has been read (Code secs. 92 and 93), perpetrate or are evidently about to perpetrate some outrage which formerly would have been classified as felony.

Even before the reading of the proclamation the magistrate is justified in repelling force by force. *R. v. Kennett*, 5 C.A.P. 282. The force should not be out of proportion to the danger to be reasonably apprehended. *Stevenson v. Wilson*, 2 L.C.J. 254.

In the riots excited by Lord George Gordon in 1780, the mob were allowed to proceed to great excesses without any interference by the civil or military authorities; and this appears to have been allowed under the impression that until the proclamation in the Riot Act was read the dispersion of the rioters would be illegal. To correct this impression Lord Loughborough made use of the following language:—“It has been imagined because the law allows an hour for the dispersion of a mob to whom the Riot Act has been read by the magistrate, the better to support the civil authority, that during that period of time the civil power and the magistrate are disarmed, and the King’s subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within view of the legislature, nor does the operation of the Act warrant any such effect. The civil magistrates are left in possession of those powers which the law had given them before. If the mob collectively, or part of it, or any individual, within or before the expiration of that hour attempts or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the law, it is the duty of all present, of whatever description they may be, to endeavor to stop the mischief and to apprehend the offender.” *R. v. Gordon*, 21 Howell’s State Trials, 493. It will be noted that the time limit under the Code is 30 minutes, not one hour, as in the English law cited. See also Code secs. 96 and 97.

It was held under the corresponding English statute that the Riot Act is not validly proclaimed if the concluding words of the proclamation, "God save the King," are omitted. *R. v. Child*, 4 C. & P. 442.

*Failure of rioters to disperse in thirty minutes*—See secs. 92 and 93.

*Justification in executing orders to suppress riot*—See secs. 48-51 and sec. 93.

*Calling out militia to suppress riot*—See the Militia Act, R.S.C. 1906, ch. 41, secs. 80-90.

The following summary of the law as to the duties of soldiers in case of riot was given in their report by the Committee who inquired into the facts of the Featherstone riots in 1893. (British Parl. papers 1893-94, C. 7234):

"By the law of this country every one is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may be used in their suppression, depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be attained.

"The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act, and who resist the attempt to disperse or apprehend them. The riotous crowd at the Ackton Hall Colliery was one whose danger consisted in its manifest design to set fire and do serious damage to the colliery property, and in pursuit of that object to assault those upon the colliery premises. It was a crowd accordingly which threatened serious outrage, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on person and property justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons.

"Officers and soldiers are under no special privileges and subject to no special responsibilities as regards this principle of the law. A soldier for the purpose of establishing civil order is only a citizen, armed in a particular manner. He cannot, because he is a soldier, excuse himself if without necessity he takes human life. The duty of magistrates and peace officers to summon or to abstain from summoning the assistance of the military depends in like manner on the necessities of the case. A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger of life and limb, and, in these days of improved rifles and perfected ammunition, without some risk of injuring some distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for

help is made, and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanor.

"The whole action of the military when called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. No set of rules exists which governs every instance or defines beforehand the contingency that may arise. One salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, although not a legal obligation, is a matter of the highest importance. The military come, it may be, from a distance. They know nothing, probably, of the locality or of the special circumstances. They find themselves introduced suddenly on a field of action, and they need the counsel of the local justice, who is presumably familiar with the details of the case. But, although the magistrate's presence is of the highest value and moment, his absence does not alter the duty of the soldier, nor ought it to paralyze his conduct, but only to render him doubly careful as to the proper steps to be taken. No officer is justified in English law in standing by and allowing felonies to be committed merely because of a magistrate's absence.

"The question whether, on any occasion, the moment has come for firing upon a mob of rioters depends, as we have said, on the necessities of the case. Such firing to be lawful, must, in the case of a riot like the present, be necessary to stop or prevent serious and violent crime as we have alluded to; and it must be conducted without recklessness or negligence. When the need is clear, the soldier's duty is to fire with all reasonable caution, so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the magistrate who is present is required by military regulations, and wisdom and discretion are in favor of the observance of such a practice. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists.

"With the above doctrines of English law the Riot Act does not interfere. Its effect is to make the failure of a crowd to disperse for a whole hour after the proclamation has been read a felony; and on this ground to afford a statutory justification for dispersing a felonious assemblage, even at the risk of taking life. In the case of the Ackton Hall Colliery, an hour had not elapsed after what is popularly called the reading of the Riot Act, before the military fired. No justification for their firing can therefore be rested on the provisions of the Riot Act itself, the further consideration of which may indeed be here dismissed from the case. But the fact that an hour had not expired since its reading did not incapacitate the troops from acting when outrage had to be prevented. All their common law duties as citizens and soldiers

remained in full force. The justification of Captain Barker and his men must stand or fall entirely by the common law. Was what they did necessary, and no more than was necessary, to put a stop to or prevent felonious crime? In doing it did they exercise all ordinary skill and caution, so as to do no more harm than could be reasonably avoided?

"If these two conditions are made out, the fact that innocent people have suffered does not involve the troops in legal responsibility. A guilty ringleader who under such circumstances is shot dead, dies by justifiable homicide. An innocent person killed under such circumstances, where no negligence has occurred, dies by accidental death. The legal reason is not that the innocent person has to thank himself for what has happened, for it is conceivable (though not often likely) that he may have been unconscious of any danger and innocent of all imprudence. The reason is that the soldier who fired has done nothing except what was his strict legal duty."

A leading English case on the question of military assistance to the civil authorities is *Redford v. Birley*, 1 State Trials N.S. 1071, an action of tort against a militia officer. Lord Haldane, when Secretary of State for war, 1908, pointed out before a Parliamentary Committee that the head note of this case was misleading and that the case when analysed was not inconsistent with the current of authority. He said further (British Parl. papers, 1908, H.C. 236): "The law to my mind is clear that the soldier is in no different position from anybody else. He must obey the civil authority by coming to its assistance, where it is necessary that the soldier should give assistance to the civil authority, but it must be necessary that he should do so, and excess of force and excess of display ought not to be used. The soldier is guilty of an offence if he uses that excess, even under the direction of the civil authority, provided he had no excuse as that he was bound to take the facts, as distinguished from the law, from the civil authority. Now the officer, of course, is placed in an extremely difficult position. He is in the same position as his man is. If an officer orders his own man to fire unnecessarily and clearly unnecessarily, the command of the officer does not absolve the private from his duty to obey the common law. On the other hand, under the law of the Army, the private is bound to obey his officer. He is, in other words, in peril of being, on one hand, tried and shot by a court-martial, and on the other hand, of being tried and hanged by a judge and jury. But in practice it is one of these situations which is really perfectly simple. In 999 cases out of 1,000 it does not arise. People are very sensible in this country. Two principles which may come into conflict have to be reconciled, and they are reconciled by taking the case in the concrete. The result is that, while the commanding officer is bound to pay great respect to the opinion of the civil authority, and on a mere question of fact, when he comes from a distance, to accept it until he sees that it is obviously wrong, he is

not absolved, in law, from his duty not to use more force than is necessary."

The following opinion of law officers of the Crown in England (Aug. 18th, 1911) on the duty of soldiers called upon to assist the police, was signed by Sir Rufus Isaacs and Sir John Simon:

"A soldier differs from the ordinary citizen in being armed and subject to discipline; but his rights and duties in dealing with crime are precisely the same as those of the ordinary citizen. If the aid of the military has been invoked by the police, and the soldiers find that a situation arises in which prompt action is required, although neither Magistrate nor police are present or available for consultation, they must act on their own responsibility. They are bound to use such force as is reasonably necessary to protect premises over which they are watching, and to prevent serious crime or riot. But they must not use lethal weapons to prevent or suppress minor disorder or offences of a less serious character, and in no case should they do so if less extreme measures will suffice. Should it be necessary for them to use extreme measures they should, whenever possible, give sufficient warning of their intention."

See Code secs. 93 and 94, notes to secs. 48-52, and secs. 80-90 of the Militia Act R.S.C. 1906, ch. 41.

**Preventing proclamation.—Not dispersing.**

**92.** All persons are guilty of an indictable offence and liable to imprisonment for life who,—

(a) with force and arms wilfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made; or,

(b) continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance.

*Origin*—Sec. 83, Code of 1892; R.S.C. 1886, ch. 147, secs. 1 and 2.

*Prosecution within one year*—See sec. 1140.

**Duty of officers if rioters do not disperse.—Indemnification of officers.—Section not restrictive.**

**93.** If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together, and do not disperse themselves, for the space of thirty minutes

after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice.

2. If any of the persons so assembled are killed or hurt in the apprehension of such persons or in the endeavour to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, are indemnified against all proceedings of every kind in respect thereof.

3. Nothing in this section contained shall, in any way, limit or affect any duties or powers imposed or given by this Act as to the suppression of riots before or after the making of the said proclamation.

*Origin*—Sec. 84, Code of 1892; R.S.C. 1886, ch. 147, sec. 3.

*Arrest of rioters not dispersing in thirty minutes after proclamation*

—See secs. 91, 92 (b), 93.

**Neglect of peace officer to suppress riot.**

**94.** Every sheriff, deputy sheriff, mayor or other head officer, justice, or other magistrate, or other peace officer, of any county, city, town, or district, who has notice that there is a riot within his jurisdiction, who, without reasonable excuse omits to do his duty in suppressing such riot, is guilty of an indictable offence and liable to two years' imprisonment.

*Origin*—Code of 1892, sec. 140.

*Magistrate's neglect in case of riot*—If the magistrate neither reads the Riot Act proclamation (Code sec. 91) nor takes steps to restrain or apprehend the rioters, nor makes use of an available military force, such will be *prima facie* evidence of criminal neglect on his part. *R. v. Kennett*, 5 C. & P. 282; *R. v. Pinney*, 5 C. & P. 254; and see Code secs. 48-51.

**Neglect to aid peace officer thereat.**

**95.** Every one is guilty of an indictable offence and liable to one year's imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy sheriff, mayor, or



other head officer, justice, magistrate, or peace officer in suppressing any riot, without reasonable excuse omits to do so.

*Origin*].—Code of 1892, sec. 141.

*Neglect to aid peace officer in quelling riot*].—To support an indictment for refusing to aid in quelling a riot it was held that it was necessary to prove, first, that the constable saw a breach of the peace committed; secondly, that there was reasonable necessity for calling on the defendant for his assistance; and, thirdly, that the defendant refused without any physical impossibility or lawful excuse. *R. v. Brown*, 1 C. & M. 314; 34 J.P. 129; and see *R. v. Sherlock*, L.R. 1 C.C.R. 20; 10 Cox C.C. 170; 13 L.T. 623.

*Assisting in suppressing riot*].—"If the riot be general and dangerous, every subject may arm himself against the evil doers to keep the peace. Such was the opinion of all the judges in England in the time of Queen Elizabeth in a case called 'The case of Arms' (Popham's Rep., 121); although the judges add that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this. It would undoubtedly be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was committed or could not be prevented without recourse to arms; and, at all events, the assistance given by men who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed than any efforts, however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law." Charge of Chief Justice Tindal, quoted in *R. v. Pinney*, 5 C. & P. 262, note. From early times the duty of sheriffs and magistrates to suppress riots and apprehend rioters, and the obligation of the people of the country to assist them have been laid down and enforced by English Statutes. See 15 Rich. II, c. 2 (1391), 13 Hen. IV, c. 7 (1411), 2 Hen. V, st. 1, c. 8 (1414).

*Justification of force in suppressing riot*].—See secs. 48-51, and sec. 93 (2), and see note to sec. 91 on the use of military forces for the quelling of riots.

*Peace officer*].—See definition in sec. 2, sub-sec. 26.

### **Riotous destruction of property.**

**96.** All persons are guilty of an indictable offence and liable to imprisonment for life who, being riotously and tumultuously

assembled together to the disturbance of the public peace, unlawfully and with force demolish or pull down, or begin to demolish or pull down, any building, or any machinery, whether fixed or movable, or any erection used in farming land, or in carrying on any trade or manufacture, or any erection or structure used in conducting the business of any mine, or any bridge, wagon-way or track for conveying minerals from any mine.

*Origin*—Sec. 85, Code of 1892; R.S.C. ch. 147, sec. 9.

*Unfounded claim of right no defence*—See sec. 97 (2).

*"Begin to demolish"*—This means not simply the demolition of a part, but of a part with intent to demolish the whole. *R. v. Ashton*, 1 Lewin C.C. 296; *R. v. Price*, 5 C. & P. 510.

If rioters destroy a building by fire the offence is within this section, and they need not be indicted under sec. 511 for arson. *B. v. Harris*, Carr. & M. 661.

If some of the rioters set fire to the house itself, and others carried furniture out of the house and burned it in a fire made outside, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying both house and the furniture, and if so the jury ought to convict, under sec. 96. As to arson and attempted arson, see secs. 511-512, and as to threats to burn, see secs. 516 and 748.

**Riotous damage to property.—Bona fides no defence.**

**97.** All persons are guilty of an indictable offence and liable to seven years' imprisonment who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force injure or damage any of the things mentioned in the last preceding section.

2. It shall not be a defence to a charge of an offence against this or the last preceding section that the offender believed he had a right to act as he did, unless he actually had such a right.

*Origin*—Sec. 86, Code of 1892; R.S.C. 1886, ch. 147, sec. 10.

*Riotous assembly*—See secs. 87-90.

*Riotous damage to building, machinery, etc., where demolition not begun*—The first sub-section deals with this offence which is somewhat similar to that declared in sec. 96 but in a less aggravated form.

Where the rioters break the doors and windows of the house and then go away, although there was nothing to prevent them committing further injury, the offence is not within sec. 96 but is the lesser offence under sec. 97, for their going away under the circumstances shows that they have completed their purpose and had done all the injury they

intended to do. *R. v. Thomas*, 4 C. & P. 237; *R. v. Adams*, Carr & M. 299.

*Unfounded claim of right no defence*—Sub-sec. (2) of sec. 97 overrules the contrary doctrine enunciated in *R. v. Langford*, Car. & M. 602 and *R. v. Casey* (1874) Irish R., 8 C.L. 408.

*Attempts*—See secs. 72, 571, 949, 950.

*Aiders and abettors*—See sec. 69.

*Wilful damage to property apart from riot*—See secs. 509-541.

### *Unlawful Drilling.*

**Prohibition of assemblies.—General or special.—Being present for purpose of drilling others.—Drilling others.**

**98.** The Governor in Council is authorized from time to time to prohibit assemblies, without lawful authority, of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements or evolutions, and to prohibit persons when assembled for any other purpose from so training or drilling themselves or being trained or drilled.

2. Any such prohibition may be general or may apply only to a particular place or district or to assemblies of a particular character, and shall come into operation from the publication in the *Canada Gazette* of a proclamation embodying the terms of such prohibition, and shall continue in force until the like publication of a proclamation issued by the authority of the Governor in Council revoking such prohibition.

3. Every person is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority and in contravention of such prohibition or proclamation,—

(a) is present at or attends any such assembly for the purpose of training or drilling any other person to the use of arms or the practice of military exercises or evolutions; or,

(b) at any assembly trains or drills any other person to the use of arms or the practice of military exercises or evolutions.

*Origin*—Sec. 87, Code of 1892; R.S.C. 1886, ch. 147, secs. 4 and 5.

*Prosecution within six months*—See sec. 1140.

*Unlawful drilling in use of arms*—By Order-in-Council of September 21, 1917, in pursuance of sec. 98, the Governor-General in Council prohibited assemblies without lawful authority, of persons for the purpose of training or drilling themselves or of being trained or drilled to the use of arms, or for the purpose of military exercise, movements or evolutions; and prohibited persons when assembled for any other purpose from so training or drilling themselves or being trained or drilled. Can. Stat. 1918, xxxiv.

**Being unlawfully drilled.**

**99.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, attends, or is present at, any such assembly as in the last preceding section mentioned, for the purpose of being, or who at any such assembly is, without lawful authority and in contravention of such prohibition or proclamation, trained or drilled to the use of arms or the practice of military exercises or evolutions.

*Origin*—Sec. 88, Code of 1892; R.S.C. 1886, ch. 147, sec. 6.

*Prosecution within six months*—See sec. 1140.

*Affrays and Duels.*

**Definition of affray.—Penalty.**

**100.** An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.

2. Every one who takes part in an affray is guilty of an indictable offence and liable to one year's imprisonment with hard labour.

*Origin*—Sec. 90, Code of 1892; R.S. 1886, ch. 147, sec. 14.

*Unlawful assembly and riot*—See secs. 87-97.

**Challenge to fight a duel.**

**101.** Every one is guilty of an indictable offence and liable to three years' imprisonment who challenges or endeavours by any means to provoke any person to fight a duel, or endeavours to provoke any person to challenge any other person so to do.

*Origin*—Sec. 91, Code of 1892.

*Forcible Entry and Detainer.*

**Definition of forcible entry.—Definition of forcible detainer.—Question of law.**

**102.** Forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, on land then in actual and peaceable possession of another.

2. Forcible detainer is where a person in actual possession of land, without colour of right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof.

3. What amounts to actual possession or colour of right is a question of law.

*Origin*].—Code of 1892, sec. 89.

*Forcible entry as a crime*].—Since the statute, 5 Richard II., st. I., ch. 7 (1389), it is a criminal offence to enter, in a manner likely to cause a breach of the peace, upon the property of another (sections 102 and 103 of the Criminal Code). *Riopelle v. City of Montreal* (1911) 44 Can. S.C.R. 579 at page 581; *R v. Martin*, 10 L.C.R. 435.

To constitute the offence of forcible entry upon land under Cr. Code, sec. 102 and 103, the entry must have been made under circumstances either of actual violence or of terror. *R. v. Campey*, 20 Can. Cr. Cas. 492.

As to forcible entry by a separated wife upon her husband's premises and the liability of those assisting her, see *R. v. Smyth*, 5 C. & P. 201, 1 M. & Rob. 155.

But although liable to indictment for forcible entry it seems that the true owner having a right of entry on property is not liable to an action for trespass for making a forcible entry and evicting an occupier wrongfully in possession. *Allan v. Kirk* [1917] 2 W.W.R. 527; *Jones v. Foley* [1891] 1 Q.B. 730, 60 L.J.Q.B. 464; *Davison v. Wilson*, 11 Q.B. 890, 17 L.J.Q.B. 196; *Lows v. Telford*, 1 App. Cas. 414; *Edwick v. Hawkes*, 18 ch. D. 199.

A breach of the peace or apprehension thereof under Cr. Code, sec. 102, is not to be anticipated as a natural sequence to a re-entry by breaking when made by landlords upon office premises overheld by their tenant effected at night when neither the tenant nor any of his employees was present. *R. v. Campey*, 20 Can. Cr. Cas. 492.

"Entering" means in sec. 102 not merely going upon land or trespassing upon it; there must accompany the act of going upon the land some intent to take possession of the land itself and deprive the possessor of the land. Such an interference with the possession as trespassing upon it for the purpose of taking away chattels upon the land is not

an "entering" within the Code. *R. v. Pike* (1898), 2 Can. Cr. Cas. 314, 12 Man. L.R. 314.

To enter upon lands with such force as to exceed a bare trespass and so as to cause a public breach of the peace was an indictable offence at common law. *R. v. Wilson*, 8 T.R. 357; *R. v. Bake*, 3 Burr. 1731.

Where thirty or forty employees of the G. W. Railway Co. went upon land then in possession of the S. & H. Railway Co., and those resisting had good reason to apprehend violence in the event of further resistance, and yielded possession in the apprehension of such violence, it was held that the entry was a forcible one. *R. v. Smith* (1878), 43 U.C.Q.B. 369.

Actual force is not an essential. *R. v. Walker*, 4 W.L.R. 288, 6 Terr. L.R. 276, 12 Can. Cr. Cas. 197.

A landlord may not so eject his tenant although the term of the tenancy has expired. *Taunton v. Costar*, 4 R.R. 481. But it has been held that the English statute regarding forcible entry (5 Ric. 2, ch. 7) does not apply to the ejection of a mere trespasser. *Browne v. Dawson*, 12 A. & E. 624; *Scott v. Brown*, 51 L.T. 747.

Actual possession does not necessarily imply actual residence, either personally or by a servant or agent. 13 Am. & Eng. Encyc. of Law, 2nd ed., p. 750.

**Restitution**—On a conviction for forcible entry the court is not bound to order a writ of restitution, but may in its discretion grant or refuse the writ. *R. v. Jackson*, Dra. Rep. (U.C.) 53; *R. v. Wightman* (1869), 29 U.C.Q.B. 211; *R. v. Smith* (1878), 43 U.C.Q.B. 369; *R. v. Connor*, 2 P.R. (Ont.) 139.

Where an order of restitution is asked it must be proved that the prosecutor is still kept out of possession, 1 Hawk. ch. 64, sec. 41. Under the statute 31 Eliz. ch. 11, no restitution shall be awarded if the defendant has been permitted to remain quietly in possession for three years previous to the finding of the indictment.

**Prosecutor's title**—The title of the prosecutor is not part of the issue; *R. v. Cokely*, 13 U.C.R. 521; *R. v. Hoar*, 18 R.R. 368; *R. v. Walker*, 4 W.L.R. 288, 6 Terr. L.R. 276, 12 Can. Cr. Cas. 197; and it is sufficient *prima facie* evidence of his seisin to show that he was in actual occupation of the premises or in receipt of the rents and profits. *R. v. Child*, 2 Cox C.C. 102; *Jayne v. Price*, 15 R.R. 518. It is immaterial so far as the crime is concerned whether the prosecutor's estate in the lands were an estate by right or by wrong. *Taunton v. Costar*, 4 R.R. 481; *R. v. Studd*, 14 W.R. 806; *Jones v. Foley* [1891] 1 Q.B. 730, 60 L.J.Q.B. 464.

**Aiders and abettors**—See Code sec. 69.

**Penalty**—See sec. 103.

**Defence of dwelling house or real property**—See Code, secs 59, 60, 61 and 62.

**Peaceable assertion of right of entry**—See Code, sec. 62.

**Penalty for forcible entry or detainer.**

**103.** Every one who forcibly enters or forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment.

*Origin*—Code of 1892, sec. 89, sub-sec. (4).

*Prize Fights.***Challenging.—Accepting challenge, etc.**

**104.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one thousand dollars and not less than one hundred dollars, or to imprisonment for a term not exceeding six months, with or without hard labour, or to both, who sends or publishes, or causes to be sent or published or otherwise made known, any challenge to fight a prize fight, or accepts any such challenge, or causes the same to be accepted, or goes into training preparatory to such fight, or acts as trainer or second to any person who intends to engage in a prize fight.

*Origin*—Sec. 93, Code of 1892; R.S.C. 1886, ch. 153, sec. 2.

*Prize fight defined*—See sec. 2 (31).

*Special authority to certain tribunals*—Every judge of a superior court or of a county court, judge of the sessions of the peace, stipendiary magistrate, police magistrate, and commissioner of police of Canada, shall, within the limits of his jurisdiction as such judge, magistrate or commissioner, have all the powers of a justice with respect to offences against provisions of this Act as to prize fights. Code sec. 606.

**Engaging as principals, in a prize fight.**

**105.** Every one is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding twelve months and not less than three months, with or without hard labour, who engages as a principal in a prize fight.

*Origin*—Sec. 94, Code of 1892; R.S.C. 1886, ch. 153, sec. 3; 44 Vict. Can., ch. 30.

*Special jurisdiction of certain tribunals*—See secs. 606, 627, 628, 1059.

*Distinction between prize fight and boxing exhibition*—In all the cases a distinction has been made between a "boxing or sparring exhibition" and a "fight." In *Rex. v. Orton*, 14 Cox Criminal Cases, 226,

upon a trial of an indictment against some persons for unlawfully assembling together for the purpose of a "prize fight," the law was stated as follows:—

"A mere exhibition of skill in sparring is not illegal. If, however, the parties meet intending to fight till one gives in from exhaustion or from injury received, it is a fight and a breach of the law, whether or not with gloves."

Judge Snider, in the Wildfong case (1911), 17 Can. Cr. Cas. 251, said: "In a boxing exhibition one of the contestants may be knocked down, but that is not the intention. In a fight it is the intention of each to so injure the other that he can no longer continue the encounter. The former has been held to be legal, the latter under the common law illegal. So in football a man may be knocked out, or have a leg or arm broken, but that is not the purpose or intention of those engaging in the game."

"Although an assault without intent, often doing grievous bodily harm, frequently occurs in football, it does not make the game unlawful. If, however, in football, as anywhere else, a person assaults another with intent to do him grievous bodily harm it is an illegal act and punishable. So far then as the word 'fight' in the definition of 'prize fight' in sub-sec. 31 of sec. 2 of the Code is concerned it must be held to have the meaning which the English decisions have given it, namely, an encounter between two persons, each intending to so injure the other that he cannot or will not continue the contest."

"Then does the word 'encounter' with hands or fists enlarge the meaning of 'prize fight.' 'Encounter' by the dictionary definitions and by common understanding applies to a great many acts and events of vastly different natures. In football men constantly tackle each other with hands, and this is an 'encounter' with hands, but not such as is intended by that word in the Code. Dozens of 'encounters' might be mentioned coming within the true definition of this word, but clearly not within the meaning of it as used in the Code. 'Encounter' in the definitions given also includes a 'fight'; it is a synonym for 'fight' and it is in that sense that it is used in the Code definition."

"At common law a 'prize fight' was unlawful, and was defined as 'an encounter with fists or hands with or without gloves for a number of rounds, limited or unlimited, for a purse, stake or prize, but in which it was intended to fight until one or the other of the combatants should give in from exhaustion or injury received.' Here in the law as it stood before in the statute or Code the words 'encounter with fists or hands' are used when defining a 'prize fight' as distinguished from a 'boxing match.'"

"As the words 'encounter with fists or hands' had always been used at common law and by the Courts in speaking of prize fights as synonymous with the word 'fight' and not including a boxing match, they must be so construed in the Code." *R. v. Wildfong, supra.*



In *R. v. Littlejohn* (N.B.), 8 Can. Cr. Cas. 212, it was said:—"There is also authority that a sporting match with gloves, according to well-known rules, is no offence in law, that is, if it be a mere exhibition of skill in sparring; but if parties meet intending to fight till one gives in from exhaustion or injury received it is a breach of the law and a prize fight, whether the combatants use gloves or not."

A boxing match which would otherwise not be a prize fight is not made a prize fight by the circumstance that the participants were each paid a fixed sum for the match. *R. v. Fitzgerald*, 19 Can. Cr. Cas. 145.

The consent of the contestant in entering into an illegal prize fight does not prevent the blows received from being considered as a criminal assault. *R. v. Coney*, 8 Q.B.D. 534, 51 L.J.M.C. 66, 15 Cox C.C. 46. An encounter with gloves may become illegal when one of the parties fights on when so much exhausted as to be likely to fall over to own injury, it being against the public good that a combatant should so endanger himself even where the contest is held in private and without malice and would, therefore, not provoke a breach of the peace by others. *R. v. Young*, 10 Cox C.C. 371; *R. v. Coney*, *supra*. Cf. *R. v. Moore* (1898), 14 Times, L.R. 229; *R. v. Canniff*, 9 C. & P. 359.

"*Prize fight*"—Sec 2, sub-sec. (31), declares that "prize fight" means an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them. It may be doubted whether this eliminates the question of a prize.

Sec. 108 deals with the case of a fight arranged between the parties to a quarrel without any "prize" dependent upon the result and without the handing over or transfer of money or property being involved. In that case the magistrate may in his discretion discharge the accused or impose a penalty not exceeding \$50. The marginal note to that sec. is: "When fight is not a prize fight"; but whether sec. 108 is a provision for a distinct and separate offence from that to which sec. 105 applies, or merely a provision for certain extenuating circumstances, is a question which can hardly be said to be settled by the authorities. If a prize or other valuable consideration is an essential to a "prize fight," sec. 108 would be for a distinct offence not constituting a prize fight but an arranged fight following a quarrel or dispute, which might be the subject of an assault charge; *R. v. Perkins*, 4 C. & P. 437; but would not be within the power of a justice to try under the summary convictions procedure, but for the express provision of sec. 108. In charging the jury in a manslaughter case arising out of an alleged prize fight, Harvey, C.J., said that the presence or absence of a "prize" which is suggested by the word "prize fight" has no significance. *R. v. Pelkey* (1913), 4 W.W.R. 1056, at 1057, 21 Can. Cr. Cas. 387, 24 W.L.R. 804. A dictum to the same effect is contained in *R. v. Wildfong*, 17 Can. Cr. Cas. 251 (Ont.). In the latter case, as well as in *R. v. Littlejohn*, 8 Can. Cr. Cas. 212, and *R. v. Fitzgerald*, 19 Can. Cr. Cas. 145,

convictions by the magistrate were set aside on appeal to the court presided over by the county judge. In *Steele v. Maher*, 19 Que. S.C. 392, 6 Can. Cr. Cas. 446, a district magistrate made a conviction for prize-fighting where an admission fee was charged and it was announced that the contestant who knocked out his opponent in a certain number of rounds should receive the prize, and it was held that it was no defence that there was in fact not a *bona fide* fight but a feigned exhibition of fighting. *Steele v. Maher*, *supra* (in which the gain to the contestants is emphasized).

*Suppressing a prospective prize fight*—See secs. 627, 628, 1059.

#### Attending or promoting a prize fight.

**106.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, with or without hard labour, or to both, who is present at a prize fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight.

*Origin*—Sec. 95, Code of 1892; R.S.C. 1886, ch. 153, sec. 5; 44 Vict. Can., ch. 30.

*Aiders and abettors*—See secs. 69, 70. It is a question of fact whether an onlooker was or was not aiding or abetting the fight, but it is necessary to determine first that the fight itself was illegal where the charge is for encouraging or abetting a prize fight. *R. v. Coney*, 8 Q.B.D. 534, 51 L.J.M.C. 66, 15 Cox C.C. 46, cited in *R. v. Pelkey* (1913), 4 W.W.R. 1055, 24 W.L.R. 804, 21 Can. Cr. Cas. 387.

*Special jurisdiction of judges and others*—See secs. 606, 627, 628, 1059.

#### Leaving Canada to engage in prize fight.

**107.** Every inhabitant or resident of Canada is guilty of an offence and liable, on summary conviction, to a penalty not exceeding four hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding six months, with or without hard labour, or to both, who leaves Canada with intent to engage in a prize fight without the limits thereof.

*Origin*—Sec. 96, Code of 1892; R.S.C. 1886, ch. 153, sec. 5, 44 Vict. Can., ch. 30.

*Special jurisdiction of judges and others*—See secs. 606, 627, 628, 1059.

**When fight is not a prize fight.—Discharge or fine.**

**108.** If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom the complaint is made is satisfied that such fight or intended fight was *bona fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was not an encounter or fight for a prize, or on the result of which the handing over or transfer of money or property depended, such person may, in his discretion, discharge the accused or impose upon him a penalty not exceeding fifty dollars.

*Origin*—Sec. 97, Code of 1892; R.S.C. 1886, ch. 153, sec. 9; 44 Vict. Can., ch. 30.

*Arranged fight to settle quarrel*—See note to sec. 105 (prize fights).

*The person before whom the complaint is made*—See secs. 706, 707 (summary convictions) and secs. 606, 627, 628, 1059 (special jurisdiction of judges and others).

### *Inciting Indians.*

**Riotous request.—Breach of the peace.**

**109.** Every one is guilty of an indictable offence and liable to two years' imprisonment who induces, incites or stirs up any three or more Indians, non-treaty Indians, or half-breeds, apparently acting in concert,—

(a) to make any request or demand of any agent or servant of the Government in a riotous, routous, disorderly or threatening manner, or in a manner calculated to cause a breach of the peace; or,

(b) to do any act calculated to cause a breach of the peace.

*Origin*—Sec. 98, Code of 1892; R.S.C. 1886, ch. 43, sec. 111.

*"Indians"*—For definition see the Indian Act, R.S.C. 1906, ch. 81, sec. 2.

That Act also deals with other offences specially relating to Indians; and see amendments, 1910, Can., ch. 28; 1911, Can., ch. 14, 1913, Can., ch. 35.

S. 94 of the Indian Act (R.S.C. 1886, c. 43) provided that, "Every person who sells, exchanges with, barter, supplies or gives to any Indian or non-treaty Indian, any intoxicant . . . shall on summary conviction . . . be liable to imprisonment for a term not

exceeding six months . . .":—Held, following *Regina v. Howson*, 1 Terr. L.R. 492, that a half-breed who has "taken treaty" is an Indian within the meaning of the Indian Act. *Regina v. Mellon* 5, Terr. L.R. 301; and see *B. v. Atkinson*, 6 W.W.R. 1055, 23 Can. Cr. Cas. 149, as to non-Indians being drunk on an Indian Reserve.

**Inciting Indians to commit indictable offence.**

**110.** Every one who incites any Indian to commit any indictable offence is guilty of an indictable offence and liable to imprisonment for any term not exceeding five years.

*Origin*—R.S.C. 1886, ch. 43, sec. 112.

*Accessories*—See secs. 69-71.

*Indians and provincial laws*—An Indian who commits an offence against a provincial law, beyond the limits of an Indian Reserve, may be convicted and punished just as all other persons may. *B. v. Martin*, 41 O.L.R. 79, 82; *R. v. Hill*, 15 O.L.R. 406; *R. v. Behoning*, 17 O.L.R. 23.

*Explosive Substances.*

**Causing dangerous explosions.**

**111.** Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully causes, by any explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not.

*Origin*—Sec. 99, Code of 1892; R.S. 1886, ch. 150, sec. 3; Explosive Substances Act, 1883 (Imp.) sec. 2.

*"Wilfully" causes*—"Wilfully" does not mean "maliciously" in sec. 111, but "deliberately." *R. v. Bonner*, 4 W.W.R. 1255, 21 Can. Cr. Cas. 442, 447, per Martin, J.A. Compare the use of the word "wilfully" in secs. 112, 113, 136, 168, 169, 172, 180, 184, 205. The indictment or charge should allege that the offence was committed "wilfully." *Ex parte O'Shaughnessy*, 13 Que. K.B. 178, 8 Can. Cr. Cas. 136.

*"Explosive substance"*—See definition in sec. 2 (14).

*"Likely" to endanger, etc.*—It is not necessary to prove actual injury, and it is sufficient if such exposure to risk or chance of injury be shown as will satisfy the jury that actual danger to life or serious injury to property was caused. *R. v. McGrath*, 14 Cox C.C. 598. The causing of danger is the gist of the offence. *R. v. Holmes* (1884), 17 N.S.R. 499.

*"Serious injury to property"*—The use of explosives in land clearing or mining operations, or *ex. gr.*, to remove useless buildings, does not, as conducted in the usual way, cause an explosion "likely to cause

serious injury to property." *R. v. Bonner* (1913), 4 W.W.R., 1255, 21 Can. Cr. Cas. 442, 447, per Martin, J.A.

"Property" means either real or personal property. Sec. 2 (32).

*Claim of right*—A *bona-fide* belief in a claim of right will not justify the employment of the dangerous means here prohibited in the exercise of the supposed right. The language of the section is wide enough to cover a case of serious injury to the property of the accused himself. *R. v. Bonner* (1913), 4 W.W.R. 1255, 21 Can. Cr. Cas. 442; per Martin, J.A.

*Bodily injuries from explosives*—See secs. 279, 280.

*Offences relating to explosive substances*—See secs. 2 (14), 111-114, 279, 280, 594, 633.

*Prohibition of smoking, etc., in vicinity of explosives stored or in transit for military uses*—See Order-in-Council 1917, P.C. 987 and 3319, Can. Stat. 1918, lvi.

*Storage of dangerous explosives*—See Order-in-Council, June 21, 1917, P.C. 1697, under the War Measures Act. Can. Stat. 1918, lv.

*Matches not to be carried into building where explosives for war purposes are stored or manufactured*—See Order-in-Council, 20th September, 1917, Can. Stat. 1918, xcv, 51 *Canada Gazette*, 1169.

#### **Attempt to destroy property with explosives.**

**112.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully places or throws any explosive substance into or near any building or ship with intent to destroy or damage the same or any machinery, working tools, or chattels whatever, whether or not an explosion takes place.

*Origin*—Code of 1892, sec. 488; R.S.C. 1886, ch. 168, secs. 14 and 49; 24-25 Vict. Imp., ch. 97, sec. 10

"*Explosive substance*"—In view of the definition of this phrase by sec. 2, sub-sec. (14), it is probably not necessary that it should have been physically possible for an explosion to have occurred. Any materials for making an explosive substance are now included in the definition and so is any apparatus intended to be used with an explosive, or a part of such apparatus. The extended definition originates in the Explosives Substances Act, 1883, Imp., 46, Vict., ch. 3, sec. 9, and supersedes the decision in *E. v. Sheppard* (1868), 11 Cox C.C. 302, where a fuse was attached to an explosive, but as the fuse was not lit when thrown, the case was held not to come under the earlier statute, 24-25 Vict. Imp., ch. 97.

"*Wilfully*"—See sec. 111.

*Offences relating to explosive substances*—See secs. 2 (14), 111-114, 279, 280, 594, 633.

**Doing anything with intent to cause an explosion.—Making or possessing explosives.**

**113.** Every one who wilfully,—

- (a) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion of a nature likely to endanger life, or to cause serious injury to property; or,
- (b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property;

is guilty of an indictable offence and liable to fourteen years' imprisonment, whether an explosion takes place or not, and whether any injury to person or property is actually caused or not.

*Origin*—Sec. 100, Code of 1892; R.S. 1886, ch. 150, sec. 3.

*Attorney-General's consent to prosecution under sub-sec. (b)*—See sec. 594.

*Offences relating to explosive substances*—See secs. 2 (14), 111-114, 279, 280, 594, 633.

*"Explosive substance"*—See definition in sec. 2 (14).

**Making or possessing explosives.**

**114.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who makes, or knowingly has in his possession or under his control, any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or has it not in his possession or under his control, for a lawful object, unless he can show that he made it or had it in his possession or under his control for a lawful object.

*Origin*—Sec. 101, Code of 1892; R.S.C. 1886, ch. 150, sec. 5; Explosive Substances Act, 1883, Imp., 46 Viet., ch. 3, sec. 4.

*Possession of explosives as a public nuisance where endangering public safety*—See sec. 222 as to criminal nuisances; R. v. Holmes (1884), 17 N.S.R. 499; R. v. Taylor, 2 Str. 1167; R. v. Lister, Dears, & B. 209, 26 L.J.M.C. 196; R. v. Oxford [1897], 1 Q.B. 370, 18 Cox, 518; R. v. Matters, 34 L.J.M.C. 22.

*Offences relating to explosive substances*—See secs. 2 (14), 111-114, 279, 280, 594, 633.

*"Explosive substance" defined*—See sec. 2 (14).

### *Offensive Weapons.*

#### **Possession of weapon.**

**115.** Every one is guilty of an indictable offence and liable to five years' imprisonment who has in his custody or possession, or carries any offensive weapon for any purpose dangerous to the public peace.

*Origin*—Sec. 102, Code of 1892; R.S.C. 1886, ch. 149, sec. 4.

*Time for prosecution*—See sec. 1140 (d).

#### **Openly carrying weapons.**

**116.** If two or more persons openly carry offensive weapons in a public place in such a manner and under such circumstances as are calculated to create terror and alarm, each of such persons is liable, on summary conviction before two justices, to a penalty not exceeding forty dollars and not less than ten dollars, and in default of payment to imprisonment for any term not exceeding thirty days.

*Origin*—Sec. 103, Code of 1892; R.S.C. 1886, ch. 148, sec. 8.

*Time for prosecution*—See sec. 1140 (d).

*"Offensive weapon"*—See sec. 2, sub-sec. (24).

#### **Smuggler carrying weapons.**

**117.** Every one is guilty of an indictable offence and liable to imprisonment for ten years who, while carrying offensive weapons, is found with any goods liable to seizure or forfeiture under any law relating to inland revenue, the customs, trade or navigation, knowing such goods to be so liable.

*Origin*—Sec. 104, Code of 1892; R.S.C. 1886, ch. 148, sec. 8.

#### **Dangerous weapons.—Penalty for having in possession without permit.—Record of sale.—Search.**

**118.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars and costs or to imprisonment for three months, or to both fine and costs and imprisonment, who—

- (a) not having a permit in Form 76, has upon his person a pistol, sheath knife, bowie knife, dagger, stiletto, metal knuckles, skull cracker or other offensive weapon that may be concealed upon the person, or any air gun or any device or contrivance for muffling or stopping the sound of the report of any firearm, elsewhere than in his own dwelling house, shop, warehouse, counting-house, or premises; or,
- (b) sells or, without lawful excuse, gives or lends any such offensive weapon, device or contrivance to any one not being the holder of a permit; or,
- (c) in the case of a sale, neglects to keep a record of such sale, the date thereof, the name of the purchaser, such sufficient description of the weapon, device or contrivance sold as may be necessary to identify it, the date and place of issue of the permit and the name and office of the issuer of the permit, or neglects to send a duplicate of such record by registered mail to the person who issued such permit or neglects to endorse upon such permit, the date and place of sale, the said description of the weapon, device or contrivance and the name of the vendor; or,
- (d) being authorized to issue a permit, issues it without keeping a duplicate thereof as a record, or having issued a permit fails to keep any record received by him of sales of weapons, devices or contrivances to the holder thereof; or,
- (e) issues a permit without lawful authority.

2. Upon sufficient cause being shown, any officer of the Royal Northwest Mounted Police or commissioner of Dominion police or superintendent of provincial police or stipendiary or district magistrate or police magistrate or acting police magistrate or sheriff or chief constable of any city, incorporated town or district municipality may grant any applicant therefor, as to whose discretion and good character he is satisfied, a permit in Form 76, for such period not exceeding twelve months as he deems fit.



3. Such permit, upon the trial of an offence, shall be *prima facie* evidence of its contents and of the signature and official character of the person by whom it purports to be granted.

4. Whenever the Governor in Council deems it expedient in the public interest he may, by proclamation, suspend the operation of any of the provisions of this section in the whole or any part of Canada, and for such period as he deems fit.

5. Nothing in this section shall apply to any weapons, devices or contrivances authorized to be carried by any member of His Majesty's naval, military, or militia forces, or carried by any peace officer, or to any *bona fide* sale made by any manufacturer of, or person trading wholesale in, such weapons, devices or contrivances, to any person *bona fide* dealing in such articles and having an established and fixed place of business.

6. Every peace officer may search any person whom he has reason to believe and does believe has upon his person any weapon, device or contrivance contrary to the provisions of this section, and may seize any weapon, device or contrivance illegally in the possession of any person without a permit. Any such weapon, device or contrivance had or carried in violation of this section shall be forfeited to the Crown to be disposed of as the Attorney General of the province in which such forfeiture takes place may direct.

*Origin*—Sec. 105, Code of 1892; 3-4 Geo. V, Can., ch. 13, sec. 4.

*Form of weapon permit*—See Code form 76, following sec. 1152.

*Prosecution within one month*—See sec. 1140 (f).

*North-West Territories*—The possession and sale of arms in the Territories is subject to the power to bring into force by proclamation Part IV of the N.W.T. Act, R.S.C., ch. 62.

*"Other offensive weapon"*—See definition in sec. 2, sub-sec. (24).

*"Peace officer"*—See definition in sec. 2, sub-sec. (26).

*Justices to make returns of certificates issued*—See sec. 1135.

**Selling pistol or air-gun to minor.—Exception.**

**119.** Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding fifty dollars who sells any firearm or gives or sells any pistol or air-gun, or any ammunition therefor, to a minor under the age of sixteen years unless he establishes to the satisfaction of the justice before whom he is charged that he used reasonable diligence in endeavouring to ascertain the age of the minor before making such sale or gift and that he had good reason to believe that such minor was not under the age of sixteen years.

*Origin*—Sec. 106, Code of 1892.

*Sale of gun to boy under sixteen*—In *Fowell v. Grafton* (1910), 20 O.L.R. 639, the defendants, who sold an air-gun to a boy of thirteen, were held liable to the plaintiff, who was injured by shot fired from the gun in the hands of the boy, for their negligence in selling it to a minor under sixteen; reference being made to Code, sec. 119, and the English case of *Dixon v. Bell* (1816), 5 M. & S. 198, followed.

*Prosecution within one month*—See sec. 1140 (f).

**Having pistol or air-gun on person when arrested.**

**120.** Every one who when arrested, either on a warrant issued against him for an offence or while committing an offence, has upon his person a pistol or air-gun is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding fifty dollars and not less than twenty dollars, or to imprisonment for any term not exceeding three months, with or without hard labour.

*Origin*—Sec. 107, Code of 1892; R.S.C. 1886, ch. 148, sec. 2.

*Confiscation of weapons on conviction*—See Code sec. 622.

*Exception as to officers in discharge of duty*—See sec. 125.

*Prosecution within one month*—See sec. 1140 (f).

**Having pistol or air-gun with intent to injure any person.**

**121.** Every one who has upon his person a pistol or air-gun, with intent therewith unlawfully to do injury to any other person, is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding two hundred

dollars and not less than fifty dollars, or to imprisonment for any term not exceeding six months, with or without hard labour.

*Origin*—Sec. 108, Code of 1892; R.S.C. 1886, ch. 148, sec. 3.

*Confiscation of weapons on conviction*—See Code Sec. 622.

*Prosecution within one month*—See sec. 1140 (*f*).

*"Upon his person"*—A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc." and is bad as not disclosing an offence known to the law. *R. v. Mines* (1894), 1 Can. Cr. Cas. 217, 25 Ont. R. 577.

#### **Pointing any firearm or air-gun at any person.**

**122.** Every one who, without lawful excuse, points at another person any firearm or air-gun, whether loaded or unloaded, is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding one hundred dollars and not less than ten dollars, or to imprisonment for any term not exceeding thirty days, with or without hard labour.

*Origin*—Sec. 109, Code of 1892; R.S.C. 1886, ch. 148, sec. 4.

*Confiscation of weapons on conviction*—See Code sec. 622.

*Prosecution within one month*—See sec. 1140 (*f*).

*Pointing fire-arm*—On the summary trial of concurrent charges of assault and pointing a fire-arm the magistrate, after hearing the assault case, reserved judgment to take up the second charge but no further evidence then being adduced except the examination of the defendant, the magistrate dismissed the second charge and entered a conviction upon the charge of assault. There is no presumption under such circumstances that the intermixing of the trials has prejudiced the accused, and the conviction should be sustained unless such prejudice is clearly shown. *The King v. Reid*, 12 Can. Cr. Cas. 352.

#### **Carrying offensive weapons.—Sale.**

**123.** Every one who carries about his person any bowie-knife, dagger, dirk, metal knuckles, skull cracker, slung shot, or other offensive weapon of a like character, or secretly carries about his person any instrument loaded at the end, or sells or exposes for sale, publicly or privately, any such weapon; or, being masked or disguised, carries or has in his possession any firearm or air-gun, is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding fifty dollars and

not less than ten dollars, or to imprisonment for any term not exceeding three months, with or without hard labour, or to both, and in default of payment of such penalty, to a term or a further term of imprisonment not exceeding three months, with or without hard labour.

*Origin*—Sec. 110, Code of 1892; R.S.C. 1886, ch. 148, sec. 5; 8-9 Edw. VII, Can., ch. 9, sec. 2.

*Confiscation of weapons on conviction*—See Code sec. 622.

*Prosecution within one month*—See sec. 1140 (f).

*Exemption of certain officers*—See sec. 125 and sec. 2, sub-secs. (26) and (29).

#### **Carrying sheath-knife in town or city.**

**124.** Every one, not being thereto required by his lawful trade or calling, who is found in any town or city carrying about his person any sheath-knife is liable, on summary conviction before two justices, to a penalty not exceeding fifty dollars, and not less than ten dollars, or to imprisonment for any term not exceeding three months, with or without hard labour, or to both and in default of payment of such penalty, to a term or a further term of imprisonment not exceeding three months, with or without hard labour.

*Origin*—Sec. 111, Code of 1892; R.S. 1886, ch. 148, sec. 6; 8-9 Edw. VII, Can., ch. 9, sec. 1.

*Confiscation of weapons on conviction*—See Code sec. 622.

*Prosecution within one month*—See sec. 1140 (f).

*Exception of certain officers*—See sec. 125 and sec. 2, sub-secs. (26) and (29).

#### **Exception as to soldiers, etc.**

**125.** It is not an offence for any soldier, public officer, peace officer, sailor or volunteer in His Majesty's service, or constable or other policeman, to carry loaded pistols or other usual arms or offensive weapons in the discharge of his duty.

*Origin*—Sec. 112, Code of 1892; R.S.C. 1886, ch. 148, sec. 10.

*Carrying weapons*—See secs. 118-128, 622, 1140 (f).

*"Public officer" and "peace officer"*—See definitions in sec. 2, sub-secs. (29) and (26).

**Refusing to deliver offensive weapon.**

**126.** Every one attending any public meeting or being on his way to attend the same who, upon demand made by any justice within whose jurisdiction such public meeting is appointed to be held, declines or refuses to deliver up, peaceably and quietly, to such justice, any offensive weapon with which he is armed or which he has in his possession, is guilty of an indictable offence.

2. The justice may record the refusal and adjudge the offender to pay a penalty not exceeding eight dollars, or the offender may be proceeded against by indictment, as in other cases of indictable offences.

*Origin*—Sec. 113, Code of 1892; R.S. 1886, ch. 152, sec. 1.

*Weapons at public meeting*—See secs. 619-622.

*Time for prosecution*—See sec. 1140 (c).

*Return of weapons on following day where persons disarmed*—See secs. 620, 621, 622.

**Coming armed within one mile of public meeting.**

**127.** Every one except the sheriff, deputy sheriff and justices for the district or county, or the mayor, justices or other peace officer for the city or town, respectively, in which any public meeting is held, and the constables and special constables employed by them, or any of them, for the preservation of the public peace at such meeting, is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars, or to imprisonment for a term not exceeding three months, or to both, who, during any part of the day upon which such meeting is appointed to be held, comes within one mile of the place appointed for such meeting armed with any offensive weapon.

*Origin*—Sec. 114, Code of 1892; R.S.C. 1886, ch. 152, sec. 5.

*Time for prosecution*—See sec. 1140 (c).

**Lying in wait for persons returning therefrom.**

**128.** Every one is guilty of an indictable offence and liable to a penalty not exceeding two hundred dollars, or to imprisonment for a term not exceeding six months, or to both, who lies

in wait for any person returning, or expected to return from any such public meeting, with intent to commit an assault upon such person, or with intent, by abusive language, opprobrious epithets or other offensive demeanour, directed to, at or against such person, to provoke such person, or those who accompany him, to a breach of the peace.

*Origin*—Sec. 115, Code of 1892; R.S.C. 1886, ch. 152, sec. 6.

*Time for prosecution*—See sec. 1140 (c).

### *Seditious Offences.*

**Administering oath to commit crime.—Inducing such oath.—Taking such oath.**

**129.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) administers, or is present at and consenting to the administration of, any oath or any engagement purporting to bind the person taking the same to commit any crime punishable by death or imprisonment for more than five years; or,
- (b) attempts to induce or compel any person to take any such oath or engagement; or,
- (c) takes any such oath or engagement.

*Origin*—Sec. 120, Code of 1892; C.S.L.C. 1860, ch. 10; (1797) 37 Geo. III, Imp., ch. 123; (1799) 39 Geo. III, Imp., ch. 79; (1812) 52 Geo. III, Imp., ch. 104; (1817) 57 Geo. III, Imp., ch. 19.

*Jurisdiction of Sessions excluded*—See sec. 583.

*Unlawful societies in Quebec*—A pre-confederation statute of Lower Canada dealt with unlawful associations and oaths, C.S.L.C. ch. 10, as criminal offences. This statute made special exception of certain lodges of Freemasons, C.S.L.C. ch. 10, sec. 9; 29 Vict. Can. ch. 46; and was amended after Confederation by the Dominion statute, 58-59 Vict. ch. 44. This amending statute is noted as "not consolidated or repealed" in the R.S.C. 1906, see schedule vol. 4 R.S.C. page 27, and it may be that portions of it not embodied in Code secs. 129-131, still remain a part of the criminal law of the province of Quebec, because not repealed by the federal parliament. They may be found in Burbidge on the Criminal Law of Canada (1890) pp. 88-91, and see Grant v. Beandry, 4 L.N. Que. 394.

**Administering oaths binding to Sedition, Disturbance of peace, Not to inform, Not to reveal illegal combination, etc.—Attempts.—Taking oath.**

**130.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who,—

(a) administers or is present at and consenting to the administration of any oath or engagement purporting to bind the person taking the same

(i) to engage in any mutinous or seditious purpose,

(ii) to disturb the public peace or commit or endeavour to commit any offence,

(iii) not to inform and give evidence against any associate, confederate or other person,

(iv) not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done, or any illegal oath or obligation or engagement which may have been administered or tendered to or taken by any person, or the import of any such oath or obligation or engagement; or,

(b) attempts to induce or compel any person to take any such oath or engagement; or,

(c) takes any such oath or engagement.

*Origin*—Sec. 121, Code of 1892; C.S.L.C. 1860, ch. 10; 37 Geo. III Imp. ch. 123; 39 Geo. III Imp. ch. 79; 52 Geo. III Imp. ch. 104; 57 Geo. III Imp. ch. 19.

*Jurisdiction of Sessions excluded*—See sec. 583.

**Compulsion thereto no excuse unless declaration made.—Limitation of time for declaration.**

**131.** Any one who, under such compulsion as would otherwise excuse him, offends against either of the last two preceding sections, shall not be excused thereby unless, within the period hereinafter mentioned, he declares the same and what he knows touching the same, and the persons by whom and in whose presence, and when and where, such oath or obligation or engagement was administered or taken, by information on oath before a justice for the district or city or county in which such oath or engagement was administered or taken.

2. Such declaration may be made by such person within fourteen days after the taking of the oath, unless he is hindered from making it by actual force or sickness, in which case it may be made within eight days of the cessation of such hindrance.

3. The declaration may be made on such person's trial if it happens before the expiration of either of the periods aforesaid.

*Origin*—Sec. 122, Code of 1892; C.S.L.C. ch. 10, sec. 2; 52 Geo. III ch. 104, sec. 2 Imp.; 37 Geo. III ch. 123, sec. 2, Imp.

**Seditious words.—Seditious libel.—Seditious conspiracy.**

**132.** Seditious words are words expressive of a seditious intention.

2. A seditious libel is a libel expressive of a seditious intention.

3. A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention.

*Origin*—Sec. 123, Code of 1892.

*Seditious intention*—See secs. 133, 134.

*Speaking seditious words*—See sec. 134.

*Publishing seditious libel*—See sec. 134. ,

**Intentions not seditious.**

**133.** No one shall be deemed to have a seditious intention only because he intends in good faith,—

(a) to show that His Majesty has been misled or mistaken in his measures; or,

(b) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof. or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or,



- (c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

*Origin*—Sec. 123, Code of 1892.

*Seditious intention*—A seditious intention is an intention to bring into hatred or contempt or to excite disaffection against the person of His Majesty, his heirs or successors, or the Government and constitution of the United Kingdom or of Canada, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in the State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects. *R. v. Felton*, 9 W.W.R. 819; *R. v. Collins*, 9 C. & P. 456; *Burbidge Criminal Law of Canada*, 92; 2 *Stephen's History of Criminal Law* 298; *R. v. Aldred* (1909), 74, J.P. 55; *R. v. Most*, 7 Q.B.D. 244; 50 L.J.M.C. 113; *R. v. Burns*, 16 Cox 355; *R. v. McHugh* [1901], 2 Irish R. 569; *R. v. Giesinger* [1917], 1 W.W.R. 595, 27 Can. Cr. Cas. 53.

It is not enough that the words used were calculated to stir up hatred and hostility against the person who uttered them and that they were unpatriotic. *R. v. Trainor* [1917], 1 W.W.R. 415, 10 Alta. L.R. 164, 27 Can. Cr. Cas. 232.

One of the forms of seditious intent is an intention to raise discontent or disaffection among "His Majesty's subjects" or to promote feelings of ill-will and hostility between different classes of His Majesty's subjects. To be a "subject" within this definition, it is not necessary to be a natural-born or naturalized British subject. The term will include all the persons subject to His Majesty's laws, whether included in the term British subject in its narrower acceptation or not. *R. v. Felton*, 9 W.W.R. 819, 25 Can. Cr. Cas. 207; *R. v. Cohen*, 10 W.W.R. 233, 25 Can. Cr. Cas. 302.

The chief field of sedition in the past has been in attacks upon the State and its form and methods of Government, but it is also clear that the offence is by no means limited to that sphere, but covers a very wide field inasmuch as anything affecting public order affects the tranquility of the State, and during the great war words which, in ordinary times, would have no outward effect in creating disorder cannot be used now without much greater danger. *R. v. Felton*, 9 W.W.R. 819, 823.

On the principle that a man is presumed to intend the natural consequences of his act, it would always be open to a judge or a jury to infer the intent from the words and the circumstances under which they are spoken. So if the words used were undoubtedly a slander on Englishmen, and a slander on the British Government, the natural inference

is that they were uttered with the intent that the hearers would accept the speaker's view, or for the purpose of insulting and annoying them. In the one case, there would be the intent to bring into hatred and contempt the Government, or in the other case, to promote ill-will with the probable consequences of a breach of the peace, either of which, according to the definitions, would be a seditious intention. *R. v. Felton*, 9 W.W.R. 819, 822, 25 Can. Cr. Cas. 207.

This intention is of the essence of the offence. It may, of course, be inferred from the nature of the publication; but in the absence of an intention of this kind the publication of writings, be they ever so defamatory, does not constitute the offence of seditious libel, and the question of the existence of this intention, in any particular case, is one for the jury. *R. v. Giesinger* [1917], 1 W.W.R. 595, 598, 27 Can. Cr. Cas. 53 (Sask.), in which *R. v. McHugh* [1901], 2 Irish R. 569, 584 was approved, and *R. v. Aldred* (1909), 22 Cox C.C. 1, 74 J.P. 55, criticised. *R. v. Manshrick*, 27 Man. R. 94, 27 Can. Cr. Cas. 17; *R. v. Cohen*, 10 W.W.R. 333, 25 Can. Cr. Cas. 302, 9 Alta. L.R. 329, 34 W.L.R. 210.

*Criticism of Government*—A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government; he can do it freely and liberally, but it must be without malignity and not imputing corrupt or malicious motives; the law only interferes when plainly and deliberately the limits of frank and candid and honest discussion are passed. *R. v. Sullivan*, 11 Cox C.C. 44; *R. v. Burns*, 16 Cox C.C. 355; *R. v. Lambert*, 2 Camp. 398, 11 Revised Reports, 748.

Compare *R. v. Bainbridge* (1917), 28 Can. Cr. Cas. 444; *R. v. Bainbridge*, 13 O.W.N. 218, 338, 459; *R. v. Bainbridge*, 42 O.L.R. 203.

In *R. v. Tutchin* (14 St. Tr. 1097; Holt, 424), Lord Holt said, "that if men shall not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; nothing can be worse to any Government than to endeavor to procure animosities as to the management of it; this has always been looked upon as a crime, and no Government can be safe unless it be punished." And Lord Ellenborough, in *R. v. Cobbett*, 29 St. Tr. 49, said that if a publication be calculated to alienate the affections of the people, by bringing the Government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, etc., are punishable. And whether the defendant really intended by his publication to alienate the affections of the people from the Government, or not, is not material; if the publication be calculated to have that effect, it is a seditious libel. *R. v. Burdett*, 1 St. Tr. (N.S.) 1; 4 B. & Ald. 95. It is also a seditious libel if the accused published it with an intention to inflame the minds of the labourers and working people, and to incite them to acts of violence, riot, and disorder, and to the burning and destruction of property. *R. v. Cobbett*, 2 St. Tr. (N.S.) 789, 899; Archbold, 22nd ed., 943.

**Punishment for seditious language or libel or for seditious conspiracy.**

**134.** Every one is guilty of an indictable offence and liable to two years' imprisonment who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy.

*Origin*—Sec. 124, Code of 1892.

*Speaking seditious words*—See secs. 132, 133.

*Seditious libel*—See secs. 132, 133. It is not necessary for the prosecution to prove the falsity of a seditious libel. *Ex parte O'Brien*, 15 Cox C.C. 180; *R. v. Duffy*, 2 Cox C.C. 45; *R. v. Sullivan*, 11 Cox C.C. 64; *R. v. Hicklin*, L.R. 3, Q.B. 360.

*Seditious conspiracy*—See *O'Connell's case*, 11 Cl. & F. 155; *R. v. Hunt*, 3, B. & Ald. 566.

*Formalities of indictment*—See secs. 859 and 861, secs. 852, 855.

*Jurisdiction of Sessions excluded*—See sec. 583.

**Libel on foreign sovereign.**

**135.** Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state.

*Origin*—Sec. 125, Code of 1892.

*"Without lawful justification"*—The common law principles of justification or excuse are retained. Sec. 16.

*Jurisdiction of Sessions excluded*—See sec. 583.

**Spreading false news.**

**136.** Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest.

*Origin*—Sec. 126, Code of 1892; English statute, 3 Edw. I., ch. 34.

*Jurisdiction of Sessions excluded*—See sec. 583.

*False news affecting the public interest*—Sec. 136 has been applied to the placarding of a false announcement in Western Canada likely to prejudice immigration from a friendly country, and therefore against the public interest. *R. v. Hoaglin* (1907), 12 Can. Cr. Cas. 226 (Alta.) See also *R. v. Scott* (1778), 5 New Newgate Calendar, 284.

*Procuring publication of false reports affecting immigration*].—By the Immigration Act, R.S.C., ch. 93, sec. 45, every person who does, in Canada, anything for the purpose of causing or procuring the publication or circulation, by advertisement or otherwise, in a country outside of Canada of false representations as to the opportunities for employment in Canada, or as to the state of the labor market in Canada, intended or adapted to encourage or induce, or to deter or prevent, the immigration into Canada of persons resident in that country, or who does anything in Canada for the purpose of causing or procuring the communication to any resident of such country of any such false representations, shall, if any such false representations are thereafter so published, circulated or communicated, be guilty of an offence, and liable, on summary conviction before two justices of the peace, to a penalty for each offence of not more than one thousand dollars and not less than fifty dollars.

### *Piracy.*

**Piracy by the law of nations.—Punishment in case of violence to person.—Other cases.**

**137.** Every one is guilty of an indictable offence who does any act which amounts to piracy by the law of nations, and is liable,—

- (a) to the penalty of death, if in committing or attempting to commit such crime the offender murders, attempts to murder or wounds any person, or does any act by which the life of any person is likely to be endangered;
- (b) to imprisonment for life in all other cases.

*Origin*].—Sec. 127, Code of 1892.

*Piracy by the law of nations*].—Piracy by the law of nations is defined by Stephen (Digest of Criminal Law art. 104), as "Taking a ship on the high seas or within the jurisdiction of the Lord High Admiral from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county." *R. v. Dawson*, 13 St. Tr. 454; *A. G. of Hong Kong v. Kwok-a-sing*, L.R. 5 P.C. 179, 199.

*Jurisdiction of Sessions excluded*].—See sec. 583.

*Offences within Admiralty jurisdiction*].—See secs. 137-140, 335 (b), 591, 656, 855 (h).

*Warrants for admiralty offences committed out of Canada*].—See Code sec. 656 and Code form No. 4.

**Piratical acts.—British subject; hostility or robbery or adhering to King's enemies.—Entering British ship and destroying goods.—Certain acts done upon British ship.—Pirate supplies.—Fitting out ship for pirate trade.—Assisting pirate.**

**138.** Every one is guilty of an indictable offence and liable to imprisonment for life who, within Canada, does any of the piratical acts specified in this section, or who, having done any of such piratical acts, comes or is brought within Canada without having been tried therefor, that is to say:—

- (a) Being a British subject, on the sea, or in any place within the jurisdiction of the Admiralty of England, under colour of any commission from any foreign prince or state, whether such prince or state is at war with His Majesty or not, or under pretense of authority from any person whomsoever commits any act of hostility or robbery against other British subjects, or during any war is in any way adherent to or gives aid to His Majesty's enemies;
- (b) Whether a British subject or not, on the sea or in any place within the jurisdiction of the Admiralty of England, enters into any British ship, and throws overboard, or destroys any part of the goods belonging to such ship, or laden on board the same;
- (c) Being on board any British ship on the sea or in any place within the jurisdiction of the Admiralty of England,
  - (i) turns enemy or rebel, and piratically runs away with the ship, or any boat, ordnance, ammunition or goods,
  - (ii) yields up voluntarily any ship, boat, ordnance, ammunition or goods to any pirate,
  - (iii) brings any seducing message from any pirate. enemy or rebel,
  - (iv) counsels or procures any persons to yield up or run away with any ship, goods or merchandise, or to turn pirate or to go over to pirates,
  - (v) lays violent hands on the commander of any such ship, in order to prevent him from fighting in defence of his ship and goods,

- (vi) confines the master or commander of any such ship
- (vii) makes or endeavours to make a revolt in the ship; or,
- (d) Being a British subject in any part of the world, or whether a British subject or not, being in any part of His Majesty's dominions or on board a British ship, knowingly
  - (i) furnishes any pirate with any ammunition or stores of any kind,
  - (ii) fits out any ship or vessel with a design to trade with or supply or correspond with any pirate,
  - (iii) conspires or corresponds with any pirate.

*Origin*—Sec. 128, Code of 1892; and see Merchant Shipping Act, 1894 (Imp.), secs. 684 and 686.

*"On board any British ship."*—On an indictment for an offence committed on board a British ship upon the high seas, it is not necessary in order to prove the nationality of the ship to produce its register; the fact that she sailed under the British flag is sufficient. *R. v. Moore*, 2 Dorion (Que.), 52; *R. v. Von Seberg*, 11 Cox, 520; *R. v. Bjornsen*, 10 Cox, 74.

*Preliminary consent to prosecution for Admiralty offences*—See sec. 591.

*Jurisdiction over foreigner for offence on board British ship on his subsequent arrest in Canada*—The Merchant Shipping Act, 1894 (Imp.), secs. 684-687, confers power on a British colonial court of criminal jurisdiction to try a foreigner or a British subject found within its jurisdiction for any offence committed by him on board of a British ship on the high seas, provided such colonial court could have tried such a person if the offence had been committed within the limits of its ordinary jurisdiction. But it seems that such an offender when he comes within the jurisdiction of the colonial court is subject to the general law of the place regulating the procedure for trying such offences; the Admiralty Offences Act of 1849, 12 and 13 Vict. (Imp.), ch. 96, must receive a like construction. *R. v. Heckman* (1902), 5 Can. Cr. Cas. 242.

*Foreign warships in British harbors*—In Stephen's Digest of Criminal Procedure, p. 6, it is stated that the criminal law of England "probably does not extend to acts done by persons subject to the discipline of foreign ships of war in British harbors or other waters, so long as such acts affect such persons only, and if such persons are not

British subjects" (see Pitt-Cobbett's *Leading Cases on International Law*, p. 33. *R. v. Serva*, 6 St. Tr. N.S. 197; 1 Den. C.C. 104; 2 Car. & K. 53; 1 Cox, 292).

*Warrants for Admiralty offences committed out of Canada*—See Code sec. 656 and Code form No. 4.

*Consent of Governor-General*—In *R. v. Heckman* (1902), 5 Can. Cr. Cas. 242, it was held, per Ritchie, J., and Weatherbe, J., that a charge against a seaman not a British subject on a British ship for inciting a revolt upon the ship while on the high seas cannot, if taken only under the Code be made without the consent of the Governor-General obtained prior to the laying of the information. (Code sec. 591).

Per Ritchie, J.—If the proceedings for the offence are taken under the Merchant Shipping Act, 1894 (Imp.), sec. 686, the consent of the Governor-General is not required and Code sec. 591 would not apply.

Per Weatherbe, J.—Code sec. 591 applies to the procedure in Canadian Courts in respect of offences committed within the Admiralty jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849 (Imp.).

A foreign seaman on a ship of Canadian register cannot be summarily convicted for insubordination under the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, unless leave to lay the information has been granted by the Governor-General under sec. 591 of the Criminal Code. *R. v. Adolph*, 12 Can. Cr. Cas. 413 (N.S.); *R. v. Heckman*, 5 Can. Cr. Cas. 522; and see *Abraham v. The Queen*, 6 Can. S.C.R. 10 and *Thorpe v. Priestnell* [1897], 1 Q.B. 159.

*Offences within Admiralty jurisdiction*—See secs. 137-140, 335 (b), 591, 656, 855 (h), and note to sec. 591.

#### **Piratical act with violence.**

**139.** Every one is guilty of an indictable offence and liable to suffer death who, in committing or attempting to commit any piratical act, assaults with intent to murder, or wounds any person, or does any act likely to endanger the life of any person.

*Origin*—Sec. 129, Code of 1892; 7 Wm. IV and 1 Vict. (Imp.), ch. 88; 12 Vict. (Imp.), ch. 96, secs. 1 and 2.

*Offence by foreigner on British ship*—See notes to secs. 138 and 591.

*Offences within Admiralty jurisdiction*—See secs. 137-140, 335 (b), 591, 656, 855 (h).

*Warrants for Admiralty offences committed out of Canada*—See Code sec. 656 and Code form No. 4.

**Not resisting pirate.**

**140.** Every one is guilty of an indictable offence and liable to six months' imprisonment, and to forfeit to the owner of the ship all wages then due to him, who, being a master, officer or seaman of any merchant ship which carries guns and arms, does not, when attacked by any pirate, fight and endeavour to defend himself and his vessel from being taken by such pirate, or who discourages others from defending the ship, if by reason thereof the ship falls into the hands of such pirate.

*Origin*—Sec. 130, Code of 1892; 8 Geo. 1, (Eng.), ch. 24, sec. 6.

*Jurisdiction of Sessions excluded*—See sec. 583.

*Offence by foreigner on British ship*—See notes to secs. 138 and 591.

*Offences within Admiralty jurisdiction*—See secs. 137-140, 335 (b), 591, 656, 855 (h).

*Warrants for Admiralty offences committed out of Canada*—See Code sec. 656 and Code form No. 4.

*Conveying Liquor on board His Majesty's Ships.*

**Taking liquor on board H. M. ship.—Attempting to take.—Delivering.**

**141.** Every one is guilty of an offence and liable, on summary conviction before two justices, to a fine not exceeding fifty dollars for each offence, and in default of payment to imprisonment for a term not exceeding one month, with or without hard labour, who, without the previous consent of the officer commanding the ship or vessel,—

- (a) conveys any intoxicating liquor on board any of His Majesty's ships or vessels; or,
- (b) approaches or hovers about any of His Majesty's ships or vessels for the purpose of conveying any such liquor on board thereof; or,



(c) gives or sells to any man in His Majesty's service, on board any such ship or vessel, any intoxicating liquor.

*Origin*—Code of 1892, sec. 119; 50-51 Vict., ch. 46, sec. 1.

*"Intoxicating liquor"*—See definition in sec. 2, sub-sec. (17).

*Special provision for arrest by naval officers*—See sec. 651.

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## PART III.

### RESPECTING THE PRESERVATION OF PEACE IN THE VICINITY OF PUBLIC WORKS.

#### *Interpretation.*

#### **Definitions.**

**142.** In this Part, unless the context otherwise requires,—

- (a) 'this Part' means such section or sections thereof as are in force, by virtue of any proclamation, in the place with reference to which the Part is to be construed and applied;
- (b) 'commissioner' means a commissioner under this Part;
- (c) 'public work' includes any railway, canal, road, bridge or other work of any kind, and any mining operation constructed or carried on by the Government of Canada, or of any province of Canada, or by any municipal corporation, or by any incorporated company, or by private enterprise.

*Origin*—The Act Respecting the Preservation of Peace Near Public Works, R.S. 1886, ch. 151, sec. 1.

*Commissioners under Part III of Code*—See also sec. 2, sub-sec. (43).

*Commissioners of Police*—See the Dominion Police Act, R.S.C. 1906, ch. 92. A commissioner of Dominion police for a province may exercise his judicial functions at any place within the province in respect of offences within the locality in respect of which he is specially designated by a separate commission. *R. v. Wells*, 15 Can. Cr. Cas. 218.

*Defects of form*—By Code sec. 1132 no action or other proceeding, warrant, judgment, order or other instrument or writing authorized by any provisions of Part XII, relating to Part III, or necessary to carry out its provisions, shall be held void or be allowed to fail for defect of form.

*Summary conviction procedure*—Any commissioner or justice may hear and determine, in manner provided by Part XV, any case arising within his jurisdiction. All the provisions of Part XV shall, in so far

as they are not inconsistent with Part XII, apply to every commissioner or justice mentioned in Part XII or empowered to try offenders against Part III. Every such commissioner shall be deemed a justice within the meaning of Part XV, whether he is or is not a justice for other purposes. Sec. 618.

*Proclamation.*

**Part III may be declared in force.—Or declared no longer in force.—  
No effect in city.—Judicial notice.**

**143.** The Governor in Council may, as often as occasion requires, declare, by proclamation, that upon and after a day therein named, this Part, or any section or sections thereof, shall be in force in any place in Canada in such proclamation designated, within the limits or in the vicinity whereof any public work is in course of construction, or in any place in the vicinity of any public work, within which he deems it necessary that this Part, or any section or sections thereof, should be in force; and this Part, or any such section or sections thereof, shall, upon and after the day named in such proclamation, take effect within the place or places designated therein.

2. The Governor in Council may, in like manner, from time to time, declare this Part, or any section or sections thereof, to be no longer in force in any such place, and may again, from time to time, declare this Part, or any section or sections thereof, to be in force therein.

3. No such proclamation shall have effect within the limits of any city.

4. All courts, magistrates and justices shall take judicial notice of every such proclamation.

*Origin*].—R.S.C. 1886, ch. 151, sec. 2.

*Districts proclaimed*].—See 1915 Can. Statutes, p. 161, for an index to the proclamations of Part III of the Code from 1907 to 1915, with references to the volume and page of each in the *Canada Gazette*, and subsequent proclamations in the *Gazette*.

*Public work*].—See definition in sec. 142 (c).

*Weapons.***Delivery of arms to commissioner.**

**144.** On or before the day named in such proclamation, every person employed on or about the public work to which the same relates, shall bring and deliver up, to some commissioner or officer appointed for the purposes of this Part, every weapon in his possession, and shall obtain from such commissioner or officer a receipt for the same.

*Origin*—R.S.C. 1886, ch. 151, sec. 3.

*Arrest of persons carrying weapons in proclaimed district*—See sec. 609.

*Search for and confiscation of weapons*—See secs. 610-612.

*Return to Secretary of State*—Every commissioner under Part III of this Act shall make a monthly return to the Secretary of State of all weapons delivered to him, and by him detained under Part III, Sec. 1136.

*Ontario*—See also the Public Works Peace Preservation Act, R.S.O. 1914, ch. 36.

**Seizure of arms not delivered.**

**145.** Every weapon found in the possession of any person employed, as aforesaid, after the day named in any proclamation and within the limits designated in such proclamation, may be seized by any justice, commissioner, constable or other peace officer, and shall be forfeited to the use of His Majesty.

*Origin*—R.S.C. 1886, ch. 151, sec. 4.

*Commissioner*—This means a commissioner or officer appointed for the purposes of Part III of the Code, secs. 142 (b) and 144.

*Search warrant for weapons*—See secs. 610-612.

**Possessing weapons near public works.**

**146.** Every one employed upon or about any public work, within any place in which this Part is in force, who, upon or after the day named in such proclamation, keeps or has in his possession or under his care or control within any such place, any weapon, is liable on summary conviction to a penalty not

exceeding four dollars and not less than two dollars for every such weapon found in his possession or under his care or control.

*Origin*—Code of 1892, 55-56 Vict. Can., ch. 29, sec. 117; R.S.C. 1886, ch. 151, sec. 5.

*Arrest of persons carrying weapons*—See secs. 609-612.

*Defects of form*—See Code sec. 1132.

#### **Receiving or concealing arms with intent.**

**147.** Every one who, for the purpose of defeating the enforcement of this Part, receives or conceals, or aids in receiving or concealing, or procures to be received or concealed, within any place in which this Part is in force, any weapon belonging to or in the custody of any person employed on or about any public work, is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than forty dollars; and a moiety of such penalty shall belong to the informer and the other moiety to His Majesty, for the public uses of Canada.

*Origin*—Code of 1892, sec. 117; R.S.C. 1886, ch. 151, sec. 6.

*Search warrant for weapons*—See secs. 610-612.

*Defects of form*—See Code sec. 1132.

#### **Employees carrying weapons.**

**148.** Every person employed on any public work found carrying any weapon, within any place in which this Part is at the time in force, for purposes dangerous to the public peace, is guilty of an indictable offence.

*Origin*—R.S.C. 1886, ch. 151, sec. 7.

*Punishment where not otherwise provided for indictable offence*—See sec. 1052.

*Special powers and duties of certain officials in proclaimed district*—See secs. 609-612.

#### **Return of weapons when Part ceases to be in force.**

**149.** Whenever this Part ceases to be in force within the place where any weapon has been delivered and detained in pursuance thereof, or whenever the owner or person lawfully entitled to any such weapon satisfies the commissioner that he is about to remove immediately from the limits within which this Part is at the time in force, the commissioner may deliver

up to the owner or person authorized to receive the same, any such weapon, on production of the receipt given for it.

*Origin*—R.S.C. 1886, ch. 151, sec. 11.

"*The commissioner*"—This reference is to a commissioner appointed for the purposes of Part III. See secs. 142 (b) and 144.

### *Intoxicating Liquor.*

#### **Sale of liquor prohibited in proclaimed districts.—Exceptions.**

**150.** Upon and after the day named in such proclamation, and during such period as the proclamation remains in force, no person shall, at any place within the limits specified in the proclamation, sell, barter, or directly or indirectly, for any matter, thing, profit or reward, exchange, supply or dispose of, or shall give to any person, any intoxicating liquor, or shall expose, keep or have in his possession any intoxicating liquor intended to be dealt with in any such way.

2. The provisions of this section shall not extend to any person selling intoxicating liquor by wholesale, and not retailing it, if the said person is a licensed distiller or brewer, nor shall they apply where liquor is supplied for *bona fide* medicinal purposes upon the prescription of a duly qualified medical practitioner.

*Origin*—Can. Stat. 1907, ch. 9, sec. 2; Code of 1892, sec. 118; R.S.C. 1886, ch. 151, sec. 13.

"*Intoxicating liquor*"—See definition in sec. 2, sub-sec. 17, as amended by 6-7 Edw. VII, ch. 9.

*Defects of form or substance*—By Code sec. 1132, no action or other proceeding, warrant, judgment, order, or other instrument or writing authorized by any provisions of Part XII, relating to Part III, or necessary to carry out its provisions, shall be held void or be allowed to fail for "defect of form."

See sec. 724 as to variances and defects in substance or in form. An information was laid against L. for "keeping for sale" intoxicating liquor contrary to the provisions of s. 150 or the Code, but the summons charged that L. "unlawfully did sell." L. appeared to the summons in person and by counsel, and pleaded to the information. His counsel at once objected that there was a variance between the information and summons, and on the application of counsel for the prosecution the summons was amended to conform with the information. L.'s counsel then applied for an adjournment on the ground that L. was not prepared to meet the new charge, but offered no affidavit or other evidence in support of his application. The Commissioner, having refused the adjournment, the cause was heard and L. made his defence: Held, the adjournment was in the discretion of the Commissioner and was not a

matter going to his jurisdiction. *R. v. LeBell, ex parte Farris*, 39 N.B.R. 468, 16 Can. Cr. Cas. 363; *R. v. Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151; *Dixon v. Wells*, 25 Q.B.D. 249, 59 L.J.M.C. 116, applied.

*Liability of employee or agent*—See sec. 152.

For a review of the *mens rea* doctrine as regards a breach by an agent of a statutory duty imposed on the principal, see *Mousell Brothers v. L. & N.W. Ry.* (1918), 87 L.J.K.B. 82.

*Search for and seizure of liquors in proclaimed districts*—The special procedure of Code secs. 613 and 614 (as amended 1907, ch. 9) and of secs. 615 to 617, applies to offences under secs. 150, 151 and 152. In addition to these there is sec. 6 of the Can. Stat. 1907, ch. 9, which, strangely enough, was not made an amendment to the Code. It reads as follows:—"Every officer appointed under Part III of the Criminal Code, and every constable appointed under any law of Canada, may seize upon view anywhere within the limits specified in any proclamation under the said part any intoxicating liquor in respect of which he has reason to believe that a violation of the provisions of the said part is intended, and he shall forthwith convey any liquor so seized, together with the owner or person in possession thereof, before a commissioner of Justice, who shall thereupon proceed as is provided in sec. 614."

*Bona fide medical prescription*—Compare *R. v. Welford* (1918), 42 O.L.R. 359; Ontario Temperance Acts, 1916, ch. 50, sec. 51, and 1917, ch. 50, sec. 18; *R. v. Rose* [1918] 3 W.W.R. 950 (Alta.); Liquor Act, Alta., 1916, ch. 4, sec. 32.

*N.-W. Territories*—See the North-West Territories Act, R.S.C. 1906, ch. 50, and the R.N.W. Mounted Police Act, R.S.C. 1906, ch. 91, sec. 19.

(Canada Statutes 1907, ch. 9, sec. 6.).

#### • Seizure of liquor under Part III.

**6.** Every officer appointed under Part III of The Criminal Code, and every constable appointed under any law of Canada, may seize upon view anywhere within the limits specified in any proclamation under the said Part any intoxicating liquor in respect of which he has reason to believe that a violation of the provisions of the said Part is intended, and he shall forthwith convey any liquor so seized, together with the owner or person in possession thereof, before a commissioner or justice, who shall thereupon proceed as is provided in sec. 614.

#### Penalty for contravention of sec. 150.

**151.** Every one who, by himself, his clerk, servant, agent or other person, violates any of the provisions of section 150 is

guilty of an offence against this Part and liable on summary conviction to a penalty of two hundred dollars and costs, and, in default of payment, to imprisonment for a term not exceeding three months; and, upon any subsequent conviction, to a penalty of three hundred dollars and costs, or to imprisonment for a term not exceeding six months, or to both, and, in default of payment of such penalty, to imprisonment or to further imprisonment for a term not exceeding three months; and imprisonment in each case shall be either with or without hard labour.

*Origin*—Can. Stat. 1907, ch. 9, sec. 3; Code of 1892, sec. 118; R.S.C. 1886, ch. 151, sec. 14.

*Describing the offence*—See the special provision of sec. 617, as to liquor offences under the Code.

*Defects of form or substance*—By Code sec. 1132 no action or other proceeding, warrant, judgment, order or other instrument or writing, authorized by any provisions of Part XII (see secs. 613-618), relating to Part III, or necessary to carry out its provisions, shall be held void or be allowed to fail for "defect of form." And see the general provision of sec. 724 as to defects either "of form or substance" in summary proceedings.

A misdescription of the official capacity of the magistrate in the proceedings prior to the final adjudication whereby a "commissioner of police" was wrongly described therein as a "justice of the peace" will not invalidate a summary conviction made by him as a "commissioner of police" if he was correctly designated as such both in the memorandum of adjudication and in the formal conviction. *R. v. Fitzgerald*, 19 Can. Cr. Cas. 39, 19 W.L.R. 462.

*Summary conviction before a commissioner or a justice*—See secs. 144, 613-618, 1132.

*Seizure of prohibited liquors*—See secs. 613 to 617 inclusive, and Can. Stat. 1907, ch. 9, sec. 6, *supra*.

*Summoning owner of liquor*—Sec. 614 provides for the summoning of the owner or keeper of the liquor in proceedings to condemn it to forfeiture and to order the liquor to be destroyed. The owner or person in possession may be convicted without any further information or trial where the liquor is declared forfeited in such proceedings to which he has been summoned. Sec. 615.

*Seizure*, the order for destruction would have to be quashed before an action could be brought against the commissioner for alleged illegal conversion of the liquor destroyed. *Townsend v. Beckwith*, 14 Can. Cr. Cas. 357, 42 N.S.R. 310; *McNeil v. McGillivray*, 42 N.S.R. 133; *Townsend v. Cox* [1907], A.C. 514, 12 Can. Cr. Cas. 509.



*Procedure where owner unknown*—See sec. 616 as to advertisement of liquor seized before ordering its destruction in cases where the owner, keeper or possessor is unknown to the officer making the seizure.

*Upon any subsequent conviction*—By Code sec. 757 a certified or proved copy of the conviction for the former offence shall be sufficient evidence; and as to certificate of conviction, see sec. 982.

**Agent liable to same penalties as principal.**

**152.** Every clerk, servant, agent or other person who, being in the employment of, or on the premises of another person, violates or assists in violating any of the said provisions for the person in whose employment or on whose premises he is, shall be equally guilty with such person, and shall be liable to the punishment mentioned in the last preceding section.

*Origin*—Code of 1892, sec. 118; R.S.C. 1886, ch. 151, sec. 15.

*Seizure of prohibited liquors*—See secs. 613 to 617.

**Consideration given for purchase may be recovered.**

**153.** Any payment or compensation, whether in money or securities for money, labour or property of any kind, for intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions aforesaid, shall be held to have been criminally received without consideration, and against law, equity and good conscience, and the amount or value thereof may be recovered from the receiver by the person making, paying or furnishing such payment or compensation.

*Origin*—R.S.C. 1886, ch. 151, sec. 18.

**Transfer for liquor void where prohibited by Part III.**

**154.** All sales, transfers, conveyances, liens and securities of every kind, which either in whole or in part have been made or given for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of contrary to such provisions, shall be void against all persons, and no right shall be acquired thereby.

2. No action of any kind shall be maintained, either in whole or in part, for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the said provisions.

*Origin*—R.S.C. 1886, ch. 151, sec. 18.

## PART IV.

### OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

#### *Interpretation.*

##### **Definitions.**

**155.** In this Part, unless the context otherwise requires,—

- (a) ‘the government’ includes the government of Canada, and the government of any province of Canada, as well as His Majesty in the right of Canada or of any province thereof, and the Commissioners of the Transcontinental Railway;
- (b) ‘official or person in the employment of the government’ and ‘official or employee of the government,’ extend to and include the Commissioners of the Transcontinental Railway and the persons holding office as such commissioners, and the engineers, officials, officers, employees and servants of the said commissioners;
- (c) ‘office’ includes every office in the gift of the Crown, or of any officer appointed by the Crown, and all commissions, civil, naval and military, and all places or employments in any public department or office whatever, and all deputations to any such office and every participation in the profits of any office or deputation.

*Origin*—6 Edw. VII, ch. 7, sec. 1; Code of 1892, secs. 133 and 137.

*Official de facto*—See *O’Neil v. Attorney-General* (1896), 26 S.C.R. 122, 1 Can. Cr. Cas. 303; *Handfield v. College of Physicians*, 45 Que. S.C. 140.

“*Public department*”—Sec. 2 (27) declares that “public department” includes the Admiralty and War Department, and also any public department or office of the Government of Canada or of the public or civil service thereof, or any branch of such department or office, unless the context otherwise requires.

An Order-in-Council of Feb. 24, 1917, added to these “the Ministry of Munitions of His Majesty.”

*Corruption and Disobedience.***Judicial, etc., officer accepting or obtaining office for consideration.****—Giving or offering bribe.**

**156.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) holding any judicial office, or being a member of Parliament or of a legislature, corruptly accepts or obtains, or agrees to accept, or attempts to obtain for himself or any other person, any ~~money or~~ valuable consideration, office, place, or employment on account of anything already done or omitted, or to be afterwards done or omitted, by him in his judicial capacity, or in his capacity as such member; or,
- (b) corruptly gives or offers to any such person or to any other person, any such bribe as aforesaid on account of any such act or omission.

*Origin*].—Code of 1892, sec. 131.

*Bribery of a legislator*].—In *R. v. Biddinger*, 22 Can. Cr. Cas. 217, 15 D.L.R. 511, Charbonneau, J., held that a magistrate made judicious use of his discretion and rendered a good judgment in deciding that there was no *prima facie* offence in the complaint and that there were no grounds for the issuing of the warrants as long as the persons mentioned in the complaint were under the protection of the safe conduct accorded them by the Legislature of Quebec. He said in that case: "The petitioner has not shown that the fact of having assumed a fictitious name in seeking a legislative incorporation was a criminal offence. On the other hand, the offence of attempted corruption, set out as it would have been by the amendment which petitioner might have made in his complaint, was not sufficiently elaborated to permit the magistrate to act. Corruption is an act which essentially implies the participation of two persons, the corrupter and the corrupted. If it were solely an act of attempted corruption that was involved, it would have been sufficient as in every unilateral offence, to make mention of the corrupting person. It was incumbent on the complainant alleging an act of corruption to denounce not only the corruption but also the corrupted ones. As it made mention only of the corrupters, the complaint was apparently nothing but an act of malice." See also to the same effect *Marsil v. Lanctot* (1914), 25 Can. Cr. Cas. 223. Compare *R. v. Bunting*, 7 Ont. R. 524, as to the offence at common law.

*Leave of Attorney-General to prosecute*].—See sec. 593.

*Jurisdiction of Sessions excluded*].—See sec. 583.

**Officer taking bribe.—Offering bribe to officer.**

**157.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) being a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime; or,
- (b) corruptly gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent.

*Origin*—Code of 1892, sec. 132.

*Jurisdiction of Sessions excluded*—See sec. 583.

*Justice, peace officer or public officer*—See definitions in sec. 2, subsecs. (18), (26), and (29).

*Bribery of public officers*—See *R. v. Whitaker* [1914], 3 K.B. 1283, 10 Cr. App. R. 245.

*Aiding and abetting*—See secs. 69 and 70; *R. v. Ryan*, 4 O.W.N. 622, 22 Can. Cr. Cas. 115, 23 O.W.R. 799.

*Offer of bribe*—Compare sec. 161 as to municipal corruption.

*Malfeasance of office*—As to the common law offence in cases not coming within any provision of the Code, see *Parsons v. Crabbe*, 31 U.C.C.P. 151; *R. v. Tisdale*, 20 U.C.Q.B. 272; *R. v. Currie* (1906), 11 Can. Cr. Cas. 343 (N.S.); *Ex parte Wallace* 27 N.B.R. 174; *Ex parte Jones* 27 N.B.R. 552; *R. v. Graham*, 2 O.W.N. 306, 17 Can. Cr. Cas. 264; *McGillivray v. Muir*, 7 Can. Cr. Cas. 360; *Aikins v. Simpson*, 19 Can. Cr. Cas. 325 affirming 18 Can. Cr. Cas. 99; *R. v. Arnoldi*, 23 Ont. R. 201; *R. v. Benjamin*, 4 U.C.C.P. 179.

*Justice of the peace receiving illegal fees*—See sec. 1134.

**Frauds upon the government.**

**158.** Every one is guilty of an indictable offence and liable to a fine of not less than one hundred dollars, and not exceeding one thousand dollars, and to imprisonment for a term not

exceeding one year and not less than one month, and in default of payment of such fine to imprisonment for a further time not exceeding six months who,—

- (a) makes any offer, proposal, gift, loan or promise, or gives or offers any compensation or consideration, directly or indirectly, to any official or person in the employment of the government, or to any member of his family, or to any person under his control or for his benefit, with intent to obtain the assistance or influence of such official or person to promote either the procuring of any contract with the government for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, the execution of any such contract, or the payment of the price or consideration stipulated therein, or any part thereof, or of any aid or subsidy payable in respect thereof; or,
- (b) being an official or person in the employment of the government, directly or indirectly, accepts or agrees to accept, or allows to be accepted by any person under his control or for his benefit, any such offer, proposal, gift, loan, promise, compensation or consideration; or,
- (c) in the case of tenders being called for by or on behalf of the government for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, directly or indirectly, by himself, or by the agency of any other person on his behalf, with intent to obtain the contract therefor, either for himself or for any other person, offers to make, or makes, any gift, loan, offer or promise, or offers or gives any consideration or compensation whatsoever to any person tendering for such work or other service, or to any member of his family or other person for his benefit, to induce such person to withdraw his tender for such work or other service, or to compensate or reward him for having withdrawn such tender; or,

- (d) in case of tendering for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, for the government when tenders are called for by or on behalf of the government, accepts or receives, directly or indirectly, or permits, or allows to be accepted or received by any member of his family, or by any other person under his control, or for his benefit, any such gift, loan, offer, promise, consideration or compensation, as a consideration or reward for withdrawing or for having withdrawn such tender; or,
- (e) being an official or employee of the government, receives, directly or indirectly, whether personally or by or through any member of his family or person under his control or for his benefit, any gift, loan, promise, compensation or consideration whatsoever, either in money or otherwise, from any person whomsoever, for assisting or favouring any individual in the transaction of any business whatsoever with the government, or who gives or offers any such gift, loan, promise, compensation or consideration; or,
- (f) by reason of, or under the pretense of, possessing influence with the government, or with any minister or official thereof, demands, exacts or receives from any person, any compensation, fee or reward, for procuring from the government the payment of any claim, or of any portion thereof, or for procuring or furthering the appointment of himself, or of any other person, to any office, place or employment, or for procuring or furthering the obtaining for himself or any other person, of any grant, lease or other benefit from the government; or offers, promises or pays to such person, under the circumstances and for the causes aforesaid, or any of them, any such compensation, fee or reward; or,
- (g) having dealings of any kind with the government through any department thereof, pays to any employee or official of the government, or to any mem-

ber of the family of such employee or official, or to any person under his control or for his benefit, any commission or reward; or within one year before or after such dealings, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, makes any gift, loan, or promise of any money, matter or thing, to any such employee or other person aforesaid; or,

- (h) being an employee or official of the government, demands, exacts or receives from such person, directly or indirectly, by himself, or by or through any other person for his benefit, or permits or allows any member of his family, or any person under his control, to accept or receive
  - (i) any such commission or reward, or
  - (ii) within the said period of one year, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, accepts or receives any such gift, loan or promise; or,
- (i) having any contract with the government for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, and having or expecting to have any claim or demand against the government by reason of such contract, directly or indirectly, by himself or by any person on his behalf, subscribes, furnishes or gives, or promises to subscribe, furnish or give, any money or other valuable consideration for the purpose of promoting the election of any candidate, or of any number, class or party of candidates, to a legislature or to Parliament, or with the intent in any way of influencing or affecting the result of a provincial or Dominion election.

2. If the value of the amount or thing paid, offered, given, loaned, promised, received or subscribed, as the case may be,

exceeds one thousand dollars, the offender under this section is liable to any fine not exceeding such value.

*Origin*—Sec. 133, Code of 1892; 56 Vict. ch. 32, sec. 1.

*Incapacity of convicted person to retain benefits illegally acquired in contravention of sec. 158*—See sec. 159.

*Time for prosecution*—See sec. 1140 (b).

*Jurisdiction of Sessions excluded*—See sec. 583.

*Official or person in the employment of the government*—See sec. 155 (b).

*"The government"*—This phrase by sec. 155 (a) includes the Government of Canada and the Government of any Province of Canada as well as His Majesty in the right of Canada or of any province thereof and the Commissioners of the Transcontinental Railway.

*Reward or commission to officer*—In *R. v. Whitaker* [1914], 3 K.B. 1283, 10 Cr. App. R. 245, it was said that bribing a colonel to corruptly show favor to a firm supplying canteen provisions is a misdemeanor; and for the colonel to put himself in a position where his interest and his duty conflict is a misdemeanor at common law.

*Offer to pay for influence with Government in appointment to office, etc.*—*R. v. Youngs* (1911), 3 O.W.N. 411, 19 Can. Cr. Cas. 98.

*Breach of trust by public officer*—See sec. 160.

*Militia Pensions Act*—Every militiaman who obtains a pension under the Militia Pensions Act by any false representation or false evidence, or by personation, or by malingering or feigning disease or infirmity, or by other fraudulent conduct, shall be liable on summary conviction to imprisonment, with or without hard labor, for a period not exceeding twelve months, or to a fine not exceeding one hundred dollars, and shall forfeit the pension obtained. R.S.C. 1906, ch. 42, sec. 22.

*Conspiracy to defraud the Government*—See *R. v. Connolly and McGreevy*, 25 Ont. R. 151, 1 Can. Cr. Cas. 488; *R. v. Kelly* [1917], 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282, on appeal from [1917], 1 W.W.R. 46, and 10 W.W.R. 1345.

#### **Incapacity of person convicted.**

**159.** Every person convicted of an offence under the last preceding section shall be incapable of contracting with the Government, or of holding any contract or office with, from, or under it, or of receiving any benefit under any such contract.

*Origin*—Sec. 134, Code of 1892; R.S.C. 1886, ch. 173, secs. 22 and 23.



**Breach of trust by public officer.**

**160.** Every public officer is guilty of an indictable offence and liable to five years' imprisonment who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.

*Origin*—Sec. 135, Code of 1892.

*"Public officer"*—Unless the context otherwise requires, the words "public officer" include any inland revenue or customs officer, officer of the army, navy, marine, militia, Royal North-West mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada. Sec. 2, sub-sec. (29).

*Jurisdiction of Sessions excluded*—See sec. 583.

**Municipal corruption.**

**161.** Every one is guilty of an indictable offence and liable to a fine not exceeding one thousand dollars and not less than one hundred dollars, and to imprisonment for a term not exceeding two years and not less than one month, and in default of payment of such fine to imprisonment for a further term not exceeding six months, who directly or indirectly,—

- (a) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member of a municipal council, whether the same is to enure to his own advantage or to the advantage of any other person, for the purpose of inducing such member either to vote or to abstain from voting at any meeting of the council of which he is a member or at any meeting of a committee of such council, in favour of or against any measure, motion, resolution or question submitted to such council or committee; or,
- (b) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member or to any officer of a municipal council for the purpose of inducing him to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or,

- (c) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any officer of a municipal council for the purpose of inducing him to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act; or,
- (d) being a member or officer of a municipal council, accepts or consents to accept any such offer, proposal, gift, loan, promise, agreement, compensation or consideration in this section mentioned; or in consideration thereof votes or abstains from voting in favour of or against any measure, motion, resolution or question, or performs or abstains from performing any official act; or,
- (e) attempts by any threat, deceit, suppression of the truth or other unlawful means to influence any member of a municipal council in giving or withholding his vote in favour of or against any measure, motion, resolution or question, or in not attending any meeting of the municipal council of which he is a member, or of any committee thereof; or,
- (f) attempts by any such means as in the last preceding paragraph mentioned to influence any member or any officer of a municipal council to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person, or to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act.

*Origin*].—Sec. 136, Code of 1892; 52 Vict., ch. 42, sec. 2.

*Jurisdiction of Sessions excluded*].—See sec. 583.

*Bribery in municipal affairs*].—A municipal council has no jurisdiction to grant immunity to those who should disclose the facts under oath before a commission appointed to probe alleged corrupt appointments in the police force, nor to authorize the commission to do so. *Martin v. City of Montreal*, 18 Que. S.C. 30.

*Counselling the offence*].—The solicitation of the offer of a bribe which offer, if made, would be a contravention of sec. 161, is, in itself, a

counselling of the offence and punishable as such although no offer was made in response thereto. Code sec. 69 (d); *Brousseau v. The King* (1917), 56 S.C.R. 22, 29 Can. Cr. Cas. 207, affirming 28 Can. Cr. Cas. 435, 26 Que. K.B. 164.

*Time limit for prosecution*—See sec. 1140 (b).

*Extradition for bribery*—On 21st December, 1906, a supplementary Convention, dated 12th April, 1905, was ratified between Great Britain and the United States, and became operative in 1907 on due publication (Canada Statutes, 1907, lxxii) whereby additional crimes were made extraditable, including amongst them (14), "Bribery, defined to be the offering, giving or receiving of bribes made criminal by the laws of both countries."

This latter Convention is to be treated as an integral part of the Convention of July 12, 1889, and December 13, 1900, and as if these additional crimes had been therein specified. (Article 2).

In an extradition case in regard to an assistant city engineer of a city in the State of Ohio, with the supervision over certain of the streets which were being improved by a firm of contractors, he accepted from the firm the sum of \$50 for the purpose of influencing him in his work of supervision:—Held, that the offence did not amount to bribery at common law, where it could only be predicated of a reward given to a Judge or other person concerned in the public administration of justice; but that it constituted bribery both under the laws of the State of Ohio, as well as under sub-sec. (c) of sec. 161 of the Criminal Code. In *re Cannon* (1908), 17 O.L.R. 352, 14 Can. Cr. Cas. 186.

**Selling office.—Purchasing office.—Forfeiture.**

**162.** Every one is guilty of an indictable offence who, directly or indirectly,—

- (a) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or,
- (b) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so;

and in addition to any other penalty incurred, forfeits any right which he may have in the office and is disabled for life from holding the same.

*Origin*—Sec. 137, Code of 1892.

"Any office"—See sec. 155 (c).

*As to municipal offices*—Sec. 162 aims to prevent the selling and purchasing of the office itself, and in this respect differs from s.s. (b) of s. 161, which aims to prevent the purchasing of the influence of the officer or member of the council in securing the office. *R. v. Hogg* (1914), 7 W.W.R. 107, 112, 23 Can. Cr. Cas. 228.

*Jurisdiction of Sessions excluded*—See sec. 583.

*Punishment*—See sec. 1052.

**Receiving reward for corrupt municipal act.—Giving or procuring any reward.—Being a party to negotiations.—Keeping office for the purpose.**

**163.** Every one is guilty of an indictable offence who, directly or indirectly,—

- (a) receives or agrees to receive any reward or profit for any interest, request or negotiation about any office, or under pretense of using any such interest, making any such request or being concerned in any such negotiation; or,
- (b) gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward, for any such interest, request or negotiation as aforesaid; or,
- (c) solicits, recommends or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit; or,
- (d) keeps any office or place for transacting or negotiating any business relating to vacancies in, or the sale or purchase of, or appointment to or resignation of offices.

*Origin*—Code of 1892, sec. 137.

*"Any office"*—See sec. 155 (c).

*Bribery at common law*—Bribery at common law was "the receiving or offering any undue reward by or to any person whatsoever, in a public office in order to influence his behavior in office and induce him to act contrary to the known rules of honesty and integrity." It is an indictable misdemeanor at common law to bribe or attempt to bribe any person holding a public office. *Rex v. Vaughan*, 4 Burr. 2494, *Rex v. Cassano*, 5 Esp. 231; *R. v. Hogg*, 7 W.W.R. 107, 23 Can. Cr. Cas. 228.

An attempt to improperly procure an office by offering a bribe or other improper inducement is an indictable misdemeanor at common law. *Rex. v. Vaughan*, *supra*; *Rex. v. Pollman*, 2 Camp. 229.

*Punishment*—See sec. 1052.

**Wilfully disobeying statute of Canada or of provincial legislature.**

**164.** Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

*Origin*—Sec. 138, Code of 1892.

*Wilful infraction of a statute whether federal or provincial*—This section has been applied to a clause in the Ontario Municipal Act prohibiting the deposit of fraudulent ballots in a ballot box used at a municipal election; *R. v. Durocher* (1913), 28 O.L.R. 499, 4 O.W.N. 1057, 21 Can. Cr. Cas. 382, affirming *R. v. Durocher*, 21 Can. Cr. Cas. 61, 4 O.W.N. 867; and to unlawfully voting twice at the same municipal election. *R. v. Meehan* (No. 2), 5 Can. Cr. Cas. 312, 3 O.L.R. 567.

There must be an active participation by the manager of a corporation in the wilful disobedience by the corporation to make the manager personally liable under sec. 164. *R. v. Hays* (1907), 14 O.L.R. 201, 6 Can. Ry. Cas. 480, 12 Can. Cr. Cas. 423, and compare *R. v. Hendrie*, 10 Can. Cr. Cas. 208.

In the *Durocher* case it was suggested by MacLaren, J.A., that sec. 164 did not extend as far as the common law, and that there may be cases beyond the scope of sec. 164, which may still be prosecuted at common law.

Where an act or omission, which is not an offence at common law, is made punishable by a statute, the question arises whether the criminal remedies are limited to the particular remedy given by the terms of the statute, or, in other words, whether the remedy given by the statute is exclusive of or alternative to other remedies given by other statutes or the common law. Where an act or omission is not an offence at common law, but is made an offence by statute, the common law permitted an indictment if there was a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given. *R. v. Durocher*, 4 O.W.N. 867, 21 Can. Cr. Cas. 61 (affirmed 28 O.L.R. 499). *Clegg v. Earby Gas Co.* [1896], 1 Q.B. 592.

If the case be one within the sections of the Code then the maxim *actus non facit reum, nisi mens sit rea* applies, and there should be evidence of guilty intention before criminal proceedings: *Rex v. Borron* (1820), 3 B. & Ald. 432.

Even if it could be assumed that the accused erred in judgment, as to the interpretation of a statute, it is not to be assumed that he acted knowingly and fraudulently. *Regina v. Badger* (1856), 6 E. & B. 137; *Re Parke* 3 Can. Cr. Cas. 122, 30 Ont. R. 498.

*"Unless some penalty," etc.*—The penalty under a provincial statute may be imposed by provincial law. *R. v. McMurrer*, 18 Can. Cr. Cas. 385.

**Disobeying orders of court where no other procedure provided.**

**165.** Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order, other than for the payment of money, made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode of proceeding is expressly provided, by law.

*Origin*—Sec. 139, Code of 1892.

**Misconduct of officers entrusted with execution of writs.**

**166.** Every one is guilty of an indictable offence and liable to a fine and imprisonment who, being a sheriff, deputy-sheriff, coroner, elisor, bailiff, constable or other officer entrusted with the execution of any writ, warrant or process, wilfully misconducts himself in the execution of the same, or wilfully, and without the consent of the person in whose favour the writ, warrant or process was issued, makes any false return thereto.

*Origin*—Sec. 143, Code of 1892; R.S.C. 1886, ch. 173, sec. 29.

*Punishment*—See secs. 1029 and 1052.

*Peace officer permitting escape*—See secs. 192 and 193.

*Compounding a criminal offence*—See sec. 181-183.

*Peace Officers.*

**Neglect to aid peace officers in arresting offenders.**

**167.** Every one is guilty of an indictable offence and liable to six months' imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy-sheriff, mayor or other head officer, justice, magistrate, or peace officer, in the execution

of his duty in arresting any person, or in preserving the peace, without reasonable excuse omits to do so.

*Origin*—Sec. 142, Code of 1892.

*Assisting peace officer to make arrest*—See secs. 31, 37, 39-44, 628 (prize fights), 649 (on fresh pursuit of person escaping).

*Preserving the peace*—See secs. 46, 47.

*"Peace officer"*—See definition in sec. 2 (26), as amended in 1913.

*Aid in suppressing riot*—See secs. 48-51, 88, 90-95, 167, and the Militia Act, R.S.C. 1906, ch. 41, secs. 80-90.

#### **Obstructing public officer.**

**168.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who resists or wilfully obstructs any public officer in the execution of his duty or any person acting in aid of such officer.

*Origin*—Sec. 144, Code of 1892; R.S.C. 1886, ch. 162, sec. 34.

*"Public officer"*—See sec. 2, sub-sec. (26).

*North-West Territories*—For special provisions as to trial, see N.W.T. Act, R.S.C., ch. 62, secs. 37-55.

*Assaulting public officer in execution of his duty*—See sec. 296.

*Summary trial*—See sec. 773 (e).

#### **Obstructing peace officer or person executing process.**

**169.** Every one who resists or wilfully obstructs,—

- (a) any peace officer in the execution of his duty or any person acting in aid of such officer;
- (b) any person in the lawful execution of any process against any lands or goods or in making lawful distress or seizure;

is guilty of an offence punishable on indictment or on summary conviction and liable if convicted on indictment to two years' imprisonment, and, on summary conviction before two justices, to six months' imprisonment with hard labour, or to a fine of one hundred dollars.

*What is "obstruction"?*—Under sec. 291, sub-sec. (3), of the Railway Act, 1903, Can., which provided that every person who wilfully obstructs or impedes any officer of a railway company in the execution of his duty upon the premises of the company, shall be liable to the

penalties imposed by that Act, it was held by the Court of King's Bench of Quebec, that it was an obstruction of the railway officer for a cabman, having no right upon the railway cab-stand, to refuse to move away from same with his cab on the demand of the officer whose duty it was to enforce the company's regulations respecting the station property, although the cabman offered no physical resistance, but simply refused to leave when ordered. *Rex v. Leclairé* (1906), 12 Can. Cr. Cas. 332.

So, also, it has been held that a workman "obstructs" his medical examination under the Workmen's Compensation Act, Eng., if by his own acts he prevented examination or made it impossible, *e.g.*, by going away to some unknown place without giving any intimation to his employer. *Finnie v. Duncan* [1904], 42 Sc.L.R. 192.

By the Prevention of Crimes Act, 1871 (Imp.) 34 and 35 Vict., ch. 112, sec. 12 provides that "where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act." By the Prevention of Crimes Amendment Act, 1885 (Imp.) 48 and 49 Vict., ch. 75, sec. 2, "the provisions of the twelfth section of the said recited Act (the Prevention of Crimes Act, 1871), shall apply to all cases of resisting or wilfully obstructing any constable or peace officer when in the execution of his duty."

Two constables, having measured certain distances on a road much frequented by motor cars, were watching in order to ascertain the pace at which each car passed over the measured distance, with a view to discovering whether it was proceeding at an illegal rate of speed. One Little gave warning of this fact to approaching cars, which then slackened speed. There was no evidence that Little was acting in concert with any of the drivers of the cars, or that any car when the warning was given, was going at an illegal pace. In a prosecution against Little for wilfully obstructing police constables in the execution of their duty the magistrates were of the opinion that the acts of Little did not in law constitute an obstruction of the police constables in the execution of their duty within the meaning of the sections of the Acts mentioned, and dismissed the information, but stated a case for the opinion of the King's Bench Division. It was there held that the magistrate had come to a right conclusion, but Darling, J., in the course of his judgment in the case, says, (p. 63):—"I do not wish to be understood to say that, in order that there should be an offence under this section there must be some physical obstruction of the constable. In my opinion a policeman who, in seeking information which might lead to the conviction of the perpetrators of a crime, was wilfully misled by false information, would be obstructed in the execution of his duty, and I should not like to say that the person who so wilfully misled him was not committing an offence within the meaning of this section": and Lord Alverstone, C.J., said:—"I also would wish to guard myself



from saying that the only obstruction contemplated by this section is a physical obstruction." *Bastable v. Little*, [1907] 1 K.B. 59, 23 Times L.R. 38.

A warning given to motorists who were exceeding the speed limit that constables further on would time them at a police trap distance, has been held in England to be an "obstruction" under the Prevention of Crimes Act. *Betts v. Stevens* [1910] 1 K.B. 1, 79 L.J.K.B. 17.

The refusal of permission to search which the officer was entitled to make is an obstruction. *R. v. Matheson, ex parte Guimond* (1913) 21 Can. Cr. Cas. 312, 13 E.L.R. 58, 12 D.L.R. 480.

There must be a "duty" to arrest or the obstruction to the arrest will not be punishable under this section. *R. v. Cook*, 11 Can. Cr. Cas. 32; *R. v. Carley*, 18 C.L.T. 26. So also if the officer is making an illegal seizure the obstruction is not within the section. *R. v. Finlay*, (1901) 13 Man. R. 383, 4 Can. Cr. Cas. 539.

If the officer has power to arrest without warrant under the particular circumstances, he may justify under that power although he had a warrant if the latter was defective. *R. v. Sabeans*, 37 N.S.B. 227, 7 Can. Cr. Cas. 498.

*Seizure under lien agreement*—The retaking of possession of a chattel by the vendors thereof under the provisions of a conditional sale agreement, is not a seizure within the meaning of the Code, so as to subject the purchaser of the chattel, who resists the right to retake it, to the penalty prescribed in section 169. *Rex. v. Shand*, 7 O.L.R. 190, 8 Can. Cr. Cas. 45 (C.A.).

*Seizure for rent*—On a charge of obstructing a lawful distress for rent, the prosecution has to prove that rent was in arrear. *R. v. Harron* (1903), 6 O.L.R. 668, 7 Can. Cr. Cas. 543.

*Seizure under execution*—The power of a court bailiff to appoint a deputy to make a seizure under execution may be implied from the statute under which the court is constituted. *R. v. Polsky* [1917], 1 W.W.R. 451, 27 Man. R. 271.

*Peace officer*—See sec. 2, sub-sec. 26.

*Obstructing peace officer entering disorderly house*—See sec. 230.

*Assault on peace officer making lawful seizure*—See sec. 296.

*Rescue*—See secs. 191, 192.

*Inspection of cattle in transit*—As to refusing admittance to a peace officer on search under Code secs. 544 and 545 in reference to cattle in transit and the provision for rest and feeding, see the special enactment of sub-section (2) of sec. 545.

*North-West Territories*—For special provisions as to trial see N.W.T. Act, R.S.C., ch. 62, secs. 37-55.

*Yukon Territory*—As to summary trial in the Yukon see the Yukon Act, R.S.C., ch. 63, sec. 65.

*Stated case on questions of law under summary conviction*—See sec. 761.

*Appeal on both law and facts from summary conviction*—See secs. 749-752.

*Summary trial as for indictable offence*—See secs. 773 (c), 776, 777, 778, 781, 784, 798.

*Summary conviction or summary trial*—The offence is expressly made punishable under the summary conviction procedure of Part XV of the Code, and being also an indictable offence, the procedure by indictment, or of a formal charge substituted for indictment in Alberta and Saskatchewan, may be followed. As to sub-sec. (a) of sec. 169, there is an alternative procedure of "summary trial" under Part XVI, see sec. 773, sub-sec. (e) if the offence be charged as wilful obstruction of a peace officer engaged in the execution of his duty or wilful obstruction of any person acting in aid of any such officer. Charges under sub-sec. (b) of sec. 169 are not affected by sec. 773, but they may, of course, be summarily tried under sec. 777 if brought before a tribunal qualified under the latter section.

A question has been raised as to whether the alternative of summary conviction can apply if the person accused under sec. 169 is brought before a police magistrate or other tribunal having "summary trial" jurisdiction under Part XVI, as well as a general jurisdiction under the "summary convictions" clauses (Part XV). In Ontario it is held that this joint jurisdiction does not prevent the magistrate from proceeding under Part XV and that Part XV (summary convictions) and Part XVI (summary trials) are quite independent of each other in that respect. *R. v. West* (1915), 35 O.L.R. 95, 25 Can. Cr. Cas. 145, affirming *R. v. West*, 34 O.L.R. 368, 24 Can. Cr. Cas. 249. The same theory is upheld in New Brunswick; *R. v. Folkins, ex parte McAdam* (1915), 43 N.B.R. 538, 25 Can. Cr. Cas. 365, 27 D.L.R. 32; and in British Columbia, *R. v. Nelson* (1901), 4 Can. Cr. Cas. 461, 8 B.C.R. 110 and *R. v. Jack*, 5 Can. Cr. Cas. 304, 9 B.C.R. 19. The theory is denied in Manitoba; *R. v. Crossen* (1899), 3 Can. Cr. Cas. 153, 12 Man. R. 571; in Nova Scotia, *R. v. Carmichael* (1902), 7 Can. Cr. Cas. 167; and in Quebec; *R. v. Van Koolberger* (1909), 16 Can. Cr. Cas. 228, 19 Que. K.B. 240. In the latter case it was held that as two justices sitting together are a statutory "magistrate" under Part XVI for certain offences (Code sec 771 (a7) and are further qualified to make a summary conviction under sec. 169, the procedure of Part XVI is ancillary to that of Part XV on such a charge because of the reference in sec. 706 to any "special provision otherwise enacted;" and that there could be no "summary conviction" without taking the consent of the accused under sec. 778 to being tried by the justices. The Manitoba and Nova Scotia decisions above referred to are, in effect, that if the tribunal is qualified under Part XVI the procedure must be under that Part

(Summary Trials) to the exclusion of Part XV (Summary Convictions). See also in support of the decisions in *R. v. Crossen*, *supra*, and *R. v. Carmichael*, *supra*, the dissenting opinion of Grimmer, J. in *R. v. Folkins* (1915), 43 N.B.R. 538.

**Falsely representing himself as peace officer.—Badge.—Uniform.**

**169A.** Every one who falsely represents himself to be a constable or other peace officer, or who, not being a constable or other peace officer, makes use of any badge or article of uniform or equipment in such a manner as is likely to make persons believe that he is a constable or other peace officer, is liable upon summary conviction to a fine not exceeding one hundred dollars and costs, or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

*Origin*—Can. Stat. 1913, ch. 13, sec. 7.

*Peace officer*—See definition in sec. 2 (26).

*Misleading Justice*

**Definition of perjury.—Subornation.—Evidence before grand jury.**

**170.** Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

2. Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

3. Evidence in this section includes evidence given on the *voir dire* and evidence given before a grand jury.

*Origin*—Sec. 145, Code of 1892; Perjury Act, E.S.C., 1886, ch. 154: 32-33 Vict. Can. ch. 23.

*Punishment*—See sec. 174.

*"As to a matter of fact, etc."*—Perjury cannot be assigned in respect of a mere promissory oath; and a court bailiff issuing a false certificate purporting to be made under his oath of office cannot be convicted of perjury in respect of its falsity. *R. v. Tremblay*, 26 Que. K.B. 37.

"Witness" defined]—See sec. 171 (1).

Other acts of perjury]—See sec. 172.

In a "judicial proceeding"]—See sec. 171.

"Upon oath or affirmation"]—As to evidence upon affirmation by persons objecting on conscientious scruples to take an oath, see Canada Evidence Act 1906, R.S.C. ch. 145 sec. 14. The court is to ascertain the grounds of objection. *R. v. Deakin*, 19 Can. Cr. Cas. 62; *R. v. Moore*, 61 L.J.M.C. 80.

"It is laid down," says Hardwicke, L.C., in *Omychund v. Barker*, Willes B. 538, 1 Atk. 21 at 45, "by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the persons taking." And Lord Mansfield says in *Atcheson v. Everett*, Cowp. 382 at 389, "that upon the principles of the common law there is no particular form essential to an oath to be taken by a witness."

In *Curry v. The King* (1913), 48 S.C.R. 532, Sir Charles Fitzpatrick, C.J., said:—"It is now admitted to be the absolute right of every person in the English Courts to be sworn for every purpose in Scotch form without the use of any book and without any question being asked. It may be open to question whether it is not better as a matter of public policy for our Courts and other persons administering oaths to adhere to the time-honoured custom of swearing witnesses upon the Bible or Testament in all cases except those where the witness or party claims to have conscientious objections to swearing in that mode or form. But we think, however that may be, that where no such objection is raised and the oath is taken voluntarily by a person with uplifted hand and calling God to witness the truth of his evidence or statements, it would be alike a mocking of justice and a disregard of the common law as we understand it to allow such a person on an indictment for perjury to escape on the sole ground that he took the oath without being sworn on the Bible or New Testament." *Curry v. The King* (1913), 48 S.C.R. 532, 22 Can. Cr. Cas. 191, affirming a conviction as to which the court below were divided. *R. v. Curry*, 47 N.S.B. 176, 21 Can. Cr. Cas. 273.

In *Regina v. Pah-Mah-Gay*, 20 U.C.B. 195, a case of a non-Christian Indian witness, who believed in a Supreme Being and a state of rewards or punishments, being sworn in the ordinary way upon the Gospels, Robinson, C.J., after referring to *Omychund v. Barker*, Willes B. 538, 1 Atk. 21, said, p. 198:—"If the witness had belonged to a nation or tribe that had in use among them any particular ceremony, which was understood to bind them to speak the truth, however strange and fantastic the ceremony might seem to us, it would have been indispensable that the witness should have been sworn, if we may use the term, according to such ceremony, because all should be done that can be done to touch the conscience of the witness according to his notions, however superstitious they may seem."

In *R. v. Lee Tuck*, 2 W.W.R. 605, 21 W.L.R. 669, 19 Can. Cr. Cas. 471, it was held that a Chinaman cannot be convicted of perjury when presented as a witness in the case in which false testimony was alleged to have been given, if, in response to a question from the clerk of the Court the accused stated that he was a Christian and that he desired to be sworn on the Bible, but under the direction of the trial Judge, without further inquiry or any assent on the part of the Chinaman, the clerk administered the Chinese oath by burning paper, as under such circumstances no binding oath was administered.

There need not be any express admission by the witness that his conscience was bound in a case where he was sworn in the form usual to persons of his race or belief. *R. v. Shajoo Ram* (1914), 23 Can. Cr. Cas. 334, 30 W.L.R. 65 (B.C.), applying *Curry v. The King*, 48 S.C.R. 532; and see *R. v. Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467.

The deponent to an affidavit is none the less liable for perjury if he himself spoke the words of obligation and consequently the official was not called upon to repeat them. *Re Collins*, 10 Can. Cr. Cas. 73.

*Being known to be false*—Where the sworn statement was voluntarily withdrawn later upon the witness realizing that he had made a mistake in denying his signature, the surrounding circumstances are to be considered in determining whether the original statement was made with knowledge of its falsity. *R. v. Doyle*, 12 Can. Cr. Cas. 69; *R. v. Wylde*, 6 C. & P. 380.

The defendant charged with perjury is entitled to have put in evidence other parts of his testimony given at the same time to explain or qualify the part of the evidence on which perjury is assigned. *R. v. Coote*, 10 B.C.R. 285, 8 Can. Cr. Cas. 199. And if the alleged perjury was in respect of evidence given on a preliminary enquiry before a magistrate, he may attack the completeness of the written depositions produced by oral testimony of other statements sworn to before the magistrate and not taken down by him. *R. v. Prasiloski* (No. 2), 16 Can. Cr. Cas. 139.

There would, however, be a presumption, although a rebuttable one, that the magistrate's statutory duty to take down all material testimony had been duly carried out. *R. v. Prasiloski*, *supra*.

*Oath of office*—A bailiff's oath of office that he will faithfully perform his duties, will not make a false return of the mileage travelled to serve process the subject of perjury, although the return is made under his oath of office. *R. v. Tremblay* (1916), 26 Que. K.B. 37, 28 Can. Cr. Cas. 21.

*Certain formal allegations dispensed with on indictment*—See secs. 852 and 862.

*Intended to mislead*—See *R. v. Skelton* (1898), 4 Can. Cr. Cas. 467, 3 Terr. L.R. 58; *R. v. Yaldon*, 17 O.L.R. 179, 13 Can. Cr. Cas. 489. Failure to specially allege the intent to mislead will not be fatal to the indictment if it charges that the accused committed perjury. *R. v. Yaldon*, *supra*.

*Perjury in homicide case*—See secs. 174, sub-sec. (2), and sec. 253

*False oath in extra-judicial matters*—See sec. 175.

*False statement or declaration in authorized extra-judicial matters*—  
See sec. 176.

*"By a witness"*—See sec. 171.

**Witness defined as regards offence of perjury.—Judicial proceeding defined.**

**171.** Every person is a witness within the meaning of the last preceding section who actually gives his evidence, whether he was competent to be a witness or not, and whether his evidence was admissible or not.

2. Every proceeding is judicial within the meaning of the last preceding section which is held in or under the authority of any court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any legislative council, legislative assembly or house of assembly or any committee thereof, empowered by law to administer an oath, or before any justice, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid.

*Origin*—Code of 1892, sec. 145.

*Certain formal allegations dispensed with on indictment*—See secs. 852 and 862.

*Whether witness competent or not*—As to competency of witnesses in criminal matters and in civil proceedings under federal jurisdiction, see the Canada Evidence Act, R.S.C. 1906, ch. 145. As to civil proceedings under provincial jurisdiction, see the "Evidence Act" of the particular province.

*Arbitrations*—See the provincial Arbitration Act as to powers of arbitrators to take evidence upon oath.

*“Judicial proceedings”*—The principle on which sec. 171 is based is that a person who attempts by falsehood to mislead a tribunal *de facto* exercising judicial functions should not escape punishment by showing some defect in the constitution of the tribunal or some error in the proceedings themselves. *Drew v. The King*, 35 S.C.R. 228, 6 Can. Cr. Cas. 424; English draft Code 119 and the Commissioners' comments thereon; *R. v. Mitchell*, 27 O.L.R. 615, 21 Can. Cr. Cas. 193.

Compare *Giroux v. The King* (1917), 56 S.C.R. 63, 29 Can. Cr. Cas. 258, dismissing appeal from 26 Que. K.B. 323.

A proceeding is judicial within sec. 171 if before a magistrate having general jurisdiction to try a complaint on a proper information although there was no information, if no objection was raised thereto or to the irregularity of the arrest. *R. v. Yaldon*, 17 O.L.R. 179, 13 Can. Cr. Cas. 489.

An examination for discovery in an action is included. *R. v. Thickens* (1906), 11 Can. Cr. Cas. 274; *R. v. T—*, 12 B.C.R. 223. *R. v. Howley* (1912), 22 Can. Cr. Cas. 108, affirming *R. v. Howley*, 20 Can. Cr. Cas. 36. Perjury may be assigned in respect of evidence taken before a *de facto* tribunal although it had no jurisdiction in the particular matter. *Drew v. The King*, 33 S.C.R. 228, 6 Can. Cr. Cas. 424, affirming 11 Que. K.B. 477, 6 Can. Cr. Cas. 241; and see *R. v. Roberts*, 14 Cox C.C. 101, as to the presumption of due appointment of an official acting as a *de facto* tribunal. The proceedings may be one held either in a court or other tribunal referred to in sec. 171 or under the authority of such court or tribunal and the evidence given by affidavit or otherwise (sec. 170) is included. But where a commissioner for taking affidavits himself exercises no judicial functions, it would seem to be an answer to a perjury charge that the affidavit was not of a class which his commission empowered him to take. *R. v. McIntosh*, 1 Hannay N.B. 372. A different class of case is that where a court registrar or examiner is deputed to take evidence and after swearing the witness leaves the room while the examination is being taken in presence of counsel and taken down by an official stenographer. It would seem that, at least where no objection was raised to proceeding with the examination in the absence of the examiner, the proceeding would be a judicial one as to which perjury would lie, but the contrary was held by Clement, J., in *R. v. Rulofson* (1908), 14 B.C.R. 79, 14 Can. Cr. Cas. 253.

*Proof of the judicial proceeding*—Where the proceeding is a preliminary enquiry in a criminal matter based upon a sworn information, the information itself is to be produced on the perjury charge to prove that the preliminary enquiry was a judicial proceeding. *R. v. Farrell*, 20 O.L.R. 182, 15 Can. Cr. Cas. 283; *R. v. Drummond* (1905), 10 O.L.R. 546, 10 Can. Cr. Cas. 340; *R. v. Dillon*, 14 Cox C.C. 4.

If the information has been lost or destroyed, that fact is to be established to let in secondary evidence of it, and the oral testimony of the magistrate will be insufficient to prove the preliminary enquiry as a judicial proceeding without production of the information or proof of its loss. *R. v. Farrell*, 20 O.L.R. 182, 15 Can. Cr. Cas. 283, and see *R. v. Graves*, 16 Can. Cr. Cas. 336.

If the trial in a summary conviction matter was not based upon a written information or other formal record the proceedings have then necessarily to be proved by oral testimony, *e.g.*, the evidence of the magistrate and his clerk, each speaking with the aid of his notes of the proceedings taken at the trial. *R. v. Yaldon*, 17 O.L.R. 179, 13 Can. Cr. Cas. 489; but if the proceeding was a summary trial of an indictable offence under Part XVI, under which a formal record was essential, the record must be produced. *R. v. Legros*, 17 O.L.R. 425, 14 Can. Cr. Cas. 161.

Where perjury is alleged in respect of a trial upon an indictment, the indictment and the formal record, or in lieu thereof a certificate under Code sec. 979, containing the substance and effect of the indictment and trial, must be produced; it is not sufficient to put in merely the evidence of the court stenographer and the evidence of the clerk of the court and his notes of the proceedings. *R. v. Drummond*, 10 O.L.R. 546, 10 Can. Cr. Cas. 340.

In addition to the provision of Code sec. 979, permitting proof of the record upon an indictment by a statutory certificate of its substance and effect, a certified copy of any proceeding or record is admissible under secs. 23 and 28 of the Canada Evidence Act, if ten clear days' notice has been given of the intention to use it, R.S.C. 1906, ch. 145; and see sec. 34 of that Act.

**Perjury by making false statement under oath within Canada.—**

**False oath, etc., in verification of statement.—Subscribing affirmation as affidavit.**

**172. Every one is guilty of perjury who,—**

- (a) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or,



- (b) knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part.

*Origin*—Secs. 172 and 175 possibly overlap. Sec. 172 (sec. 148 of the Code of 1892) is taken from older statutes of Canada, R.S.C. 1886, ch. 154, while sec. 175 of the Code is taken from the English draft Code, sec. 122. These two sections in the Crim. Code probably mean the same thing. One has the words "wilfully and corruptly," the other by reference to sec. 170 has the words "such assertion being known to the witness to be false." *R. v. Morrison* (1916), 26 Can. Cr. Cas. 26 at 28.

"*Wilfully and corruptly*"—The word "wilfully" has been held to mean "intentionally" under the English Perjury Act of 1911. *R. v. Ryan*, 10 Cr. App. R. 4. The form of indictment or charge will be validated under secs. 852 or 1152, if the offence is stated in substance in popular language sufficient to give the accused notice of the offence intended or by following the statutory form (Code form 64), which furnishes two examples of the manner of stating the offence of perjury. *R. v. Morrison* (1916), 26 Can. Cr. Cas. 26, in which *R. v. Cohn*, 36 N.S.R. 240; 6 Can. Cr. Cas. 386 is explained, and *R. v. George*, 35 S.O.R. 376, 8 Can. Cr. Cas. 401 (as to the form of a charge of theft), is specially referred to.

"*Knowingly, wilfully and corruptly*" (sub-sec. (b).)—Where it alleged in the indictment or charge following Code form 64 that the accused "committed perjury" by falsely swearing, etc., that statement is to be understood as if the words "wilfully and corruptly" (sub-sec. (a1) or "knowingly, wilfully and corruptly" (sub-sec. (b), had been inserted. *R. v. Morrison* (1916), 26 Can. Cr. Cas. 26, per Harris, J. (N.S.), and see *R. v. Skelton*, 3 Terr. L.R. 58, 4 Can. Cr. Cas. 467, *R. v. Yee Mock* (1913), 4 W.W.R. 1342 (Alta.); *R. v. Yaldon*, 13 Can. Cr. Cas. 489, 17 O.L.R. 179; *George v. The King*, 35 S.C.R. 376, 8 Can. Cr. Cas. 401.

*Special provision as to form of indictment*—See sec. 862 and see sec. 852; *R. v. Cohn*, 6 Can. Cr. Cas. 386, 36 N.S.R. 240; *R. v. Morrison* (1916), 49 N.S.R. 446, 26 Can. Cr. Cas. 26; *R. v. Yee Mock*, 21 Can. Cr. Cas. 400.

*Oaths under federal law*—Where an oath of identity authorized to be administered to an "elector," this includes a person presenting himself as an elector though he may not be such in fact. *R. v. Chamberlain*, 10 Man. R. 261 (under the Dominion Elections Act).

*Oaths required or permitted under provincial law*—See *R. v. Morrison* (1916), 49 N.S.R. 446, 26 Can. Cr. Cas. 26 (as to false oaths at a municipal election). *R. v. Moraes* (1907), 12 Can. Cr. Cas. 145.

*Punishment*—See note to sec. 175.

**Making false affidavit out of the province but within Canada.**

**173.** Every person who wilfully and corruptly makes any false affidavit, affirmation or solemn declaration, out of the province in which it is to be used but within Canada, before any person authorized to take the same, for the purpose of being used in any province of Canada, is guilty of perjury in like manner as if such false affidavit, affirmation or declaration were made before a competent authority in the province in which it is used or intended to be used.

*Origin*—Sec. 149, Code of 1892; R.S.C. 1886, ch. 154, sec. 3.

**Penalty for perjury or subornation.—Increased in certain cases.**

**174.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life.

*Origin*—Code of 1892, sec. 146.

*Evidence on a perjury trial*—Subject to the provisions made by federal law the laws of evidence in force in the province in which such proceedings are taken, apply. Can. Evid. Act, sec. 35.

A witness present at the trial when the alleged perjury was committed may be called to state from recollection the evidence given by the accused. It will be sufficient if the witness can state with certainty that what he relates was all the evidence given by the accused on the point regarding which perjury is charged and that the accused said nothing to qualify it, although he is unable to state in effect all the evidence which the accused then gave. *R. v. Bowley*, 1 Mood. C.C. 111; *R. v. Munton*, 3 C. & P. 498; *R. v. Browne*, 3 O. & P. 572.

Besides proving the whole of what is set out in the indictment as having been falsely sworn to, the prosecution should prove the evidence connected with and necessary for the explanation of the alleged false evidence. *R. v. Jones*, Peake 51; *R. v. Dowlin*, Peake 227. But statements made by the judge presiding when the alleged perjury was committed are not admissible. *R. v. Britton*, 17 Cox C.C. 627; nor are the judge's notes except for the purpose of refreshing his memory when called as a witness. *R. v. Child*, 5 Cox C.C. 197; *R. v. Morgan*, 6 Cox C.C. 107.

The finding of fact by the tribunal before which the alleged perjury was committed is not proof of that fact on the perjury trial. *R. v. Goodfellow*, C. & M. 569.

The prosecution may in some cases be entitled to prove special facts to show that the deposition of the accused in a civil proceeding was false. *Downie v. The Queen*, 15 S.C.R. 358.

The accused charged with perjury on a civil trial, may put in other parts of his depositions then given, and so explain or qualify the alleged false statement. *R. v. Coote* (1903), 10 B.C.R. 285, 8 Can. Cr. Cas. 199. He may also under some circumstances be entitled to put in the pleadings in the case to which he was a party. *R. v. Ross*, 1 Montreal L.R. 227.

Depositions before a magistrate holding a preliminary enquiry not being before a court of record may be explained by the defence on a charge of perjury brought thereon by showing that other statements were sworn to, but not transcribed by the magistrate. *R. v. Prasilewski*, 15 B.C.R. 29, 16 Can. Cr. Cas. 139; and see *R. v. Yaldon*, 13 Can. Cr. Cas. 489, distinguishing *R. v. Drummond*, 10 O.L.R. 546.

And a false statement under oath before a magistrate on ordering or refusing to order a recognizance to keep the peace because of threats (Code sec. 748), sub-sec. 2), may be proved by oral testimony supplementing the notes taken by the magistrate. *R. v. Doyle* (1906), 12 Can. Cr. Cas. 69.

Where the different allegations of perjury are contained in the one affidavit, the judge is to consider each charge with reference to the other allegations in the affidavit, and to weigh the statements as a whole in arriving at a conclusion as to the guilt or innocence of the prisoner on a trial without a jury. *R. v. Cohn*, 36 N.S.R. 240, 6 Can. Cr. Cas. 386.

One well-established requirement in the trial of an indictment for perjury alleged to have been committed at the trial of an indictment, is the legal proof of the trial at which the alleged perjury was committed. Another, equally well established, is that such trial being matter of record, it is to be proved by the production of the record of the former trial, that is to say, the sworn or exemplified copy of the indictment and of the verdict and judgment thereon, or by some authoritative document which the law has declared to be a sufficient substitute there-

for. *Roscoe's Crim. Evid.* 11th ed. (1890), pp. 804, 812; *Regina v. Coles*, 16 Cox C.C. 165; *Arch. Crim. Pleading and Evidence*, 22nd ed. (1900), p. 1012; *R. v. Drummond*, 10 Can. Cr. Cas. 340, 10 O.L.R. 546.

To simplify the proof in such cases it has long been the law, as it now stands in sec. 979 of the *Crim. Code*, that "A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same."

Where the alleged perjury is assigned as having been committed before the same magistrate as is trying the charge, the formal record, if any, must be proved; the case is not to be disposed of upon the magistrate's recollection of the prior proceedings and evidence, as to which the magistrate has not been called to testify as he might be where there is no formal record. *R. v. Legros*, 17 O.L.R. 425, 14 Can. Cr. Cas. 161. *R. v. Graves*, 16 Can. Cr. Cas. 336; *R. v. Farrell*, 20 O.L.R. 182, 15 Can. Cr. Cas. 287; *R. v. Drummond* (1905), 10 O.L.R. 546, 10 Can. Cr. Cas. 340; *R. v. Graf*, 15 Can. Cr. Cas. 200.

The magistrate holding a summary trial in respect of alleged perjury committed at a prior trial before himself is to be guided solely by the evidence and demeanor of witnesses at the perjury trial without regard to unproved demeanor of witnesses at the prior trial, although he may himself be able to recall the latter to his mind. *R. v. Legros*, 17 O.L.R. 425, 14 Can. Cr. Cas. 161.

**Corroboration**—Sec. 1002 (c) requires corroboration "in some material particular implicating the accused."

The corroboration required is as to the falsity of the prior sworn statement. *Peterson v. The King*, 55 S.C.R. 155, [1917] 3 W.W.R. 345, 28 Can. Cr. Cas. 332, affirming *R. v. Peterson*, [1917] 1 W.W.R. 600, 27 Can. Cr. Cas. 3.

It is not, however, imperative that there should be two witnesses to disprove the fact sworn to by the accused, for if any other material circumstance be proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. *R. v. Lec*, 3 *Russell on Crimes*, 5th ed. 72. Two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one to show that one party is more to be believed than the other. *Reg. v. Boulter* (1852), 5 Cox C.C. 543; 3 *Car. & Kir.* 236. And it has been held that a letter written by the accused contradicting his statement upon oath would be sufficient to make it

unnecessary to have a second witness where the sworn statement has been disproved by one witness. *Rex. v. Mayhew*, 6 Car. & P. 315.

Corroboration on a charge of perjury may be found in the testimony which the accused gives in his own defence in which he qualified his prior sworn statement on which the perjury was assigned. *R. v. Nash*, 6 W.W.R. 1390, 7 Alta. L.R. 449, 28 W.L.R. 960, 23 Can. Cr. Cas. 38; appeal to Supreme Court of Canada dismissed. *R. v. Nash*, 8 W.W.R. 632.

The corroboration need only go to the truth or falsity of the fact sworn to, and not to the circumstance of knowledge of want of authority on the part of a person with whom as agent the accused claimed he contracted and which if true would absolve him from the perjury charge. *R. v. Nash*, *supra*.

When an indictment for perjury containing several assignments and a general verdict of guilty is returned, though one assignment is clearly not proved by reason of the want of corroboration, the Court will quash the conviction. *R. v. Gaskell* (1912), 8 Cr. App. R. 103.

On a charge of subornation of perjury the corroboration necessary to sustain a conviction may be afforded by the facts and circumstances of the case. *Rex. v. Threlfall*, 10 Cr. App. R. 112, [1914] W.N. 160.

*Adding fine to imprisonment*—See sec. 1035. Both imprisonment and a fine may be imposed, but a fine in lieu of imprisonment is not permissible as the maximum imprisonment is more than five years. (Sec. 1035). *R. v. Legros* (1908), 17 O.L.R. 425, 14 Can. Cr. Cas. 161.

*Perjury at common law*—It has always been an offence at common law for a witness upon oath in a judicial proceeding, before a court of competent jurisdiction, to give evidence material to the issue, which he believes to be false. The common law, however, stopped there and took no notice of false statements, whether made upon oath or not, made under other conditions. The perjury had also to be in a judicial proceeding before a competent tribunal. *R. v. Townsend*, 10 Cox C.C. 356; *R. v. Row* (1864), 14 U.C.C.P. 307. And it was therefore formerly the law that false evidence given upon an examination in the absence of the authority competent to hold such examination was not perjury. *R. v. Lloyd*, L.R. 19 Q.B.D. 213; *R. v. Gibson*, 7 *Revue Legale* (Que.) 573. The witness must also have been a competent one. *R. v. Baker* [1895] 1 Q.B. 797; *R. v. Clegg*, 19 L.T. 47. The statutory offence under the Code is much more extensive.

*Statutory perjury in a judicial proceeding*—See secs. 170-173.

*Other false oaths or statements in authorized proceedings*—See secs. 175-176.

*Formalities of indictment*—See secs. 859 and 862, 852-856, 864.

Knowledge on the part of the defendant of the falsity of the statements charged to have been made by him is not a necessary allegation in the charge. Sec. 852 of the *Crim. Code* provides that a count shall be

sufficient if it contains, in substance, a statement that the accused has committed some indictable offence therein specified. By sub-sec. 2 such statement may be made in popular language without any technical averments—and the form (c) in form 64 in the schedule clearly shows that it is not necessary to aver such knowledge on the part of the accused. A count in an indictment for perjury is not open to objection because it charges that the accused made more than one false statement in the same affidavit, or in the course of his evidence upon a certain trial; (*Rex v. Solomon, Ryan & Moody*, 252; *R. v. Yee Mock*, 4 W.W.R. 1342, 21 Can. Cr. Cas. 400, 13 D.L.R. 220. *Bishop's Criminal Procedure*, 2nd ed., sec. 916 *et seq.*).

It has been held that a charge that the defendant falsely swore that a sum of money had not been paid to him was not supported merely by proof of payment to a firm of which he was a member and not shown to have reached his hands. *R. v. Cohn*, 30 N.S.R. 240. If it were intended to prove that the accused knew of the payment and had, notwithstanding such knowledge, corruptly and with intent to mislead, sworn that the payment had not been made, this should have been alleged in the indictment or charge; *R. v. Cohn*, *supra.*; but it would seem that if it be a necessary inference from what is alleged in the indictment, apart from the formal conclusion that the act constituted perjury, that there were the necessary ingredients of the offence, the indictment would be valid. *R. v. Bain* (1877), *Ramsay's Cases* (Que.) 192; *R. v. Bownes*, *Ramsay's Cases* (Que.) 192; *R. v. Coote* (1903), 10 B.C.R. 285; *R. v. Doyle* (1906), 12 Can. Cr. Cas. 69; Code form 64, examples (d) and (e).

The statutory mode indicated by Code form 64 may be followed in describing the offence "in the cases thereby provided for"; Code sec. 1152; and may be varied to suit the case and still have the benefit of validation under that section. *R. v. Yee Mock* (1913) 4 W.W.R. 1342, 21 Can. Cr. Cas. 400.

A charge based on evidence taken before a coroner and a jury will not be quashed because it referred only to the coroner, and made no mention of the coroner's jury, as the accused was furnished with such reasonable information as not to be deceived as to the offence with which he was being charged. *R. v. Thompson* (1895), 2 Terr. L.R. 383, 385. Code secs. 852, 853. The count might have been amended if the court was of opinion that the accused had been misled or prejudiced in his defence. Code sec. 889; *R. v. Thompson*, *supra.*

The exact words of the false statement in testimony taken *viva voce*, need not be set forth in the indictment; the charge may be properly stated by summarizing what was in effect the false evidence, and specifying the tribunal and the time and place of the alleged perjury. *R. v. Legros*, 14 Can. Cr. Cas. 161, 17 O.L.R. 425.

*Regularity of proceedings in which false testimony given*—Now that it is immaterial whether the witness accused of perjury was a competent

witness or not, and whether his evidence was admissible or not (sec. 171), and whether his evidence was material or not (sec. 170), it would be unreasonable if the accused's guilt or innocence of the crime of perjury were dependent upon whether the proceedings in which the testimony was given were or were not instituted in the manner provided by the enactment. *R. v. Yaldon*, 13 Can. Cr. Cas. 489, at 496; and see sec. 171.

*Perjury in a pending civil action*—In the case of *The Queen v. Ingham* (1849), 14 Q.B. 396, 19 L.J.M.C. 69, wherein it was sought to compel two justices of the peace to proceed with and hear an information charging one Browne with perjury, Coleridge, J., said:—"The question is, whether, having exercised a discretion in the matter, we think the justices were wrong, and should now be compelled to proceed. It is enough to say that there is abundant reason for thinking that the course they have taken is the most likely to answer the ends of justice, and is full of convenience. Here the very party against whom the witness gives evidence in a pending suit, comes and seeks to destroy that evidence by convicting the witness of perjury. Surely such a proceeding can only be for the purpose of preventing justice." Chief Justice Hagarty in *Chadd v. Meagher* (1874), 24 U.C.C.P. 54, at p. 58, in delivering the judgment of the Court said:—"We find in the cases a strong disapproval expressed of the practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending." These two cases were approved and followed in *R. v. Thickens*, 11 Can. Cr. Cas. 274, in which the court refused to hear a criminal charge of perjury alleged to have taken place on a preliminary examination for discovery in a civil action until after the action itself had been tried; and see *R. v. Cohn*, 36 N.S.B. 240.

*Proof that the false oath was in a judicial proceeding*—See sec. 171.

*Summary trial*—See secs. 776, 777.

*Prosecution directed by the court of record before which perjury was committed*—See sec. 870.

*Children under 14 years*—See sec. 18; *R. v. Carvery*, 11 Can. Cr. Cas. 331.

*Perjury in evidence given through interpreter*—It is sufficient that the interpreter stated all that was material of what the foreigner had deposed to in his native language without translating every word. *R. v. Bogh Sing* (1913), 18 B.C.R. 323, 24 W.L.R. 941, 21 Can. Cr. Cas. 323.

*Plea of previous conviction or acquittal*—See secs. 905-909, 982. *R. v. Quinn*, 11 O.L.R. 242, 10 Can. Cr. Cas. 412.

*Punishment for statutory perjury in a non-judicial proceeding*—See note to sec. 175.

*Extradition*—Perjury is extraditable with any State of the United States in which the imputed perjury is a crime in that State as well as in Canada. *Re Collins*, 11 B.C.R. 436, 10 Can. Cr. Cas. 70, 73 and 80.

*Several false statements in one trial*—A conviction on summary trial for perjury may include several false statements made in the course of the one trial and these may be treated as one offence and the one penalty applied on a conviction for perjury in respect of all the false statements. *R. v. Yee Mock* (1913), 4 W.W.R. 1342. Even if each false statement should constitute a distinct offence, that would not invalidate a summary trial conviction in which he is found guilty of each. *R. v. Yee Mock*, 4 W.W.R. 1342, 1344, 21 Can. Cr. Cas. 400.

*Perjury as a contempt of court*—Perjury is punishable as a contempt of court when committed before a court of record. *R. v. Evans*, (1915), 8 W.W.R. 444, 21 B.C.R. 322. But not only must the specific charge be distinctly stated if the witness is to be dealt with summarily for contempt, but he must be given an opportunity of giving reasons against summary measures and of answering the charge. *Ibid.*; *Ex parte Chang Hang Kiu* [1909] A.C. 312, L.J.P.C. 89; *Re Pollard*, L.R. 2 P.C. 106.

#### **False oaths in extra-judicial proceedings.**

**175.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

*Origin*—Code of 1892, sec. 147; English Draft Code, sec. 122. See note to sec. 172.

*"Judicial proceeding"*—See definition in sec. 171, sub-sec. (2).

*Formalities of indictment*—See secs. 859 and 862, 852-856, 864.

*"Which would amount to perjury," etc.*—Secs. 170-171 deal with the elements of perjury in a judicial proceeding; sec. 172 declares that the making of certain false oaths in non-judicial proceedings shall be perjury, while sec. 176 applies to statements or declarations which are not under oath and are not necessarily under affirmation or solemn declaration so as to come within the purview of sec. 175. There appears to be an overlapping in secs. 172, 175 and 176, and it appears to be arguable that offences under sec. 172 are to be punished under sec. 175 only, and so by implication to limit the penalty of sec. 174, sub-sec. (1) to cases where there is a judicial proceeding as defined by sec. 171, sub-sec. (2).

*Intent to mislead*—There must have been an intent to mislead in like manner to the intent necessary to constitute perjury by a false oath in a judicial proceeding; *R. v. Skelton*, 3 Terr. L.R. 58, 4 Can. Cr. Cas. 467; but whether the intent to mislead must be alleged in the indictment may depend on the nature of the particular charge; *R. v.*



Skelton, *supra*; R. v. Sinclair, 12 Can. Cr. Cas. 20; and see R. v. Yaldon, 17 O.L.R. 179, 13 Can. Cr. Cas. 489; R. v. Legros, 14 Can. Cr. Cas. 164; R. v. Farrell, 20 O.L.R. 182, 15 Can. Cr. Cas. 283; R. v. Yee Mock, 4 W.W.R. 1342, 21 Can. Cr. Cas. 400, R. v. Lee Chu, 14 Can. Cr. Cas. 322; R. v. Doyle, 12 Can. Cr. Cas. 69.

"*Required or authorized by law*"—These words may be contrasted with the language of sec. 176—"permitted by law to make any statement, etc. before any officer authorized by law to permit it to be made before him," etc. Sec. 176 appears to be aimed at statutory declarations under the Canada Evidence Act when made purely voluntarily and not because of the declaration being a legal necessity for any purpose. Sec. 175 with its more onerous penalty might be applied if the statutory declaration were a legal necessity under some other statute, although *pro forma* a declaration under the Canada Evidence Act. There is a diversity of judicial opinion as to whether the person making a statutory declaration can be said to be "required or authorized by law" to make it merely because the furnishing of such a declaration had by contract been made a condition precedent to a right of action in the courts. Stuart, J., in R. v. Nier (1915), 9 W.W.R. 938, thought it could, while Beck, J., was of the contrary opinion. Harvey, C. J., and Scott, J., supported the conviction in that case on the ground that it was a good conviction for an offence under sec. 176, in respect of a declaration which, under sec. 36 of the Canada Evidence Act, the defendant was permitted to make before a notary. On a criminal trial before County Judge Wilson, in British Columbia, R. v. Phillips (1908), 14 B.C.R. 194, 14 Can. Cr. Cas. 239, it was held in effect that the statutory permission for the notary or other official to receive the declaration necessarily means that the declarant is "authorized by law" to make a declaration. That decision is, however, open to question in view of the decision in R. v. Nier, *supra*.

*Corroboration*—The statutory requirement of corroboration as to perjury (Code sec. 174), was held, in R. v. Phillips, 14 B.C.R. 194, 14 Can. Cr. Cas. 239, not to extend to a false statutory declaration punishable under sec. 175.

#### False statements in extra-judicial proceedings.

**176.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

*Origin*—Sec. 150, Code of 1892.

*Formalities of indictment*—See secs. 859 and 862, 852-856, 864.

"*Authorized by law to permit it to be made*"—See note to sec. 175.

*Corroboration*—The offence under sec. 176 is not perjury within sec. 1002 as to corroboration for the offence of "perjury, sec. 174."

*False statutory declaration*—See note to sec. 175.

"*If made on oath in a judicial proceeding*"—See secs. 170, 171, 174.

### **Fabricating evidence.**

**177.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to mislead any court of justice or person holding any such judicial proceeding, fabricates evidence by any means other than perjury or subornation of perjury.

*Origin*—Sec. 151, Code of 1892.

*Formalities of indictment*—See secs. 859 and 862, 852-856, 864.

*Inciting to give false evidence*—It is a common law misdemeanor to incite a witness to give particular evidence where the inciter does not know whether it be true or false. *Ex parte Overton*, 2 Rose 257. This offence differs from subornation in that it is not necessary to prove that the evidence was in fact given, or was false to the knowledge of the witness. Archbold Cr. Evid., 1019. And by Code sec. 70 every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be *likely* to be committed in consequence of such counselling or procuring.

The offence is complete if the evidence is fabricated with intent to mislead a judicial tribunal even if the evidence is not used. *R. v. Vreones* [1891], 1 Q.B. 360; 17 Cox C.C. 267; 60 L.J.M.C. 62.

*Summary trial*—See *R. v. Harding* (1918), 13 O.W.N. 37.

*Dissuading witness from giving evidence*—See sec. 180.

### **Conspiring to bring false accusations.**

**178.** Every one is guilty of an indictable offence who conspires to prosecute any person for any alleged offence, knowing such person to be innocent thereof, and shall be liable,—

- (a) to imprisonment for fourteen years if such person might, upon conviction for the alleged offence, be sentenced to death or imprisonment for life;

- (b) to imprisonment for ten years if such person might, upon conviction for the alleged offence, be sentenced to imprisonment for any term less than life.

*Origin*—Sec. 152, Code of 1892.

*Other conspiracies*—As to conspiracy to defraud, see Code sec. 444, and conspiracy to commit an indictable offence, sec. 573, and note to the latter section on the subject of conspiracies generally.

**Administering oaths without authority.—Exceptions.**

**179.** Every justice or other person who administers, or causes to be administered, or receives, or causes or allows to be received, any oath or affirmation touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some law in force at the time being, or not authorized or required by any such law, is guilty of an indictable offence and liable to a fine not exceeding fifty dollars, or to imprisonment for any term not exceeding three months.

2. Nothing in this section contained shall be construed to extend to any oath or affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or to any oath or affirmation required or authorized by any law of Canada, or by any law of the province wherein such oath or affirmation is received or administered, or is to be used, or to any oath or affirmation, which is required or authorized by the laws of any foreign country to give validity to an instrument in writing or to evidence designed or intended to be used in such foreign country.

*Origin*—Sec. 153, Code of 1892; R.S.C. 1886, ch. 141, sec. 1.

*Affirmation instead of oath*—See Canada Evidence Act, sec. 14.

*Requisites of an "affidavit"*—In 1 Bacon's Abridgment 124, an "affidavit" is defined as "An oath in writing signed by the party deposing, sworn before and attested by him who hath authority to administer the same," and see Moxley & Whitely's Law Dictionary, quoting 2 Stephen's Commentaries; The Annual Practice (1915), at page 694.

In *Phillips v. Prentice*, 2 Hare 542, 12 L.J. Ch. p. 497 (1843), Sir James Wigram, V.C., held that the omission in an affidavit of the word "oath" or some equivalent expression is not cured by the jurat representing it as "sworn." *R. v. Marshall* (1915), 24 Can. Cr. Cas. 180, 31 W.L.R. 702, is to the same effect.

**Corrupting witness.—Corrupting juryman.—Accepting bribes.—  
Wilfully obstructing course of justice.**

**180.** Every one is guilty of an indictable offence and liable to two years' imprisonment who,—

- (a) dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means from giving evidence in any cause or matter, civil or criminal; or,
- (b) influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or,
- (c) accepts any bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or,
- (d) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice.

*Origin*—Sec. 154, Code of 1892; R.S.C. 1886, ch. 173, sec. 30, as to clauses (b) and (c).

*Wilfully attempts*—Compare as to the meaning of "wilful," sec. 285 as to "wilful misconduct" and "wilful neglect" under the latter section. A conviction for "unlawfully" committing an act does not sufficiently charge that the act was "wilfully" done to constitute an offence under a statute which makes the latter an essential element of the offence. *Ex parte O'Shaughnessy*, 8 Can. Cr. Cas. 136, 13 Que. K.B. 178. Compare sec. 205 as to wilfully doing any indecent act in a public place.

*Corrupt means to dissuade a witness*—If threats, bribes, or corrupt means are used, it is no answer that the accused believed that the evidence he sought to suppress was untrue. *R. v. Silverman*, 17 O.L.R. 248, 14 Can. Cr. Cas. 79.

Clause (a) is limited to the cases of witnesses since it is only witnesses who "give evidence," but it includes a witness who has not been served with a subpoena. *R. v. Lake*, (1906), 6 Terr. L.R. 345, 3 W.L.R. 244, 11 Can. Cr. Cas. 37.

*Competency of tribunal*—Code sec. 180 contemplates that the person to be dissuaded from giving evidence must be required to give evidence before a tribunal having proper authority to take the evidence; it is not an offence to dissuade a person from making a statement before a person having no authority whatever to take evidence. *B. v. Rosen* [1917], 1 W.W.R. 582, 9 Sask. L.R. 401, 27 Can. Cr. Cas. 259.

*Special statutes as to tampering with witnesses*—See Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 150; *R. v. Armstrong* (1916), 26 Can. Cr. Cas. 151, 36 O.L.R. 2, 9 O.W.N. 472; *R. v. Lawrence*, 43 U.C.Q.B. 164; *R. v. Gibson*, 29 N.S.R. 88; *ex parte White* (1890), 30 N.B.R. 12; *R. v. Le Blanc* (1885), 8 Montreal L.N. 114.

*Attempt to defeat the course of justice*—For one person to impersonate another and to act as juryman in the place of that other is an interference with the course of justice punishable as a contempt of court. *R. v. Levy, ex parte Hobbs* [1916], W.N. 30, 32 Times L.R. 238.

But where contempt is charged, the offence must be distinctly stated and an opportunity given to the accused to answer the charge. *R. v. Evans, (re Fisher)* (1915), 8 W.W.R. 444, 24 Can. Cr. Cas. 125; *Chang Hang v. Piggott* [1909], A.C. 312.

If the impersonation be by a man not qualified to serve, a mistrial results. *R. v. Wakefield* (1918), 87 L.J.K.B. 319; *R. v. Mellor*, 27 L.J.M.C. 121, 1 Dears. & B. 468.

It is an obstruction of the course of justice to publish newspaper articles inducing the jury to be prejudiced by imputations against the character of a person charged with crime which would not be admissible in evidence on his trial. *R. v. Tibbits* [1902], 1 K.B. 77.

A charge under sub-sec. (d) based on non-attendance to give evidence should indicate some reason why the attendance of the person who was induced by the accused to stay away was essential to the due administration of justice. *R. v. Lake*, 6 Terr. L.R. 345, 3 W.L.R. 244, 11 Can. Cr. Cas. 37.

*"Any cause or matter, civil or criminal"*—These words are sufficient to cover every proceeding of whatever character in any court of whatever kind. *R. v. Lake, supra*; *R. v. Holland*, 14 C.L.T. 294; *R. v. Leblanc*, 8 Mont. L.N. 114; *R. v. Cornellier*, 29 L.C.J. 69; and see *R. v. Gibson*, 29 N.S.R. 88.

*Conspiracies and attempts generally*—See secs. 72, 570-573.

*Ontario*—It is made by statute in Ontario the duty of the sheriff at the sittings of the High Court Division for trials by jury and of the court of general sessions of the peace to post up in the court-room and jury-rooms, and in the general entrance hall of the court-house, printed copies in conspicuous type, of sec. 180 of the Criminal Code. *R.S.O. 1914, ch. 64, sec. 112.*

*Contempt of court by unfair newspaper comment*—See sec. 322.

### Compounding penal actions.

**181.** Every one is guilty of an indictable offence and liable to a fine not exceeding the penalty compounded for who, having brought, or under colour of bringing, an action against any person under any penal statute in order to obtain from him any

penalty, compounds the said action without order or consent of the court, whether any offence has in fact been committed or not.

*Origin*].—Sec. 155, Code of 1892; R.S.C. 1886, ch. 173, sec. 31.

*Compounding a criminal prosecution*].—An agreement to stifle or compound a criminal prosecution is illegal if the offence be really one against public order and not merely a quasi-criminal offence against a private party as to which the law affords the latter a remedy of procedure under the criminal law. *Bruce v. Western Canada Flour Mills Co. (Man.)* [1917] 3 W.W.R. 365; *Kier v. Leeman*, 9 Q.B. 371, 15 L.J.Q.B. 359; *Windhill v. Vint*, 45 Ch. D. 351; *Fisher v. Appolinaris Co.*, 44 L.J. Ch. 500, L.R. 10 Ch. App. 297 (a trade mark prosecution); *Williams v. Bayley*, L.R. 1 H.L. 200; *Jones v. Merionethshire, etc., Socy.* [1892] 1 Ch. 173; *Morgan v. McFee* (1908), 14 Can. Cr. Cas. 308; *McLatchie v. Haslam*, 17 Cox C.C. 402. The rule applies not only to offences which were formerly felonies but to those which, although misdemeanors only, were more particularly offences against public order rather than private injuries. *Keir v. Leeman*, *supra*; *B. v. Mabey*, 37 U.C.Q.B. 248; *Morgan v. McFee* (1908), 14 Can. Cr. Cas. 308 (Ont.). It is not always easy to determine the line of demarcation between the two classes. Obtaining money by false pretenses has been held to be essentially a public crime not to be compromised; *Morgan v. McFee*, *supra*; but common assault being one as to which the aggrieved party may, at his option, take either civil or criminal proceedings, is one which may be compromised. *Keir v. Leeman*, *supra*. So also are trade-mark offences as to which the Criminal Code adds a mode of criminal prosecution to the civil remedy previously available and gives the prosecutor a choice of remedies. *Fisher v. Appolinaris Co.*, L.R. 10 Ch. App. 297. An offence is compounded when the agreement is made not to prosecute for it. *R. v. Burgess*, 16 Q.B.D. 141. It is important in many cases to ascertain whether the compounded offence was a felony or a misdemeanor before the abolition by the Criminal Code of the distinction between them as regards prosecution for the offence itself. Compounding a felony was illegal at common law and constituted in itself a misdemeanor punishable by fine and imprisonment. If reparation takes the form of a bargain whether with the accused or his friends that he will not be prosecuted, the bargain is illegal and cannot be enforced. *Jones v. Merionethshire* [1892] 1 Ch. 173. Whether an offence against a provincial statute is or is not a "crime" so as to make its compromise illegal will depend on the nature of the offence and it is probable that the same considerations would apply as in the case of misdemeanors under federal law. *R. v. Mabey*, 37 U.C.Q.B. 248; *re Fraser* 1 C.L.J. 326. Furthermore, the provincial law may itself declare the illegality of a compromise and impose restrictions and penalties. *Stewart v. Colonial Engineering Co.* (1908), 33 Que. S.C. 420. So the compounding

of a *qui tam* action without the consent of the Crown or of the court may be prohibited by provincial law in a matter within the scope of provincial legislation. *Laprés v. Massé*, 19 Que. S.C. 275.

It is open to the court in investigating the legality of an agreement by friends of the accused to make reparation to the defrauded party to find that it was an implied term of same that there should be no prosecution although there was no express promise. *Jones v. Merionethshire* [1892] 1 Ch. 173 affirming [1891] 2 Ch. 587; *Leggatt v. Brown* (1899), 30 Ont. R. 225, affirming 29 Ont. R. 530. Where the public have a higher interest than the private prosecutor because of the offence being one against public order, and a true bill has been found, the private prosecutor is not without the leave of the court to abandon the prosecution even by way of offering no evidence. *R. v. Nicholson* (1899) cited in *Archbold's Cr. Pldg.* (1900) 1035; and if he takes money to settle the prosecution he may be liable to fine under the statute 18 Eliz. ch. 5. *R. v. Mason*, 17 U.C.C.P. 534. The aggrieved party may receive back the money or goods of which he was deprived by criminal means so long as he does not agree not to prosecute. *Morgan v. McFee* (1908), 14 Can. Cr. Cas. 308.

An agreement by third parties to pay money misappropriated by a trustee in consideration of the stifling of the prosecution would be invalid as founded upon an illegal consideration. *Major v. McCraney*, 29 S.C.R. 183, 2 Can. Cr. Cas. 547. An agreement to drop a prosecution for malicious injury to chattels has been held to be illegal in Alberta. *Johnson v. Musselman* [1917], 1 W.W.R. 527, 28 Can. Cr. Cas. 165.

The justice or magistrate holding a preliminary enquiry cannot by his assent to a compromise validate an invalid agreement. *Morgan v. McFee* (1908), 14 Can. Cr. Cas. 308.

#### **Corruptly taking reward without bringing offender to trial.**

**182.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who corruptly takes any money or reward, directly or indirectly, under pretense or upon account of helping any person to recover any chattel, money, valuable security or other property which, by any indictable offence, has been stolen, taken, obtained, extorted, converted or disposed of, unless he has used all due diligence to cause the offender to be brought to trial for the same.

*Origin*—Sec. 156, Code of 1892; R.S.C. 1886, ch. 164, sec. 89; 24-25 Vict. Imp. ch. 96, sec. 101.

*Receiving money to assist in recovering stolen goods*—If the person receives the money corruptly and with no intention to do anything for the detection of the thief, he is punishable under this section although

he had no special means of information and did not know or pretend to know who the thief was. *R. v. Ledbitter*, 1 Mood. C.C. 76; *R. v. King*, 1 Cox C.C. 36. It is an offence likewise to act for the owner in buying back from the thief the owner's goods without taking steps to have the thief prosecuted. *R. v. Pascoe*, 1 Den. C.C. 456, 18 L.J.M.C. 186.

**Advertising reward and immunity for offender.—Making use of words in advertisement to like effect.—Advertising that money advanced on property stolen will be paid.**

**183.** Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction, who,—

- (a) publicly advertises a reward for the return of any property which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked; or,
- (b) makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property; or,
- (c) promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought, any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property; or,
- (d) prints or publishes any such advertisement.

*Origin*—Sec. 157, Code of 1892; R.S.C. 1886, ch. 164, sec. 90.

*Time limitation*—Prosecution to be within six months from commission of offence. Sec. 1140.

**False declaration in respect to execution of judgment of death.**

**184.** Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and wilfully signs a false certificate or declaration, when a certificate or declaration is required, with respect to the execution of judgment of death on any prisoner.

*Origin*—Sec. 158, Code of 1892; R.S.C. 1886, ch. 181, sec. 19.



*Escapes and Rescues.***Being at large while under sentence of imprisonment.**

**185.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him.

*Origin*—Sec. 159, Code of 1892.

*"Having been sentenced"*—The fact of the sentence being in force when the defendant was found at large is sufficiently proved by the certificate of the conviction and sentence, if the judgment remains unreversed, and this although it appears on the face of the certificate that the sentence was one which could not legally have been inflicted on the defendant for the offence of which according to the certificate he had been convicted. *R. v. Finney*, 2 C. & K. 274. Where the conviction is by justices on summary trial under Part XVI the formal conviction or a certified copy must be produced. *R. v. Taylor*, 12 Can. Cr. Cas. 245; Code sees. 793, 794.

*Ticket of Leave*—It may be proved as a defence that the prisoner is at large conditionally under a license or ticket of leave or otherwise and that the conditions have been observed. The license issued under the authority of the Ticket of Leave Acts, R.S.C. 1906, ch. 150, may be revoked by the Governor-General either with or without cause assigned. *R. v. Johnson*, 4 Can. Cr. Cas. 178 (Que.). The revocation by the Crown without cause assigned does not interrupt the running of the sentence, and the latter terminates at the same time as it would had no license been granted. *Ibid.*; and see as to conviction while on leave. *R. v. McColl*, 21 Man. R. 552, 19 W.L.R. 515, 19 Can. Cr. Cas. 59.

*Pardon*—A pardon is a good defence. *R. v. Miller*, W.B. 797, 1 Leach C.C. 74; but the sentence revives if the terms of a conditional pardon are not observed. *R. v. Madan*, 1 Leach C.C. 223; *Aickles' Case*, 1 Leach C.C. 390.

*Juvenile delinquents*—See the Juvenile Delinquents Act 1908 Can. ch. 40, as amended 1912 Can. ch. 30, 1914 Can. ch. 39.

*"Without some lawful excuse"*—Aside from the provisions of the Code, the common law rule was that the period during which a person under sentence was improperly at liberty is not to be counted as part of his term of imprisonment. *R. v. Taylor*, 12 Can. Cr. Cas. 245, 249 (Alta.).

But it would seem that if there has been arrest under a summary conviction, the term of the sentence will continue to run during the period for which the accused was removed to a hospital from the gaol. *R. v. Peters* (1918), 29 Can. Cr. Cas. 298 (N.S.).

An order made by a magistrate for bail pending an appeal when in fact there was no right of appeal, does not afford a "lawful excuse." *R. v. Taylor*, 12 Can. Cr. Cas. 245 (Alta.); *Robinson v. Morris*, 19 O.L.R. 633, 23 Can. Cr. Cas. 209, overruling *R. v. Robinson*, 14 O.L.R. 519, 12 Can. Cr. Cas. 447.

A person illegally released on bail must be held to have known the law and therefore to have known that he was improperly at large. *R. v. Taylor*, *supra*, applying *Bank of N.S.W. v. Piper* [1897] A.C. 383. But where the granting of bail is declared illegal and a conviction is made in respect thereof for being unlawfully at large, the sentence for the offence may properly be made to run concurrently with the equivalent of the unexpired portion of the original sentence which is to be imposed under sec. 196 on every one who "escapes" from custody. *R. v. Taylor*, *supra*; and see note to sec. 196.

*Territories*—The offence under sec. 185 is within the N.W.T. Act, sec. 66 (d) as an escape from lawful custody, and there is no right to elect a jury trial where that statute is in force. *R. v. Taylor*, 12 Can. Cr. Cas. 245, 246.

*Effect of escape on pending habeas corpus motion*—See *re Bartels*, 13 Can. Cr. Cas. 59.

**Assisting prisoner of war to escape.**—Assisting while at large on parole.

**186.** Every one is guilty of an indictable offence and liable to five years' imprisonment who knowingly and wilfully,—

- (a) assists any alien enemy of His Majesty, being a prisoner of war in Canada, to escape from any place in which he may be detained; or,
- (b) assists any such prisoner as aforesaid, suffered to be at large on his parole in Canada or in any part thereof, to escape from the place where he is at large on his parole.

*Origin*—Sec. 160, Code of 1892; 52 Geo. III Imp. ch. 156; 5455 Vict., Imp., ch. 69, sec. 1.

**Prison-breach.**

**187.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by force or violence, breaks

any prison with intent to set at liberty himself or any person confined therein on any criminal charge.

*Origin*—Sec. 161, Code of 1892.

*"Prison"*—See sec. 2, sub-sec. (30), which makes this term include a gaol, lock-up, guard-room "or other place in which persons charged with the commission of offences are usually kept or detained in custody,"

Where it is proved that a town "lock-up was constantly used as a place for the detention of persons arrested upon charges of criminal offences and that the defendant was a prisoner therein, the regularity of all proceedings necessary to constitute the lock-up a regularly established lock-up or prison is to be presumed. *R. v. Brown*, 13 Can. Cr. Cas. 133, 41 N.S.R. 293.

*"By force and violence"*—where force and violence is not proved, the charge should be laid for an escape (secs. 189, 190, 196) or for unlawfully being at large while under sentence (sec. 185) or for an attempt to escape (sec. 571). See *R. v. Haswell*, Russ. & Ry. 458.

*Yukon Territory*—As to summary trial in the Yukon see the Yukon Act, R.S.C., ch. 63 sec. 65.

#### **Attempt to break prison.**

**188.** Every one is guilty of an indictable offence and liable to two years' imprisonment who attempts to break prison, or who forcibly breaks out of his cell or makes any breach therein with intent to escape therefrom.

*Origin*—Sec. 162, Code of 1892; R.S.C. 1866, ch. 155, sec. 5.

*"Prison"*—See sec. 2, sub-sec. (30).

*"Attempts" to break prison*—As to attempts generally, see sec. 72. Doing something with intent to commit the offence is not necessarily sufficient to constitute an "attempt." *R. v. Labourdette*, 13 B.C.R. 443, 13 Can. Cr. Cas. 379.

#### **Escapes after conviction.—Escaping from prison.**

**189.** Every one is guilty of an indictable offence and liable to two years' imprisonment who,—

- (a) having been convicted of any offence, escapes from any lawful custody in which he may be under such conviction; or,

(b) whether convicted or not, escapes from any prison in which he is lawfully confined on any criminal charge.

*Origin*—Sec. 163, Code of 1892.

*"Offence"*—See secs. 15, 69-71. The word "offence" as here used is presumably restricted to offences under federal jurisdiction. The question whether the Prisons Act, R.S.C. 1906, ch. 148, sec. 3, applied to an offence against an Ontario Act was discussed in *Robinson v. Morris*, 19 O.L.R. 633, 23 Can. Cr. Cas. 209, in which *R. v. Robinson*, 14 O.L.R. 519, 12 Can. Cr. Cas. 447 was overruled, but the court found it unnecessary to determine that question, as, whether it applied or not, the plaintiff was not entitled to count as a part of his sentence under an Ontario law, the time during which he had been allowed out on bail after conviction and before his arrest on a warrant of commitment; and this would be so whether or not the allowance of bail under the circumstances was illegal.

*"Escapes"*—"An escape is where one who is arrested gains his liberty before he is delivered by due course of law (*Termes de la Ley*):" *Russell on Crimes and Misdemeanours*, 7th ed., vol. 1, p. 555. "It is . . . criminal in a prisoner to escape from lawful confinement on a criminal charge though no force or artifice be used on his part to effect such purpose. Thus, a prisoner is guilty of a misdemeanour if he goes out of his prison by license of the keeper (*Attorney-General v. Hobert* (1631), Cro. Car. 210), without any obstruction . . . or if he escapes in any other manner, without using any kind of force or violence:" *Russell on Crimes and Misdemeanours*, 7th ed., vol. 1, p. 555; (quoted in *R. v. Rapp*, 23 Can. Cr. Cas. 203 at 208), and see *R. v. Nugent*, 11 Cox C.C. 64. Code sec. 185 provides specially for the offence of a convicted person under sentence "being at large" without some lawful excuse.

*"Prison"*—See sec. 2, sub-sec. (30).

*Bail*—The escape of an unconvicted person held in prison to answer a charge of theft is aailable offence along with such charge; the recognizance may be conditioned to suit the impending trials of several offences before different tribunals. *R. v. Drake* (1918) 29 Can. Cr. Cas. 174, per *Russell, J.* (N.S.).

*Justification of means to prevent escape*—See secs. 41-45.

*Prison breach*—See secs. 187, 188; the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, as amended 1908, ch. 55, 1910, ch. 48, 1912, ch. 43, 1913, ch. 39, 1914, ch. 14; the Penitentiaries Act, R.S.C. 1906, ch. 147, as amended 1913, ch. 36.

*Yukon Territory*—As to summary trial in the Yukon, see the Yukon Act, R.S.C., ch. 63, sec. 65.

*North-West Territories*—For special provisions as to trial see N.W.T. Act, R.S.C., ch. 62, secs. 37-55.

*Recaption*—See *R. v. Hall*, 27 Can. Cr. Cas. 1 (N.S.) and *R. v. Peters*, 29 Can. Cr. Cas. 298 (N.S.).

### **Escape from custody.**

**180.** Every one is guilty of an indictable offence and liable to two years' imprisonment who being in lawful custody other than as aforesaid on any criminal charge, escapes from such custody.

*Origin*—Sec. 164, Code of 1892.

"*Other than as aforesaid*"—See secs. 185-189.

"*On any criminal charge*"—If a prisoner who has applied for a writ of habeas corpus in review of an extradition warrant escapes after the issue of such a writ and pending the argument upon its return, and thus himself puts an end to the detention, he thereby waives all right which he might have had under the writ, and no order can be afterwards made for his release, even though he may have meanwhile again come into custody of the same sheriff. If, however, in such a case he is recaptured or surrenders himself again into custody, the Court is not precluded from granting him another writ of habeas corpus under proper circumstances, and where there has not already been an adjudication upon the merits. *Re Bartels*, 15 O.L.R. 205, 13 Can. Cr. Cas. 59.

And see *ex parte Lamirande*, 10 L.C. Jurist 280.

### **Rescuing or assisting to escape in other cases.—Officer permitting escape.**

**181.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who,—

- (a) rescues any person or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under sentence of death or imprisonment for life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with death or imprisonment for life; or,

- (b) being a peace officer and having any such person in his lawful custody, or being an officer of any prison

in which any such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

*Origin*—Sec. 165, Code of 1892.

*Peace officer*—See sec. 2, sub-sec. (26).

*Assisting an attempt to escape*—See sec. 72 as to what constitutes an "attempt." If a prisoner conceals himself with the intention of escaping, that may or may not be sufficient evidence of an attempt according to the circumstances. *R. v. Labourdette*, 13 B.C.B. 443, 8 W.L.R. 402; and see *R. v. Hagel*, 6 W.W.R. 164.

"*Prison*"—See sec. 2, sub-sec. (30).

**Rescuing or assisting to escape in other cases.—Officer permitting escape in other cases.**

**192.** Every one is guilty of an indictable offence and liable to five years' imprisonment who,—

- (a) rescues any person, or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term less than life; or,
- (b) being a peace officer having any such person in his lawful custody, or being an officer of any prison in which such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

*Origin*—Sec. 166, Code of 1892.

"*Under a sentence of imprisonment etc.*"—A person acquitted of crime on the ground of insanity and committed by order of the Lieutenant-Governor to an asylum for the criminal insane is so committed on an indeterminate sentence and remains in custody as a person who has committed a criminal act, see Code secs. 966-970; another person assisting his escape from the asylum is liable under sec. 192.

*R. v. Trapnell*, 17 Can. Cr. Cas. 346.

"*Peace officer*"—See definition of this term in Code sec. 2 (26) as amended in 1913.

**Escape by failure to perform legal duty.**

**193.** Every one is guilty of an indictable offence and liable to one year's imprisonment, who, by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom.

*Origin*—Sec. 166A, Code of 1892; 63-64 Vict. Can. ch. 46, sec. 3.

*Officer permitting escape of person in custody*—The section is aimed at negligent conduct from which an escape results. *R. v. Shuttleworth*, 22 U.C.R. 372.

A person who has power to bail is guilty of negligent escape by bailing one whom he knows is not bailable: *Russell on Crimes and Misdemeanours*, 7th ed., vol. 1, p. 557; *B. v. Rapp*, 23 Can. Cr. Cas. 203, 206, per Biddell, J.

**Escape by conveying things into prison.**

**194.** Every one is guilty of an indictable offence and liable to two years' imprisonment who with intent to facilitate the escape of any prisoner lawfully imprisoned conveys, or causes to be conveyed, any thing into any prison.

*Origin*—Sec. 167, Code of 1892.

"Prison"—See sec. 2, sub-sec. (30).

**Causing discharge of prisoner under pretended authority.**

**195.** Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, and the person so discharged shall be held to have escaped.

*Origin*—Sec. 168, Code of 1892; R.S.C. 1886, ch. 155, sec. 8.

**Full term to be served when retaken.**

**196.** Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, a term equivalent to the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape.

2. Any imprisonment so awarded may be to the penitentiary or prison from which the escape was made.

*Origin*—Sec. 169, Code of 1892; R.S.C. 1886, ch. 155, sec. 11.

*Escapes from custody*—Where a person has been illegally released on bail he has technically "escaped from custody." *R. v. Taylor*, 12 Can. Cr. Cas. 244 at 250; *R. v. Rapp* (1914), 23 Can. Cr. Cas. 202; *Robinson v. Morris*, 23 Can. Cr. Cas. 209, 19 O.L.R. 633. A person convicted and sentenced who on the ground of appealing obtains his liberty on bail although there was in fact no right of appeal, must be taken to have known the law and the fact that the magistrate made the illegal order for bail was held in *R. v. Taylor*, supra, not to operate as a lawful excuse to the accused for being at large. See Code sec. 16. But *quære* whether an order for bail is not within Code secs. 26 and 27 so as to justify not only the officer but the accused as a person in good faith "assisting in carrying out the same." The latter sections imply that there may be "lawful assistance" in carrying out an order made without jurisdiction.

What sec. 27 demands is "good faith" and a "belief of jurisdiction" which are matters quite apart from the legal maxim "*Ignorantia legis non excusat*" now embodied in the Code as sec. 22.

An escape from custody puts an end to a pending habeas corpus application made on the prisoner's behalf, but a new writ may issue on his re-capture or surrender. *Re Bartels* (1907), 15 O.L.R. 205; *Ex parte Lamirande* (1866), 10 L.C. Jur. 280.

*Return to custody after escape*—The prisoner escaping from the constable's custody while being taken to jail under sentence in a summary conviction matter may be re-captured under the original commitment. *R. v. Hall* (1916) (N.S.), 27 Can. Cr. Cas. 1, 32 D.L.R. 236. The escape is not a voluntary one on the part of the constable where he became intoxicated on the way and in consequence allowed the prisoner his freedom. *R. v. Hall*, supra.

If the person summarily convicted was in fact let out on bail before being taken in charge under the sentence or under a warrant of commitment, the intermediate period until his close custody actually commenced will not count as part of his sentence. R.S.C. 1906, ch. 148; *Robinson v. Morris*, 19 O.L.R. 633, 23 Can. Cr. Cas. 209, overruling *R. v. Robinson* (1907), 14 O.L.R. 519, 12 Can. Cr. Cas. 447; and see *R. v. Taylor* (1906), 12 Can. Cr. Cas. 244.

If the statute R.S.C. 1906, ch. 148, sec. 3, is not applicable to a summary conviction under a provincial law, the term of imprisonment under such conviction awarding imprisonment for a stated number of months or days would not commence until the accused was taken into close custody under the conviction or commitment or until his lodgment



in gaol thereunder, *Robinson v. Morris*, *supra*; *R. v. Robinson* (1907), 14 O.L.R. 519, 12 Can. Cr. Cas. 447, overruled; *R. v. Taylor* (1906), 12 Can. Cr. Cas. 244, approved.

*Return to custody after conditional release*—If a convict released under license from a provincial prison is sentenced for another crime to the penitentiary and so forfeits his license, the unexpired term in the provincial prison is not to be added to the penitentiary sentence, but after the expiry of the latter he is to be returned to the provincial prison to serve out the original term, or if that sentence is under a federal law and the second sentence is in another province he may be sent to a prison in that province to complete the first sentence. *R. v. McColl* (1911), 21 Man. R. 552, 19 W.L.R. 515, 19 Can. Cr. Cas. 59.

*"Penitentiary" or "prison"*—By sec. 2 (30), unless the context otherwise requires, the word "prison," when used in the Code, includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard-room or other place in which persons charged with the commission of offences are usually kept or detained in custody.

## PART V.

### OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

#### *Interpretation.*

#### **Definitions.**

**197.** In this Part, unless the context otherwise requires,—

- (a) ‘theatre’ includes any place open to the public, gratuitously or otherwise, where dramatic, musical, acrobatic or other entertainments or representations are presented or given;
- (b) ‘guardian’ includes any person who has in law or in fact the custody or control of any girl or child referred to;
- (c) ‘public place’ includes any open place to which the public have or are permitted to have access and any place of public resort.

*Origin*—3 Edw. VII, Can., ch. 13, sec. 2; 63-64 Vict., Can., ch. 46, sec. 3; 57-58 Vict., Can., ch. 57, sec. 1.

*Public place*—A licensed saloon and billiard hall is a “public place” under Code sections 197 and 238, and a person causing a disturbance therein by being drunk is liable as a vagrant under sec. 238. *R. v. Kearney and Denning*, 12 Can. Cr. Cas. 349, (Y.T.); *Langrish v. Archer*, 10 Q.B.D. 44; *Ex parte Freestone*, 25 L.J.M.C. 121.

A public place does not mean a place devoted solely to the uses of the public, but it means a place which is in point of fact public, as distinguished from private, to a place that is visited by many persons, and usually accessible to the neighboring public. A place may be public during some hours of the day and private during other hours. The term is a relative one. What is a “public place” for one purpose is not for another. A “public place,” within the meaning of a statute prescribing the time and place for posting notices of tax sales, may not be a “public place” within the common law definition of an affray, and so a place which is public in one community is not necessarily so in another. *Roullier v. Town of Magog* (1909), 37 Que. S.C. 246.

"Public place" is a fluctuating term, and the meaning varies with the context. *Grove, J., in Regina v. Wellard (1884), 14 Q.B.D. 63, said: "A public place is one where the public go, no matter whether they have a right to go or not."*

### *Offences Against Religion.*

#### **Blasphemous libels.—Question of fact.—Expression of opinion.**

**198.** Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel.

2. Whether any particular published matter is a blasphemous libel or not is a question of fact: Provided that no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

*Origin*—Sec. 170, Code of 1892.

*Formalities of indictment*—See secs. 859, 861, 852, 853.

*Blasphemous libel*—Publications which in an indecent and malicious spirit assail and asperse the truth of Christianity or of the Scriptures in language calculated and intended to shock the feelings and outrage the belief of mankind are punishable as blasphemous libels. *R. v. Bradlaugh*, 15 Cox C.C. 217; *R. v. Hetherington*, 4 St. Tr. (N.S.) 563, 590; *R. v. Pelletier (1900)*, 6 *Revue Legale*, N.S. 116. But if the decencies of controversy are observed even the fundamentals of religion may be attacked without the right of being guilty of blasphemous libel. *R. v. Ramsay & Foote*, 15 Cox C.C. 231, 238, 1 Cab. & El. 126; *Odgers' Libel*, 3rd ed., 466. And see *re Bowman*, *Secular Society v. Bowman [1915]*, 2 Ch. 447, 31 Times L.R. 618.

No justification of a blasphemous libel can be pleaded nor is argument as to its truth permitted. *Cooke v. Hughes, Ry. & M.* 112; *R. v. Tunbridge*, 1 St. Tr. (N.S.), 1168; *R. v. Hicklin*, L.R. 3 Q.B. 360. Code secs. 910 and 911 as to pleas of justification are limited to cases of defamatory libels.

#### **Obstructing officiating clergyman.**

**199.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-

house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place.

*Origin*—Sec. 171, Code of 1892; R.S.C. 1886, ch. 156, sec. 1.

*Unlawfully obstructs*—There is no offence if the minister had not the permission of the proper church authorities, but was in fact a trespasser in attempting to conduct the service. *R. v. Wasyl Kapij*, 15 Man. R. 110, 1 W.L.R. 130, 9 Can. Cr. Cas. 186.

Compare *Holiness Movement v. Horner*, 13 O.W.N. 29; *Stein v. Hauser* (1913), 5 W.W.R. 971; *Free Church of Scotland v. Overtoun* [1904] A.C. 515; *Zacklinski v. Poluskie* [1908] A.C. 65, affirming 37 Can. S.C.R. 177, and see the case below at 1 W.L.R. 32.

#### **Violence to officiating clergyman.**

**200.** Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or arrests upon any civil process or under the pretense of executing any civil process, any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in the last preceding section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof.

*Origin*—Sec. 172, Code of 1892; R.S.C. 1886, ch. 561, sec. 1.

#### **Disturbing meetings for religious worship or special purposes.**

**201.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment, to one month's imprisonment, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting.

*Origin*—Sec. 173, Code of 1892; R.S.C. 1886, ch. 156, sec. 2.

*Disturbing public meeting*—If a person not belonging to the association which rents the hall enters it during the meeting and calls upon his own co-religionists to leave the meeting at a time when he has no privilege of addressing the audience, he is liable to conviction. *Moore v. Gauthier*, 14 Que. K.B. 530, 11 Can. Cr. Cas. 203.

*Offences Against Morality.***Buggery.**

**202.** Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature.

*Origin*—Sec. 174, Code of 1892; R.S.C. 1886, ch. 157, sec. 1.

*Buggery*—This offence, also called sodomy, is the carnal copulation against nature by human beings with each other or with a beast. 1 Bishop Cr. Law 380. There must be a penetration per anum. Archbold Cr. Plead. (1900), 879. A penetration of the mouth is not sodomy; *Rex v. Jacobs*, Russ. & Ry. 331; but is punishable as an act of indecency. See sec. 206. Unlike rape, sodomy may be committed between two persons, both of whom consent, and even by husband and wife. *R. v. Jellyman*, 8 C. & P. 604. Whichever is the pathic, both may be indicted. *R. v. Allen*, 1 Den. C.C. 364; 2 C. & K. 869.

*Evidence*—The common law presumption is, that a person under fourteen is incapable of having carnal knowledge, not merely that such a person is incapable of committing rape. It is because of the presumption, so understood, that a person under fourteen cannot be convicted of rape. The case of *The Queen v. Allen*, 1 Den. 364, shows that the same presumption applies to cases of unnatural crime. *R. v. Hartlen* (1898), 2 Can. Cr. Cas. 12 (N.S.), 30 N.S.R. 317. Penetration alone is now sufficient to constitute the offence. Code sec. 7.

Evidence is not admissible to prove that the defendant has a general disposition to commit the offence. *R. v. Cole*, 3 Russ. Cr., 6th ed., 251.

An equivocal statement of the accused will not avail as an admission of guilt. *R. v. Blyth*, 28 Can. Cr. Cas. 20, 11 O.W.N. 406.

Telling the jury to disregard evidence improperly admitted as to a prior offence will not be sufficient to validate the proceeding, if it must have resulted that notwithstanding such direction the jury could not clear their minds absolutely of the suspicion created by such evidence. *R. v. Barron* (1913), 9 Cr. App. R. 236 [1914], 2 K.B. 570; and see *R. v. Bond* [1906], 2 K.B. 389, 21 Cox C.C. 252.

It would seem that a prior acquittal for buggery will be an answer to a subsequent charge for any lesser offence based on the same evidence and for which he might have been convicted on the prior indictment. *R. v. Barron* [1914], 2 K.B. 570. But the decision in that case that a subsequent charge of gross indecency on the same facts was not barred under the English law is probably not applicable in Canada because of the special provisions of the Code authorizing conviction under the same indictment for lesser offences necessarily included therein. See secs. 907 and 951.

*Exclusion of public from trial*—Code sec. 645.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Assault with intent*—Code secs. 293, 294.

*Acts of gross indecency with male*—Code sec. 206.

#### **Attempt to commit buggery.**

**203.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the last preceding section.

*Origin*—Sec. 175, Code of 1892; R.S.C. 1886, ch. 157, sec. 1.

*Evidence*—It is desirable to give warning to the jury as to giving credence to the evidence of boys of from ten to twelve years in cases of assault with intent to commit sodomy. See *R. v. Cratchley* (1913), 9 Cr. App. R. 232.

*Exclusion of public from trial*—Code sec. 645.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

#### **Incest.**

**204.** Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, if aware of their consanguinity, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped: Provided that, if the court or judge is of opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section.

*Origin*—Sec. 176, Code of 1892; 53 Vict., ch. 37, sec. 8; Incest Act, 1906, Imp.; R.S.N.S. 3rd series, ch. 160; R.S.N.B. ch. 145; 24 Vict. (P.E.I.), ch 27, sec. 3.

*Evidence*—On a trial for incest, the only evidence against the accused was that of the child, a girl of 11 years, and of a woman who had known accused and the girl living together as father and daughter for some seven or eight months. This evidence was not rebutted:—Held, on appeal, that this was not sufficient proof of relationship to justify a conviction. *Rex v. Smith*, 13 B.C.R. 384, 13 Can. Cr. Cas. 403.

Evidence of penetration need not also include proof of emission. *R. v. Lindsay*, 26 Can. Cr. Cas. 163, 36 O.L.R. 171. Code sec. 7.

Medical evidence that the bodily state of a child is compatible with her story is corroboration thereof. *Rex. v. Cooper*, 10 Cr. App. R. 195.

Oral evidence is not admissible to prove relationship on a charge of incest in the Province of Quebec, and the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by the Canada Evidence Act, sec. 35, unless the absence of such registers is proved. *R. v. Garneau* (1899), 4 Can. Cr. Cas. 69, 8 Que. Q.B. 447. It is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed. *Ibid.*

In *Griffiths v. Reed*, 1 Hagg, E.C.C. 202, Sir John Nicholl, in an incest case, the parties being uncle and niece, said:—"It has been justly observed that the charge, if true, is highly criminal and scandalous; that it would subject the party to a severe punishment . . . and that therefore the proof of the charge must be clear and full."

Although in that case, the niece had given birth to a child, whose paternity was unaccounted for, the Judge dismissed the case, although the uncle and niece had slept in the same room, where however there were two beds, for thirteen years.

Even assuming that direct evidence of the offence is wanting in the case, the court hearing a case reserved on the question whether there was any evidence on which the conviction could be made, must affirm it if a fair and reasonable inference of guilt might be drawn, and it is unable to say it was improperly drawn; and where, if the case were being tried by a jury it could not properly be withdrawn from them. *R. v. Ward* (N.S.), 24 Can. Cr. Cas. 75.

*Woman as accomplice*—The corresponding English statute is the Incest Act, 1906. Where the parties are adults, the female consenting becomes an accomplice, and the rule as to corroboration of an accomplice's testimony becomes applicable; that is, the jury should be warned against accepting her uncorroborated story. *R. v. Dimes* (1911), 76 J.P. 47, 7 Cr. App. R. 43; *R. v. Ball* [1911], A.C. 47, 80 L.J.K.B. 69; *R. v. Bloodworth* (1913), 9 Cr. App. R. 80.

The mere oath of the prosecutrix that she resisted to the best of her strength does not prevent her from being an accomplice. It is open to the jury, where there had been an acquittal on another charge of rape, to believe that she offered some resistance and eventually submitted, without consenting in the sense of acting of her own free will. There is a distinction between submission and permission. The amount of corroboration required depends on the degree of complicity of the woman; if the jury finds that she consented she would be an accomplice. *R. v. Dimes* (1911), 7 Cr. App. R. 43.

Where such corroboration exists, the evidence of such a witness of other incestuous acts between the same parties (not charged in the indictment) is, on the authority of *R. v. Ball* [1911], A.C. 47, admissible, but if such evidence is uncorroborated, the jury should be warned against it. *R. v. Bloodworth*, 8 Cr. App. R. 80.

*Punishment by whipping*—See secs. 80, 204, 276, 292, 293, 301, 302, 446, 457, 1060.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Exclusion of public from trial*—Code sec. 645.

*Evidence of small children not under oath*—See Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 16; *R. v. Pailleur*, 20 O.L.R. 207, 15 Can. Cr. Cas. 339.

*Attempt*—See sec. 570. If the accused has done what he could to commit the crime of incest with a girl of seven years, he is properly convicted of an attempt. *R. v. Pailleur*, 20 O.L.R. 207, 15 Can. Cr. Cas. 339.

#### **Indecent acts in public places or as an insult.**

**205.** Every one is guilty of an offence and liable, on summary conviction before two justices, to a fine of fifty dollars or to six months' imprisonment with or without hard labour, or to both fine and imprisonment, who wilfully,—

- (a) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access; or,
- (b) does any indecent act in any place intending thereby to insult or offend any person.

*Origin*—Sec. 177, Code of 1892; 58 Vict., ch. 37, sec. 6.

*Evidence of single offence on summary conviction charge*—Only one offence should be included in a single information. Code sec. 710, sub-sec. (3). The same limitation applies to the evidence in support, except where the circumstances of other offences are not only admissible in proof of intent, but such proof is needed. *R. v. Boach* (1914), 23 Can. Cr. Cas. 28, 6 O.W.N. 632; *Thompson v. Director of Public Prosecutions* [1918], 87 L.J.K.B. 478, affirming *R. v. Thompson*, 86 L.J.K.B. 1321, [1917] 2 K.B. 630; *Perkins v. Jeffery*, 84 L.J.K.B. 1554, [1915] 2 K.B. 702; *R. v. Fisher*, 79 L.J.K.B. 187, [1910] 1 K.B. 149; *R. v. Rodley*, 82 L.J.K.B. 1070, [1913] 3 K.B. 468; *R. v. Mackenzie* (1910), 6 Cr. App. R. 64; *Director of Public Prosecutions v. Ball*, 80 L.J.K.B. 691, [1911] A.C. 47; *Dal Singh v.*



King-Emperor (1917), 86 L.J.P.C. 140; *Makin v. Attorney-General of N.S.W.*, 63 L.J.P.C. 41, [1894] A.C. 57; *R. v. Rhodes*, 68 L.J.Q.B. 83, [1899] 1 Q.B. 77; *R. v. Ollis*, 69 L.J.Q.B. 918, [1900] 2 Q.B. 758.

Evidence of the complainant of a prior indecent exposure by the defendant a few weeks previously is properly admitted to show that she was not mistaken in her identification, where the accused had said when arrested that they had the wrong man; such evidence was also relevant as showing that what was done by the accused was done wilfully and not accidentally, and that it was done to insult the complainant. *Perkins v. Jeffery* [1915], 2 K.B. 702, 84 L.J.K.B. 1554.

*Wilful indecency*—The act must have been done wilfully. *R. v. Clifford* (1916), 35 O.L.R. 287, 26 Can. Cr. Cas. 5, 26 D.L.R. 754; *R. v. Gerald* (1916), 26 Can. Cr. Cas. 7, 9 O.W.N. 346. The information is defective if it does not so charge, but the defect may be cured by the evidence. Code sec. 1124; *R. v. Clifford* (1916), 26 Can. Cr. Cas. 5, 35 O.L.R. 287; *R. v. Gerald* (1916), 26 Can. Cr. Cas. 7; *ex parte O'Shaughnessy*, 13 Que. K.B. 178, 8 Can. Cr. Cas. 136. *R. v. Tupper*, 11 Can. Cr. Cas. 199; *R. v. Barre*, 15 Man. B. 420, 11 Can. Cr. Cas. 1.

Indecent gestures in a public place while singing an obscene song may constitute an indecent act within sec. 205. *R. v. Jourdan*, 8 Can. Cr. Cas. 337.

*Place to which public have access*—It will be noticed that where the act is done with intent to insult or offend (sub-sec. (b)), the phrase used is "in any place" as distinguished from the limitation made in sub-sec. (a). *Berman v. Kocurka* (1915), 25 Can. Cr. Cas. 44 (Que.)

Sub-sec. (a) does not aim at the punishment of an act of indecency unless there is some third person present at the time of the occurrence.

*Stephen's Digest*, 6th ed., p. 132; *Regina v. Wellard* (1884), 14 Q.B.D. 63; *Thallman's Case* (1863), L. & C. 326; *Bex v. Cook* (1912), 20 Can. Cr. Cas. 201, 8 D.L.R. 217, 27 O.L.R. 406; *Regina v. Watson* (1847), 2 Cox C.C. 376; *Elliot's Case* (1861), L. & C. 103.

Under this sub-section the act is punishable only when committed in any place to which the public have or are permitted to have access. The phraseology of the English statute 14 & 15 Vict., ch. 100, sec. 29, is different in that respect. *R. v. Clifford* (1916), 35 O.L.R. 287, 26 Can. Cr. Cas. 5, 26 D.L.R. 754.

A massage parlor has been held to be a public place. *R. v. Clifford*, 35 O.L.R. 287, 26 Can. Cr. Cas. 5; and see *ex parte Walter*, *Ramsay's App. Cas.*, Que. 183; *R. v. Lavoisier*, 9 Montreal, L.N. 386.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Excluding public from trial*—See sec. 645.

**Acts of gross indecency between male persons.**

**206.** Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person.

*Origin*].—Sec. 178, Code of 1892; 53 Vict., Can., ch. 37, sec. 5; Criminal Law Amendment Act, 1885, Imp., 48-49 Vict., ch. 69, sec. 11.

*Excluding public from trial*].—Code sec. 645.

*Corroboration of accomplice's testimony*].—See note to sec. 1002; *R. v. Williams* (1914), 23 Can. Cr. Cas. 339; 7 O.W.N. 426.

*Wife of accused a compellable witness*].—Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

*Gross indecency between male persons*].—As said by Lord Sumner in *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478, 485, "experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property." Evidence may, therefore, be admissible on a question of disputed identity, to show that articles found in the possession of the accused stamped him as a person having a propensity to commit indecent acts of the class charged. *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478, H.L., affirming *R. v. Thompson*, 86 L.J.K.B. 1321 [1917], 2 K.B. 630, C.A. See also *R. v. Williams* (1914), 23 Can. Cr. Cas. 389, 7 O.W.N. 426; *R. v. Jones* [1896], 1 Q.B. 4.

*Indecency accompanied by assault*].—See Code secs. 292-294.

**Obscene or immoral books or pictures.—Indecent show.—Drugs for abortion.—Advertising venereal preparations.—Questions for judge and jury.—Motives.**

**207.** Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse,—

- (a) makes, manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated, or has in his possession for sale, distribution or circulation, or assists in such making, manufacture, sale, exposure, having in possession, distribution or circulation, any obscene

book or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals, or any plate for the reproduction of any such picture or photograph; or,

(b) publicly exhibits any disgusting object or any indecent show; or,

(c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means or instructions or any medicine, drug or article intended or represented as a means of preventing conception or of causing abortion or miscarriage; or advertises or publishes an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required.

3. It shall be a question for the court or judge whether the occasion of the manufacture, sale, exposing for sale, publishing, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good required in the manner, extent or circumstances in, to or under which the manufacture, sale, exposing for sale, publishing or exhibition is made; but it shall be a question for the jury whether there is or is not such excess.

4. The motives of the manufacturer, seller, exposor, publisher or exhibitor shall in all cases be irrelevant.

*Origin*—Sec. 179, Code of 1892.

*"Knowingly"*—In *Brownlie v. Camphill*, 5 App. Cas. 932, Lord Blackburn, quoting with approval from *Bell v. Gardner*, 4 M. & G. 11, (Tindal, C.J.) said: "We can, in fact, regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances; but there is no conclusive rule of law because a party has the means of knowledge he has the knowledge itself." Tindal, C.J., further said: "There may be cases where the existence of the means

of knowledge might lead irresistibly to the inference that the party had actual knowledge."

The insertion of the word "knowingly" in the place where it is found makes it incumbent on the prosecution to give some evidence of knowledge. *R. v. Beaver*, 9 O.L.R. 418, 9 Can. Cr. Cas. 415.

A like use of the word "knowingly" in the English Licensing Act, 1872, was held by Day, J., in *Sherras v. De Rutzen* [1895], 1 Q.B. 918, at p. 921, to shift the burden of proof from the defence to the prosecution. See also *Bank of New South Wales v. Piper* [1897], A.C. 383, at p. 389, and *Mullins v. Collins* (1874), L.R. 9 Q.B. 292.

The omission of the word "knowingly" from the warrant of commitment was held to be fatal in *R. v. Graf* (1909), 19 O.L.R. 238, 15 Can. Cr. Cas. 193, where there was a like omission from the information; but a direction was given for the further detention of the person convicted so that a new warrant conforming with a regularly amended conviction could be issued. *Ibid.*

*Without lawful justification or excuse*—No one can be convicted under the section unless "without lawful justification or excuse" he does the act for which the prosecution is brought. The duty of showing the absence of this justification or excuse is on the Crown; *R. v. Beaver* (1905), 9 O.L.R. 418, 9 Can. Cr. Cas. 415; *R. v. St. Clair*, 28 O.L.R. 271; while the onus of proving that the public good was served is thrown on the accused. A lawful justification or excuse must exist in fact, and not in mere belief. *Lyons & Sons v. Wilkins* [1896], 1 Ch. 811; *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K.B. 88, 732; *Glamorgan Coal Co. v. South Wales Miners' Federation* [1903], 1 K.B. 118 [1903], 2 K.B. 545. So the public good must be actually served, and an intention so to serve it is not sufficient. *R. v. St. Clair* (1913), 21 Can. Cr. Cas. 350, 364, 28 O.L.R. 271, 4 O.W.N. 856, 12 D.L.R. 710.

The same test, therefore, may be applied in determining whether a lawful justification or excuse existed in fact, or whether the public good was in fact served. *Ibid.*

*Obscenity defined*—"Obscenity," in criminal law, is defined in *Bouvier's Law Dictionary*, as "such indecency as is calculated to violation of the law and the general corruption of morals"; that is, it must have a tendency to violate some law and to corrupt morals. There must be the two elements; abusive language violates the law of peace but does not necessarily corrupt morals; when the both are combined it becomes obscene. A publication may be technically obscene, yet, it is only when it tends to corrupt the morals by inflaming the passions and inciting to immoral conduct that it is punishable. *R. v. Ballentine*, 22 Can. Cr. Cas. 385, 14 E.L.R. 278; *R. v. Beaver* (1905), 9 O.L.R. 418, 9 Can. Cr. Cas. 415, 5 Ont. W.R. 102.

A newspaper proprietor may be liable for publishing another's advertisement in his newspaper offering obscene prints for sale. *R. v. De Marny* [1907], 1 K.B. 388.

*Possessing obscene picture for circulation*—See *R. v. McCutcheon*, 15 Can. Cr. Cas. 362.

*"Tending to corrupt morals"*—In *R. v. St. Clair*, 21 Can. Cr. Cas. 350, at 369, 12 D.L.R. 710, 28 O.L.R. 271, Hodgins, J.A., said: "I should be disposed to think that the words 'tending to corrupt morals' apply to everything which precedes them in sub-sec. (a). See *Rex v. Beaver*, 8 Can. Crim. Cas. 415, at p. 422, 9 O.L.R. 418, at p. 424; *Rex v. Britnell* (1912), 20 Can. Crim. Cas. 85, at p. 93, 26 O.L.R. 136, at p. 143. In *The King v. Macdougall* (1909), 39 N.B.R. 388, 15 Can. Crim. Cas. 466, at pp. 476, 480, they are so applied. In the cases of *The Queen v. Hicklin*, L.R. 3 Q.B. 360 (see pp. 370, 375), and *Steele v. Brannan* (1872), L.R. 7 C.P. 261 (see pp. 266, 270), tending to corrupt morals is made the test of obscenity."

*Inspection of pictures by magistrate before trial*—It is no objection to a conviction on summary trial that the police magistrate before whom the information was laid had, before the commencement of the trial, inspected the alleged obscene prints or pictures seized by the police, as he was at liberty to inspect them on considering whether he would issue a summons or a warrant. *R. v. Graf* (1909), 19 O.L.R. 238, 15 Can. Cr. Cas. 193.

*Advertising means to cause miscarriage*—It is for the trial judge to determine whether the advertisement is capable of bearing the meaning assigned to it and for the jury to say whether, under the circumstances, it has that meaning or not. *R. v. Karn*, 5 O.L.R. 704, 6 Can. Cr. Cas. 479.

*Formalities of indictment*—See secs. 852, 855, 859, 861.

*Intermixing of trials of cognate offences*—In a court of common law, such a thing is unknown as to begin a trial against the same prisoner who is already on his trial for another offence, that is to say, to interject, as it were, one into the other, thus not only harassing the mind of the accused, but also prejudicing his defence. *R. v. McBarny*, 3 Can. Cr. Cas. 339, 343. So in the case of *Hamilton v. Walker* [1892], 2 Q.B. 25, there were two informations laid before justices of the peace, charging the defendant (1), with delivering to a certain person indecent advertisements, and (2), with aiding and abetting this person in exhibiting the same. The justices heard the evidence on the first information, and without deciding on the defendant's guilt or innocence, heard the evidence on the second, and convicted him on both. The court held that, as the evidence on the second charge was substantially the same as on the first, each case ought to have been decided on the evidence given with relation to the particular charge, and, therefore,

the justices were wrong in hearing the evidence on the second information, before deciding on the first, and both convictions were bad. And see *R. v. Bigelow*, 8 Can. Cr. Cas. 134; *R. v. Bullock*, 6 O.L.R. 663, 8 Can. Cr. Cas. 13. *R. v. Iman Din*, 15 B.C.R. 476, 18 Can. Cr. Cas. 88; *R. v. Lapointe*, 20 Can. Cr. Cas. 98; *R. v. Burke*, 36 N.S.R. 411.

*Aiding and abetting illegal sales*—See *Cook v. Stockwell*, 84 L.J., K.B. 2187.

*Indecent public exhibition*—See Code sec. 238 (vagrancy).

*Indecent theatrical play or vaudeville show*—See sec. 208.

**Immoral theatrical performance.—Penalty for lessee or manager.—**  
**Person appearing as actor.—Person in an indecent costume.**

**208.** Every person who, being the lessee, agent or person in charge or manager of a theatre, presents or gives or allows to be presented or given therein any immoral, indecent or obscene play, opera, concert, acrobatic, variety, or vaudeville performance, or other entertainment or representation, is guilty of an offence punishable on indictment or on summary conviction, and liable, if convicted upon indictment, to one year's imprisonment with or without hard labour, or to a fine of five hundred dollars, or to both, and, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

2. Every person who takes part or appears as an actor, performer, or assistant in any capacity, in any such immoral, indecent or obscene play, opera, concert, performance, or other entertainment or representation, is guilty of an offence and liable, on summary conviction, to three months' imprisonment, or to a fine not exceeding twenty dollars, or to both.

3. Every person who so takes part or appears in an indecent costume is guilty of an offence and liable, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

*Origin*—Code Amendment Act, 1903, Can. 3 Edw. VII, ch. 13, sec. 2.

*Onus of proof*—It is for the prosecution to prove that the performance is immoral, indecent or obscene. *R. v. McAuliffe* (1904), 8 Can. Cr. Cas. 21 (N.S.) Ballet dancing in the customary costume does not raise that inference. *Ibid.* Compare *R. v. Jourdan*, 8 Can. Cr. Cas. 337.

The words "previous chaste character" do not mean "previously chaste reputation," but point to those acts and that disposition of mind which constitute an unmarried woman's virtue or morals. *R. v. Loughheed*, 8 Can. Cr. Cas. 184, 6 Terr. L.R. 77; *R. v. Fiola* (1918), 29 Can. Cr. Cas. 125 (Que.). Under particular circumstances there may possibly be a second seduction of the same woman by the same, or another man. A woman may have been guilty of unchaste conduct, and subsequently become chaste in legal contemplation, and be the subject of seduction. But there must be, at all events, between the two acts of seduction, such conduct and behaviour as to imply reform and self-rehabilitation in chastity. *R. v. Loughheed*, 8 Can. Cr. Cas. 184, 6 Terr. L.R. 77; *R. v. Hauberg*, 23 Can. Cr. Cas. 297.

If it appears that the girl was of a lewd and lascivious disposition and offered herself for prostitution, such has been held to negative the existence of previously chaste character. *R. v. Fiola* (1918), 29 Can. Cr. Cas. 125 (Que.); The most direct proof of previous unchastity on the part of the girl would be evidence that, before the commission of the offence charged, she had illicit intercourse with another or others. *R. v. Pieco* [1917], 1 W.W.R. 892, 27 Can. Cr. Cas. 435 (Alta.). Cases where the charges were for indecent assault or rape are distinguishable, for, in such cases, the previous chastity of the persons upon whom the offences were committed is not an element of the offence, and evidence of unchastity would properly be refused, as a person accused of such an offence may be convicted notwithstanding the fact that the prosecutrix may be a common prostitute. *R. v. Pieco*, *supra*.

Declarations or admissions made by the prosecutrix after the alleged seduction as to her prior practices would be admissible in evidence to show her prior unchastity. *R. v. Fiola*, *supra*.

If the girl testifies in her own behalf, she may be cross-examined and compelled to answer queries concerning specific acts of fornication between her and the other man prior to the alleged seduction. *R. v. Fiola*, *supra*; and see 14 L.R.A., N.S. 753.

*Corroboration*—See sec. 1002.

The corroboration may be derived from statements made by the accused to third persons. *R. v. Burr* (1906), 13 O.L.R. 485, 12 Can. Cr. Cas. 104; *R. v. Wyse* (1895), 1 Can. Cr. Cas. 6; *R. v. Daun* (1906), 11 Can. Cr. Cas. 244, 12 O.L.R. 227.

The corroborative evidence must do more than show a probability of the guilt of the accused. *R. v. Vahey*, 2 Can. Cr. Cas. 258 (Ont.).

*Dawson v. McKenzie*, [1908] Scot. R. 648; *Ridley v. Whipp* (1916) 22 Com. L.R. 381 (Austr.).

*Proof of girl's age*—On a charge of criminal seduction under Code sec. 211, credit may be given the evidence of the girl's mother as to the daughter's age, although the mother is unable to state the year of the girl's birth. *R. v. Pieco* [1917], 1 W.W.R. 892 (Alta.), citing

*Reg. v. Nicholls*, 10 Cox C.C. 476. As to inferring age in certain cases, see Code sec. 984, the application of which is restricted to crimes against children under sixteen years of age. *R. v. Hauberg*, 8 Sask. L.R. 239, 31 W.L.R. 779, 24 Can. Cr. Cas. 297.

It has been held in Saskatchewan that it would not be competent proof if the girl alone testified to her own age. *R. v. Hauberg*, 8 Sask. L.R. 239; and see *Doe v. Ford*, 3 U.C.Q.B. 352; *Martin Hargreaves Co. v. Wrigley*, 30 W.L.R. 92; *Haines v. Guthrie*, 13 Q.B.D. 818; but see *contra*, *Wigmore on Evidence*, par. 222. Where parol testimony is admissible by the provincial law to prove age, the better opinion seems to be that a child who has arrived at the age of discretion is competent to testify as to her own age. *R. v. Spera* (1915), 34 O.L.R. 539, 25 Can. Cr. Cas. 180, citing *Loose v. The State* (1903), 120 Wis. 115, and *Cheever v. Congdon*, 34 Mich. 296.

If the evidence of a parent is not available, the opinion of persons who had known the girl from early childhood may be received. *R. v. Spera* (1915), 34 O.L.R. 539, 25 Can. Cr. Cas. 180; following *R. v. Cox* [1898], 1 Q.B. 179, 67 L.J.Q.B. 293, 18 Cox C.C. 672.

Apart from the special provisions of the Code, the proof of age should be given in accordance with the requirements of the provincial law. Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 35. Provincial statutes regarding the registration of births usually provide for a certificate or an extract from the register being evidence of the fact registered, but the fact can be proved by parol testimony, if available; *R. v. Cox* [1898], 1 Q.B. 179, 18 Cox C.C. 672; unless the provincial law expressly requires that the age of persons born there shall be proved only by official certificate. See the Quebec Civil Code as to acts of civil status.

*Inference of age*—Code sec. 984.

*Questions of fact and of law*—Whether the woman in respect to whom the offence defined in sec. 211 was, at the time of the alleged commission of the offence, a woman of previously chaste character or not, is a question of fact for the jury to decide upon a proper direction by the Judge as to the meaning of those words. *R. v. Wakelyn* (1913), 4 W.W.R. 170, 21 Can. Cr. Cas. 111, 23 W.L.R. 807, 5 Alta. L.R. 464.

In *The King v. Wakelyn*, 4 W.W.R. 170, *supra*, Stuart, J. suggests a possible form of a question of law involved on the trial of a charge under sec. 211, as follows: "Assuming in the complainant's favour all the facts that the jury could upon the evidence reasonably find in her favour, that is, assuming that the accused, in undertaking the burden of proving unchastity, which sec. 210 cast upon him, proved against the complainant the least that the jury upon the evidence could reasonably find against her, were those facts such as to constitute the complainant a girl of previously unchaste character?" The definition of what constitutes previously chaste character is a question of law; as it



is the duty of the Judge at the trial to define the essential ingredients of the crime which is charged. *Ibid.*

*Excluding public from trial*—Sec. 645.

*Prosecution within one year*—By sec. 1140 (c) the prosecution must be commenced within one year from the commission of the offence. See as to suggested amendment of this limitation, 37 C.L.T. 226.

*Wife of accused a compellable witness*—This section is included amongst those specified in sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

### **Seduction of female under twenty-one under promise of marriage.**

**212.** Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age.

*Origin*—Sec. 182, Code of 1892; 50-51 Vict., ch. 48, sec. 2.

*Seduction under promise of marriage*—It is not enough that the girl was induced to resume illicit intercourse because of the promise of marriage then made by the accused who had previously seduced her. *R. v. Hauberg* (1915), 8 Sask. L.R. 239, 24 Can. Cr. Cas. 297, 31 W.L.R. 779.

It would seem that an equivocal statement which might or might not be a promise of marriage is not enough. *R. v. Spray* (1914), 20 B.C.R. 147, 24 Can. Cr. Cas. 152.

The offence is committed on the date of the first connection. *R. v. Lacelle*, 11 O.L.R. 74, 10 Can. Cr. Cas. 229.

There is a difference of judicial opinion as to whether the renewal of promise of marriage where the parties are already engaged to be married would be sufficient. The better view seems to be that such a case is equally within the scope of sec. 212, as being "under" promise of marriage as the case of a promise of marriage first made as a means of obtaining the girl's consent to intercourse. *R. v. Romaine* (1908), 13 Can. Cr. Cas. 68, but see contra, *R. v. Walker* (1893), 1 Terr. L.R. 482, 5 Can. Cr. Cas. 465. It would seem sufficient that the subsistence of the promise induced the girl's consent although there was no express renewal of the promise at the time of the seduction. *R. v. Romaine* (1908), 13 Can. Cr. Cas. 68.

A promise of marriage conditional upon the girl becoming pregnant as a result of the intercourse has been held not to be sufficient to support a charge under a similar New York law. *People v. Van Alstyne*, 39 N.E. Rep. 343.

*Subsequent marriage of parties*—The subsequent intermarriage of

the seducer and the seduced is a good plea in defence of the charge. Sec. 214 (2). A mere offer to marry is no defence. *State v. Wise*, 50 Pac. 800; *State v. Thompson*, 45 N.W. 293; *State v. Mackey*, 48 N.W. 918.

*Proof of age*—See note to sec. 211; *R. v. Hauberg* (1915), 8 Sask. L.R. 239, 24 Can. Cr. Cas. 297; *R. v. Spera* (1915), 34 O.L.R. 539, 25 Can. Cr. Cas. 180.

*Previously chaste character*—See sec. 210 and note to sec. 211.

*Corroboration*—See sec. 1002 and note to sec. 211. The corroboration of the promise of marriage may consist of statements made by the accused both before and after the seduction showing his expressed intention to marry the girl. *R. v. Daun*, 12 O.L.R. 227, 11 Can. Cr. Cas. 244.

*Prosecution within one year*—By sec. 1140 (c) the prosecution must be commenced within one year from the commission of the offence. See as to suggested amendment of this limitation, 37 C.L.T. 226. If the first occasion of the illicit intercourse was more than a year prior to the occasion of illicit intercourse when the promise of marriage was made, the prosecution under sec. 212 fails, as the girl was not of chaste character up to the date of the seduction under promise of marriage. *R. v. Loughheed*; 6 Terr. L.R. 77, 8 Can. Cr. Cas. 184; *R. v. Howard*, 8 Can. Cr. Cas. 188 (Ont.); unless between the two acts of seduction there was such conduct and behaviour on her part as to imply reform and rehabilitation in chastity. *R. v. Hauberg* (1915), 8 Sask. L.R. 239, 24 Can. Cr. Cas. 297; *R. v. Loughheed*, *supra*.

*Excluding public from trial*—Sec. 645.

**Seduction of ward or step-child or foster child.**

**213.** Every one is guilty of an indictable offence and liable to two years' imprisonment,—

- (a) who, being a step-parent or foster parent or guardian, seduces or has illicit connection with his step-child or foster child, or ward; or,
- (b) who seduces or has illicit connection with any woman or girl previously chaste and under the age of twenty-one years who is in his employment in a factory, mill, workshop, shop or store, or who, being in a common, but not necessarily similar, employment with him in such factory, mill, workshop, shop or store, is, in respect of her employment or work in such factory, mill, workshop, shop or store, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him.

*Origin*—1917 Can. ch. 14; Sec. 183, Code of 1892.

*"Previously chaste"*—See sec. 210 and compare secs. 211, 212.

*Subsequent marriage of guardian and ward*—See sec. 214 (2).

*Prosecution within one year*—By sec. 1140 (c) the prosecution must be commenced within one year from the commission of the offence; at least, if the offence be the "seduction of a ward or employee." It will be noted that no corresponding amendment was made to sec. 1140 (c) (vi) when sec. 213 was amended in 1917 so as to include a step-child or foster-child.

*Excluding public from trial*—See sec. 645.

*Wife of accused a compellable witness*—This section is included amongst those specified in sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Corroboration*—See sec. 1002 (c).

**Seducing female passengers on vessels.—Subsequent marriage a defence.**

**214.** Every one is guilty of an indictable offence and liable to a fine of four hundred dollars or to one year's imprisonment, who, being the master or other officer or seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger.

2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two last preceding sections, except in the case of a guardian seducing his ward.

*Origin*—Sec. 184, Code of 1892; R.S.C. 1886, ch. 65, sec. 37.

*"Under promise of marriage"*—Compare sec. 212 and see note to that section.

*Excluding public from the trial*—Sec. 645.

*Subsequent marriage of the parties*—See note to sec. 212.

*Wife of accused a compellable witness*—See sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145.

*Corroboration*—See sec. 1002 (c).

**Parent or guardian procuring or party to defilement of girl or woman.**

**215.** Every one who, being the parent or guardian of any girl or woman,—

- (a) procures such girl or woman to have carnal connection with any man other than the procurer; or,
- (b) orders, is party to, permits or knowingly receives the avails of, the defilement, seduction or prostitution of such girl or woman;

is guilty of an indictable offence, and liable to fourteen years' imprisonment, if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years, to five years' imprisonment.

*Origin*—Sec. 186, Code of 1892; 53 Vict., ch. 37, sec. 9.

*Parent "permitting" defilement*—Compare the Children Act Imp. 1908, as amended 1910, Imp., making it an offence to "cause" or "encourage" the defilement; and see *R. v. Ralphs*, 9 Cr. App. 86; *R. v. Chainey* [1914], 1 K.B. 137, 30 Times L.R. 41, 9 Cr. App. R. 175; *R. v. Moon* [1910], 1 K.B. 818.

*Avails of . . . prostitution, etc.*—Compare with secs. 216, clause (1) and 238, clause (1).

*Prosecution within one year*—Code sec. 1140 (c).

*Excluding public from trial*—Code sec. 645.

*Wife of accused a compellable witness*—See sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145.

*Corroboration*—Code sec. 1002 (c).

*Proof of age*—See note to sec. 211.

**Procuring.—Male person living on prostitute's earnings.**

**216.** Every one is guilty of an indictable offence and shall be liable to five years' imprisonment and on any second or subsequent conviction shall also be liable to be whipped in addition to such imprisonment who,—

- (a) procures, or attempts to procure or solicits any girl or woman to have unlawful carnal connection, either within or without Canada, with any other person or persons; or,
- (b) inveigles or entices any woman or girl not being a common prostitute or of known immoral character to a common bawdy or assignation house for the purpose of illicit intercourse or prostitution; or,

- (c) knowingly conceals any woman or girl in any common bawdy or assignation house; or,
- (d) procures or attempts to procure any woman or girl to become, either within or without Canada, a common prostitute; or,
- (e) procures or attempts to procure any woman or girl to leave her usual place of abode in Canada, such place not being a common bawdy house, with intent that she may become an inmate or frequenter of a common bawdy house within or without Canada; or,
- (f) on the arrival of any woman or girl in Canada, directs or causes her to be directed, takes or causes her to be taken, to any common bawdy house or house of assignation; or,
- (g) procures any woman or girl to come to Canada, or to leave Canada, for the purpose of prostitution; or,
- (h) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without Canada; or,
- (i) for the purposes of gain, exercises control, direction or influence over the movements of any woman or girl in such a manner as to show that he is aiding, abetting or compelling her prostitution with any person or generally; or,
- (j) by false pretences or false representations procures any woman or girl to have any unlawful carnal connection, either within or without Canada; or,
- (k) applies, administers to, or causes to be taken by any woman or girl any drug, intoxicating liquor, matter, or thing with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl; or,
- (l) being a male person, lives wholly or in part on the earnings of prostitution.

2. Where a male person is proved to live with or to be habitually in the company of a prostitute or prostitutes, and has no visible means of support, or to live in a house of prostitution, he shall, unless he can satisfy the court to the contrary, be deemed to be living on the earnings of prostitution,

*Origin*—Can. Stat. 1913, ch. 13, sec. 9; Can. Stat. 1909, ch. 9; R.S.C. 1906, ch. 146, sec. 216; Code of 1892, sec. 185; 53 Vict., Can., ch. 37, sec. 9; R.S.C. 1886, ch. 157, sec. 7.

*Procuring*—There can be no procuring, and no attempt or conspiracy, where the woman frequents a house of ill-fame of her own free will without any fraud or persuasion on the part of any other person. *R. v. Christian*, 23 Cox C.C. 541. Directing and conveying men to a house of ill-fame is not "procuring." *R. v. Quinn*, (1918) 43 O.L.R. 385.

A conviction must not be in the alternative for "procuring or attempting to procure, etc."; in such form it would be void for uncertainty. *R. v. Gibson* (1898), 29 Ont. R. 660; 2 Can. Cr. Cas. 302.

The illegal act relied upon must have been committed in Canada to bring a foreigner within the scope of Canadian jurisdiction. *R. v. Blythe* (1895), 4 B.C.R. 276, 1 Can. Cr. Cas. 263; *Re Gertie Johnson* (1904), 8 Can. Cr. Cas. 243.

*By false pretences or false representations*—Clause (j) makes it an offence by false pretences or false representations to procure any woman or girl to have any unlawful carnal connection. Seduction under promise of marriage made by a married man falsely representing himself as unmarried, may, it seems, be prosecuted under sub-sec. (j) if the girl believed the false representation. See 33 Eng. Law Journal, 253; *R. v. Williams* (1898), Central Crim. Court (Eng.); *R. v. Jones*, 67 L.J.Q.B. 41, [1898], 1 Q.B. 4.

*Procuring to come to Canada or to leave Canada for the purpose of prostitution*—This offence (clause g) does not cover the case of a woman becoming the mistress of the accused only. *R. v. Cardell* (1914), 7 Alta. L.R. 404, 23 Can. Cr. Cas. 271. The word "prostitution," in sec. 216, means promiscuous sexual intercourse with men. *R. v. Cardell*, *supra*.

*Man living on the earnings of prostitution*—Compare clause (l) and sub-sec. (2) with Code secs. 235 (b), 238 (l) and 238 (a); and see *R. v. Austin* [1913], 1 K.B. 551, 82 L.J.Q.B. 387, 8 Cr. App. R. 169.

An indictment under sub-sec. (l) is not bad for laying the offence as on one specified day. *R. v. Hill* [1914], 2 K.B. 386, 10 Cr. App. R. 56.

*Solicitation*—The offence of solicitation may be complete although it did not reach the mind of the person intended to be solicited so as to attract her notice. *Horton v. Mead* [1913], 1 K.B. 154, 82 L.J.K.B. 200, 23 Cox C.C. 279; *R. v. Wing* (1913), 29 O.L.R. 553, 22 Can. Cr. Cas. 426, 5 O.W.N. 295.

*Attempts where not expressly mentioned*—In clauses in which an attempt is not dealt with, it may be punished as Code sec. 571 provides; the language of sec. 571 is too plain to admit of the application of the rule, *expressi unius*, etc. *R. v. Wing*, 29 O.L.R. 553, 22 Can. Cr. Cas. 426, 5 O.W.N. 295.

*Corroboration*—See sec. 1002 (c); *R. v. McNamara*, 20 Ont. R. 489; *R. v. St. Clair*, 27 A.R. (Ont.) 308, 3 Can. Cr. Cas. 351; *R. v. Quinn* (1918), 14 O.W.N. 342.

*Wife of accused a compellable witness*—See sec. 4 of the Canada Evidence Act, R.S.C. 1906; ch. 145, a compellable and competent witness for the prosecution.

*Warrant to search house of ill-fame*—See sec. 640.

*Arrest without warrant*—See the special provision of sec. 652A for offences under sec. 216.

*Prosecution within one year*—See Code sec. 1140 (c);

*Excluding public from trial*—Code sec. 645.

*Continuing offence*—The offence of procuration under sec. 2 of the Criminal Law Amendment Act (Eng.) has been held to be a continuing offence, and if any part of it takes place within the jurisdiction, there is jurisdiction to try for the offence. *R. v. Mackenzie* (1910), 27 Times, L.R. 152.

*Whipping on second or subsequent conviction*—This penalty was introduced by the amendment of 1913. Under the corresponding English Act (Crim. Law Amendment, 1912, sec. 7), it was held that it was not necessary that the previous conviction should be one on indictment, or that it should have taken place since the enactment of the new English law of 1912 authorizing an indictment of a male person for an offence similar to that stated in sub-sec. (1) of Code sec. 216 instead of summary proceedings for vagrancy under a statutory provision similar to sub-sec. (1) of Code sec. 238. *R. v. Austin* [1913], 1 K.B. 551, 82 L.J.K.B. 387, 8 Cr. App. R. 169, 23 Cox C.C. 346.

*Punishment of whipping*—See secs. 80, 204, 216, 276, 292, 293, 301, 302, 446, 457, 1060.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 478, 748.

#### Householder permitting defilement.

**217.** Every one who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence, and is liable,—

- (a) to ten years' imprisonment if such girl is under the age of fourteen years;

(b) to two years' imprisonment if such girl is of or above the age of fourteen years.

*Origin*—Sec. 187, Code of 1892; 48-49 Vict., Imp., ch. 69, sec. 6; 49 Vict., Can., ch. 52, sec. 4; 53 Vict., Can., ch. 37, sec. 3; 63-64 Vict., Can., ch. 46.

*Permitting defilement*—The section is not aimed at the mere act of illicit intercourse. The offence would be complete, although not easily proved, without any evidence of actual illicit intercourse, if it was established that the girl was induced or knowingly permitted to be upon the premises for the unlawful purpose. A connection with a man following is merely in the nature of evidence of the unlawful purpose. If, for instance, an owner or occupier of premises was knowingly to permit a girl to be upon his premises under an appointment made with her to there meet her paramour for the purpose of illicit connection, the offence of the owner or occupier would be complete, although the man failed to appear. The statutory offence may be committed by a woman, as was the case in *The Queen v. Webster*, 16 Q.B.D. 134. The language of the section is, no doubt, purposely made wide, but its object is to forbid the use, either occasionally or habitually, of premises as assignation-houses, or houses of that nature, to which young girls may or may be induced to resort. The girls need not, as in sec. 211, have been of previously chaste character. They may even, for anything that appears, be leading a life of prostitution. *R. v. Sam Sing* (Ont.) 20 O.L.R. 613, 17 Can. Cr. Cas. 361, per Garrow, J.A.

*"Knowingly suffers," etc.*—The Children Act (1908), Amendment Act, 1910 (Eng.), enacts that a person shall be deemed to have caused or encouraged the seduction or prostitution or unlawful carnal knowledge (as the case may be), if he has "knowingly" allowed the girl to consort with or to enter or continue in the employment of any prostitute or person of known immoral character. Isaacs, L.C.J. in *R. v. Chainey* (1913), 9 Cr. App. R. 175, at 178, said, in reference to that enactment: "If it is established that the father (the accused) knew it and stood by and allowed it, he may be convicted of 'causing or encouraging.' There is a very important difference between allowing it and knowingly allowing it within the meaning of the section . . . When cases of this kind are considered, one must take into consideration the circumstances of the home."

*"Girl under the age of eighteen years"*—It is not necessary for the prosecution to prove that the accused knew the girl to be under this age. *R. v. Sam Sing* (1910), 22 O.L.R. 613, 17 Can. Cr. Cas. 361, distinguishing *R. v. Karn*, 20 O.L.R. 91, 15 Can. Cr. Cas. 301.

*"Unlawfully and carnally known"*—The term "unlawfully" as used in Code sec. 217 means not lawful or not sanctioned by law; it does not import that to be unlawful, the carnal connection must be something



of a character elsewhere declared to be unlawful and penalized by the Code or by some other definite law or by the general law of the land. *R. v. Karn*, 15 Can. Cr. Cas. 301, 20 O.L.R. 91; and see *R. v. Sam Sing*, 22, O.L.R. 613, 17 Can. Cr. Cas. 363.

"*With any particular man or generally*"—The judicial interpretation placed upon this language excludes the owner or occupier of the premises from coming under the designation "any particular man." The offence is in allowing the girl to be upon the premises for purposes of illicit intercourse with some man other than the accused. *R. v. Sam Jon* (1914), 20 B.C.R. 549, 24 Can. Cr. Cas. 334; *R. v. Sam Sing*, 22 O.L.R. 613, 17 Can. Cr. Cas. 361.

*Corroboration*—See sec. 1002 (c); *R. v. Brindley*, 6 Can. Cr. Cas. 196.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a compellable and competent witness for the prosecution.

*Juvenile delinquency*—See The Juvenile Delinquents Act, 1908, 7-8 Edw. VII, Can., ch. 40, and amending Acts.

### **Conspiracy to defile.**

**218.** Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretenses, or false representations or other fraudulent means to induce any woman to commit adultery or fornication.

*Origin*—Sec. 188, Code of 1892.

*Conspiracy to defile women*—This is a common law offence, see 52 C.L.J. 92-93, *R. v. Mears*, 2 Den. C.C. 80, *R. v. Howell*, 4 F. & F. 160.

*Corroboration*—See sec. 1002 (c).

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a compellable and competent witness for the prosecution.

*Excluding public from trial*—Code sec. 645.

*Adultery a crime in New Brunswick*—Adultery is an indictable offence in New Brunswick under a pre-Confederation statute of that province. *R. v. Strong* (1915), 43 N.B.R. 190, 24 Can. Cr. Cas. 430; R.S.N.B. 1854, ch. 145, sec. 3.

### **Carnally knowing idiots.**

**219.** Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female

idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb.

*Origin*—Sec. 189, Code of 1892.

*Corroboration*—See sec. 1002 (c).

*Wife of accused a compellable witness*—See the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

*Conspiracy to carnally know imbecile, etc.*—Where the imbecility is of that class that it is not easy to prove knowledge of same on the part of the accused, but there has been a conspiracy by several to induce the woman to commit fornication with them, it would seem that an indictment will lay for such conspiracy as at common law without proof of false pretenses, etc., under Code sec. 218. See article in 52 C.L.J. 92, by Mr. J. E. Farewell, K.C.

*"Under circumstances which do not amount to rape"*—See Code sec. 298.

*Knowledge of imbecility*—R. v. Walebek, (1913) 4 W.W.R. 501, 21 Can. Cr. Cas. 130 (Sask.).

#### **Indian prostitution.**

**220.** Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment,—

- (a) who, being the keeper of any house, tent or wigwam, allows or suffers any unenfranchised Indian woman to be or remain in such house, tent or wigwam, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent or wigwam with the intention of prostituting herself therein; or,
- (b) who, being an Indian woman, prostitutes herself therein; or,
- (c) who, being an unenfranchised Indian woman, keeps, frequents or is found in a disorderly house, tent or wigwam used for any such purpose.

2. Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management, of any house, tent or wigwam in which any such Indian woman is or remains for the purpose of prostituting herself therein, is

deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof.

*Origin*—Sec. 190, Code of 1892; R.S.C. 1886, ch. 43, sec. 106, 50-51 Vict., ch. 33, sec. 11.

*Corroboration*—See sec. 1002 (c).

*Deemed to be the keeper*—Compare sec. 228.

*Excluding public from trial*—Code sec. 645.

### Corrupting children.

**220A.** (1) Any person who, in the home of a child, by indulgence in sexual immorality, in habitual drunkenness or in any other form of vice, causes such child to be in danger of being or becoming immoral, dissolute or criminal, or the morals of such child to be injuriously affected, or renders the home of such child an unfit place for such child to be in, shall be liable, on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding one year or to both fine and imprisonment.

(2) For the purposes of this section, 'child' means a boy or girl apparently or actually under the age of sixteen years. . .

(3) It shall not be a valid defence to a prosecution under this section that the child is of too tender years to understand or appreciate the nature of the act complained of or to be immediately affected thereby.

(4) No prosecution shall be instituted under this section unless it be at the instance of some recognized society for the protection of children or an officer of a juvenile court, without the authorization of the Attorney-General of the province in which the offence is alleged to have been committed, nor shall any such prosecution be commenced after the expiration of six months from the time of the commission of the alleged offence.

*Origin*—(1918), 8-9 Geo. V, Can., ch. 16, sec. 1.

*Juvenile Delinquents Act*—In districts in which the *Juvenile Delinquents Act* is in force, sec. 29 of that Act applies to make liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding one year, or to both fine and imprisonment, (1) who knowingly or wilfully encourages, aids, causes, abets or connives at the commission by a child, apparently or actually under the age of sixteen, of a "delinquency," i.e., the violation of any provision of the Criminal Code or of any Dominion or provincial statute,

or of any by-law or ordinance of any municipality for which violation punishment by fine or imprisonment may be awarded, or the commission of any other act by reason of which the child is liable to be committed to an industrial school or juvenile reformatory; (2), who knowingly or wilfully does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent, whether or not such person is the parent or guardian of the child, or (3) who, being the parent or guardian of the child, and being able to do so, wilfully neglects to do that which would directly tend to prevent a child's being or becoming a juvenile delinquent, i.e., a child who commits an act of delinquency of any of the classes above set out. The Juvenile Delinquents Act, 7-8 Edw. VII, Can., ch. 40; 2 Geo. V, Can., ch. 30; 4-5 Geo. V, Can., ch. 39. Jurisdiction under the Juvenile Delinquents Act is conferred upon the Juvenile Court established or specially authorized for that purpose (7-8 Edw. VII, ch. 40, sec. 2 (f)); but where the act complained of is under the provisions of the Criminal Code or otherwise, an "indictable" offence, and the accused child is apparently or actually over the age of fourteen, the Court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the Criminal Code in that behalf; but such course shall in no case be followed unless the Court is of the opinion that the good of the child and the interest of the community demand it. 7-8 Edw. VII, Can., ch. 40, sec. 7. The Juvenile Court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts rescind an order it has made for proceeding by indictment against such child apparently or actually over the age of fourteen, and apparently or actually under the age of sixteen. 7-8 Edw. VII, Can., ch. 40, sec. 7. The public is excluded from trials under the Juvenile Delinquents Act. *Ibid.*, sec. 10. The name of the child tried under that Act, or of its parent or guardian, is not to be published in any newspaper account of the trial. *Ibid.*, sec. 10. Pending the hearing of a charge against a child under the Juvenile Delinquents Act it is not to be held in jail, unless an order has been made in the ordinary criminal courts under sec. 7, but the child is to be detained at a "detention home," or shelter used exclusively for children, or under other charge approved of by the judge or, in his absence, by the sheriff or, in the absence of both the judge and the sheriff, by the mayor or other chief magistrate of the city, town, county or place. 7-8 Edw. VII, Can., ch. 40, sec. 11. Pending the hearing of a charge of delinquency the juvenile court may accept bail for the appearance of the child charged at the trial as in the case of other accused persons. 7-8 Edw. VII, Can., ch. 40, sec. 13.

On proof of the delinquency, the court may, instead of inflicting a punishment, release the child on probation. 7-8 Edw. VII, Can., ch. 40, sec. 16.

*Prosecution of adults for Code offences in respect of a child*—In cities or districts which have asked for and obtained the issue of a proclamation bringing the Juvenile Delinquents Act into force there, prosecutions against adults for offences against the Criminal Code in respect of a child apparently or actually under the age of sixteen, may be brought in the Juvenile Court, established or authorized under the Juvenile Delinquents Act, without the necessity of a preliminary hearing before a "justice" as defined by Code sec. 2, sub-sec. (18); such prosecutions against adults may be summarily disposed of where the offence is triable summarily. 7-8 Edw. VII, Can., ch. 40, sec. 30. Otherwise the charge may be dealt with by the Juvenile Court as in the case of a preliminary hearing before a justice under Part XIV of the Code. Juvenile Delinquents Act, 7-8 Edw. VII, Can., ch. 40, sec. 30. Power is given the Juvenile Court in the case of a child "proved" to be a juvenile delinquent to adjourn the hearing from time to time for any definite or indefinite period, and to release the child on probation. 7-8 Edw. VII, Can., ch. 40, sec. 16. If the child is committed to a foster home or to an institution for the care of neglected children, the Juvenile Court may make an order upon the parent or parents of child, or upon the municipality to which it belongs, to contribute to its support such sum as the Court may determine. 7-8 Edw. VII, Can., ch. 40, sec. 16 (2).

*Fine upon parent for child's delinquency*—Where the Juvenile Delinquents Act is in force by proclamation (7-8 Edw. VII, Can., ch. 40, secs. 34 and 35), and a child under sixteen is proved to have been guilty of an offence for the commission of which a fine, damages or costs might, in the case of an adult, be imposed, the Juvenile Court has a discretion to call upon the parent or guardian to show cause (7-8 Edw. VII, ch. 40, secs. 8 and 18) why he should not be ordered to pay such fine, or damages, or costs instead of the child. *Ibid.*, sec. 18. The Juvenile Court may so order on citation of the parent by notice under sec. 8 of the Juvenile Delinquents Act, and after giving the parent an opportunity of being heard, unless the Court is satisfied that the parent has not conduced to the commission of the child's offence "by neglecting to exercise due care of the child or otherwise," 7-8 Edw. VII, Can., ch. 40, sec. 18. The order against the parent for fine, damages or costs, in respect of the child's offence is subject to the same right of appeal as if the order had been made on the conviction of the parent. 7-8 Edw. VII, Can., ch. 40, sec. 18, sub-sec. (5); *ibid.*, sec. 5; Code sec. 749 *et seq.*

### *Nuisances.*

#### **Common nuisance defined.**

**221.** A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by

which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects.

*Origin*—Sec. 191, Code of 1892; English Draft Code, sec. 150.

*Criminal and non-criminal nuisances*—See secs. 222 and 223.

**Criminal common nuisances.**

**222.** Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual.

*Origin*—Sec. 192, Code of 1892; English draft Code, sec. 151.

*"Common nuisance"*—See definition in sec. 221.

*Criminal nuisances*—In *Union Colliery Co. v. The Queen*, 31 S.C.R. 81, 4 Can. Cr. Cas. 400, the appellants were the owners of a public franchise to operate a railway between certain points. In its course the railway crossed a bridge which they were bound, but neglected, to maintain in a safe and secure condition for the traffic which they carried over it. In consequence of their neglect a train broke through the bridge and several persons in it were killed. It was held that the appellants were indictable under secs. 222 and 247; and see *R. v. Michigan Central Ry. Co.*, 17 Can. Cr. Cas. 483.

A street railway company has been indicted for a common nuisance endangering public safety in operating some of its cars for a considerable distance reversely at night, without a headlight at the end of the car in the direction in which it was being moved. *R. v. Toronto Ry.* 10 O.L.R. 26, 10 Can. Cr. Cas. 106.

Careless operations in making necessary road repairs may be indictable if the safety of the public is endangered. *R. v. Burt*, 11 Cox C.C. 339.

In an unreported case at Toronto a prosecution was instituted against building contractors for careless operations in construction work said to endanger passers-by.

*Private prosecutions*—A private prosecutor seeking an indictment against a municipality for an alleged nuisance in respect of the operation of a city sewage system, should lay his information before a magistrate and initiate a preliminary enquiry for the offence rather than apply for leave to prefer an indictment without a preliminary enquiry. *Re Schofield and Toronto* (1913), 22 Can. Cr. Cas. 93, 5 O.W.N. 109, 25 O.W.R. 331.

**Non-criminal common nuisances.**

**223.** Any one convicted upon any indictment or information for any common nuisance other than those mentioned in

the last preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

*Origin*.—Sec. 193, Code of 1892; English draft Code, sec. 152.

*Non-criminal common nuisances endangering merely the property or comfort of the public or obstructing the exercise of a common right*.—In order to be a common nuisance the duty must be one to the public generally. Code sec. 221; *Toronto Ry. v. The King* [1917], A.C. 630, 29 Can. Cr. Cas. 29, 34.

This does not include as an indictable nuisance the continuous overcrowding of street cars operating on city streets under contract with the municipality and which the public could only enter by invitation. *Toronto Ry. v. The King*, *supra*; *R. v. Toronto Ry.*, 34 O.L.R. 589, 25 Can. Cr. Cas. 183, (C.A.), and *R. v. Toronto Ry.*, 23 O.L.R. 186, 18 Can. Cr. Cas. 417, reversed.

Indictment is in some cases a method for trying a merely civil right, see *R. v. Reynolds* (1906), 11 Can. Cr. Cas. 312 (N.S.); *Pillow v. City of Montreal* (1885), *Montreal L.R.* 1 Q.B. 401. A permanent obstruction erected on a highway and placed there without lawful authority which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law. *R. v. United Kingdom Electric Telegraph Co.* (1862), 31 L.J.M.C. 166; *Attorney-General v. Brighton, etc. Supply Association* [1900], 1 Ch. 276; *R. v. Nimmons* (1892), 1 Terr. L.R. 415; *Re Jamieson and Lanark County*, 38 U.C.Q.B. 647; *R. v. Grand Trunk Ry.*, 17 U.C.Q.B. 165; *R. v. Cooper*, 40 U.C.Q.B. 294; *R. v. Hart*, 45 U.C.Q.B. 1; *R. v. Portage la Prairie*, 2 W.L.R. 141, 10 Can. Cr. Cas. 125; *R. v. Great North of England Ry.*, 9 Q.B. 315; *R. v. City of London*, 32 Ont. R. 326.

The effect of sec. 223 is to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public, or by obstruction of any right, other than one affecting life, safety, or health, which is common to all His Majesty's subjects, has been committed. But it does deprive a conviction on indictment, in these cases, of its criminal character. The method of indictment is at times used in English law as a convenient one for trying a civil right, and sec. 223 appears to give recognition to this use of the method, and to deprive it of any result in criminal consequences. *Toronto Ry. v. The King* [1917], A.C. 630, 29 Can. Cr. Cas. 29, reversing *R. v. Toronto Ry.* 34 O.L.R. 589, 25 Can. Cr. Cas. 183, 9 O.W.N. 152.

*Ontario tariff*.—By schedule "A" of the Administration of Justice Expenses Act, R.S.O. 1914, ch. 96, the following provision is made as to Crown Attorney's fees:

Note (b)—“In cases of indictment for the obstruction, or the non-repair of a highway or bridge, or of indictment for nuisance (where there is a *bona fide* dispute as to boundary, or title, or claim of right, and where no present public inconvenience is being suffered from what is complained of) the Crown Attorney shall not be entitled to charge costs to the public without the special sanction of the Attorney-General, but will collect his fees and costs from the parties only.”

**Knowingly selling unfit food.**

**224.** Every one is guilty of an indictable offence and liable to one year's imprisonment who knowingly and wilfully exposes for sale, or has in his possession with intent to sell, for human food articles which he knows to be unfit for human food.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment.

*Origin*—Sec. 194, Code of 1892.

*At common law*—The selling of food which is dangerous or unfit for human food with knowledge of the fact is an offence at common law. *R. v. Dixon* (1814), 3 M. & Sel. 11; 15 R.R. 381; *Shillito v. Thompson* (1875), 1 Q.B.D. 12. If death ensues from eating such food, the seller knowing that it is dangerous is indictable for manslaughter. *R. v. Stevenson* (1861), 3 F. & F. 106; *R. v. Kempson* (1893), 28 L.J. (Eng.) 477.

**Common bawdy-house defined.**

**225.** A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution, or for the practice of acts of indecency, or occupied or resorted to by one or more persons for such purposes.

*Origin*—1917, Can., ch. 14; 6-7 Edw. VII, ch. 8; Sec. 194, Code of 1892; E.S.C. 1886, ch. 157; C.S. Can. (1859), ch. 105, sec. 1.

“*Kept for purposes of prostitution*”—The keeping need not be for lucre. The offence consists in the house being a public nuisance. *R. v. Fabri* (1917), 28 Can. Cr. Cas. 6 (Que.).

Prostitution means promiscuous sexual intercourse. *R. v. Cardell*, 7 Alta. L.R. 404, 23 Can. Cr. Cas. 271.

A woman who continues to have unlawful sexual relations with one man only, or who lives with him as his mistress, is not a prostitute. *Bedard v. The King* (1916), 26 Can. Cr. Cas. 99 (Que.); *R. v. Cardell*, 7 Alta. L.R. 404, 23 Can. Cr. Cas. 271; *R. v. Emery* [1917], 1 W.W.R. 337, 358, per Beck, J.; *R. v. Sands*, 9 W.W.R. 496, 25 Can. Cr. Cas. 116, 25 Man. B. 690.



A conviction will be quashed on *certiorari* if there was no evidence to prove that the place was a bawdy-house; *R. v. Cross* (1918), 14 O.W.N. 7; or to prove that the accused was the keeper. *R. v. Cross*, *supra*; *R. v. Weller* (1917), 40 O.L.R. 296; *R. v. Jackson* (1917), 40 O.L.R. 173; *R. v. Rehe* (1897), 1 Can. Cr. Cas. 63.

"*Occupied or resorted to*"—The enactment means that a house occupied by one person who receives men and prostitutes herself as a prostitute, is a bawdy-house; that one person resorting to a house for that purpose, to the knowledge of the owner of the house, constitutes an offence also. It does not alter the law as to isolated acts not constituting prostitution. One or two acts may not be considered an offence under the Act, but where repeated acts are proved, then it is certainly "resorted to" under the meaning of the section. *R. v. Mercier*, 13 Can. Cr. Cas. 475, at 484. 7 W.L.R. 922. The resorting by one person to a house for the purposes of prostitution constitutes that house a bawdy-house, if the owner of it or the keeper of it is aware of what the resorting is for. It is no answer that it is a case of one woman resorting with one man who is a tenant, if the woman is a prostitute. *R. v. Mercier*, *supra*.

An hotel proprietor who, with knowledge of the facts, permits a room in his hotel to be used for purposes of prostitution, may be convicted of keeping a common bawdy-house. *R. v. Mercier*, 13 Can. Cr. Cas. 475, 7 W.L.R. 922 (Y.T.).

*Proof of the bad repute of the house*—Evidence of the bad repute of the house will not alone justify a conviction. Some evidence of acts in support of the bad repute must be given: see *Regina v. McNamara*, 20 O.R. 489; *R. v. Mercier*, 7 W.L.R. 922, 13 Can. Cr. Cas. 475, at 481; or proof that the people who go there are of ill-fame. *R. v. Sands* (No. 2), 25 Man. R. 690, 25 Can. Cr. Cas. 120; *R. v. Emery* [1917], 1 W.W.R. 337; *R. v. James*, 9 W.W.R. 235; 9 Alta. L.R. 66; *R. v. Cardell*, 23 Can. Cr. Cas. 271; *R. v. Demetrio*, 20 Can. Cr. Cas. 306; *R. v. Carroll*, 9 W.L.R. 119; *R. v. St. Clair*, 27 A.R. (Ont.), 308, 3 Can. Cr. Cas. 551; and see cases under the prior Code, *R. v. Mannix*, 10 O.L.R. 303, 10 Can. Cr. Cas. 150; *R. v. Osberg*, 15 Man. R. 147, 1 W.L.R. 121, 9 Can. Cr. Cas. 180; *R. v. Shepherd*, 6 Can. Cr. Cas. 463; *R. v. Young*, 14 Man. R. 58, 6 Can. Cr. Cas. 42.

The use of a place on a single and isolated occasion for the purpose of illicit intercourse between one man and one woman would not constitute the place a common bawdy-house as defined by sec. 225. *R. v. Cardell*, 23 Can. Cr. Cas. 271, 7 Alta. L.R. 404; *R. v. Newton*, 11 P.R. (Ont.) 101.

If there is sufficient evidence of illicit intercourse to the knowledge of the proprietress or from which her knowledge can properly be inferred, it is unnecessary to have any evidence of reputation, while the

latter alone would be useless, and in fact, dangerous, as apt to cloud the judgment. *R. v. Carroll*, 9 W.L.R. 119 (B.C.).

Without any evidence of the general reputation of the house, a conviction may be supported on proof of the one act of sexual intercourse, although invited by police "spotters," and the defendant's admission that she had been carrying on the business of a bawdy-house for only a few days. *R. v. Marceau* (1915), 7 W.W.R. 1174, 30 W.L.R. 418.

The reputation of the keeper of an alleged bawdy-house as being a prostitute is not proof that the house is "kept for purposes of prostitution" or that she occupies it for such purposes. *R. v. Sands* (1915), 9 W.W.R. 496, 25 Man. R. 690, 32 W.L.R. 775.

Even proof that she had made a future appointment for illicit intercourse at the house with a detective who solicited her for the purpose of getting evidence, will not be enough when the act of prostitution did not take place, and the detective had no intention of keeping the appointment. *R. v. Sands*, *supra*. His call under such circumstances to get evidence against the woman cannot be said to be a "resort" by him to that house for the purposes of prostitution. *Ibid*.

In Roscoe's Criminal Evidence, 11th ed., 86, it is laid down in reference to the offence of keeping a bawdy-house or house of ill-fame that "it is a cumulative offence. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment." Evidence of the general reputation of the house, while perhaps not alone sufficient to convict, is held to be admissible, and in the case of *The Queen v. St. Clair*, 27 A.R. (Ont.) 308, 3 Can. Cr. Cas. 551, Osler, J.A., who delivered the judgment of the Ontario Court of Appeal, said:—"Such reputation is not acquired without acts or conduct capable of proof from which the character of the house may be inferred, such as the character of the women as being common prostitutes, and the facts of men visiting the house at all hours, and dissolute and disorderly behaviour there."

The charge may be general, yet at the trial evidence of particular acts and the particular time of doing them may be given. *R. v. Johnson*, 23 Can. Cr. Cas. 136. Solicitation by the accused may be enough. *R. v. Emery*, [1917] 1 W.W.R. 337, 10 Alta. L.R. 139.

In *R. v. Jackson* (1914), 5 W.W.R. 1286, 22 Can. Cr. Cas. 215, 27 W.L.R. 31, Walsh, J., said: "I understand that it is the general reputation of a place which may help to attribute to it the character of a bawdy-house. I am quite unable to bring my mind to the conclusion that complaints made by two persons, who, for this purpose, may be treated as but one, can create a general reputation for the place complained of. I do not wish to be understood as holding that no amount of complaining can avail to affect or fix the general reputation of a place, for I can quite well understand that such complaints may be so

general and so widespread as to thereby definitely fix its reputation. That, however, is not this case. It seems to me to be a most dangerous thing to say, that, because some undisclosed person tells the police that such and such a thing has happened in a certain place that that place has thereby acquired a general reputation appropriate to the character of the story thus told of it; for a vindictive or unscrupulous person might very easily in this way give a most undeservedly bad reputation to the premises of another with whom he or she happened to be on unfriendly terms."

"*Common bawdy-house*"—It is the keeping of a "common" bawdy-house that is an offence under secs. 225 and 228, and it is not enough to charge merely the keeping of a bawdy-house. *R. v. Jousseau*, 24 Can. Cr. Cas. 417 (Que.).

The offence of keeping a bawdy-house is a continuing offence, and an information or conviction does not disclose more than one offence (Code sec. 710) where the offence is charged as having occurred on several separate days. *R. v. Burnby* [1901], 2 K.B. 459, 70 L.J.K.B. 739, 20 Cox C.C. 25; *R. v. Keeping*, 34 N.S.R. 442; *R. v. Johnson*, 23 Can. Cr. Cas. 136 (Y.T.).

Several persons may be convicted of the one offence of keeping a common bawdy-house, and that either jointly or severally. *R. v. Bloom*, 5 W.W.R. 897, 22 Can. Cr. Cas. 205; and on a joint information, separate convictions may be made. *Ibid.*

*House of ill-fame*—A conviction on summary trial for keeping a "house of ill-fame" will not be quashed because of the different phraseology to that of the Code, but will be amended under Code sec. 1124, to conform with secs. 225 and 228, if the evidence warrants it. *R. v. Darroch* (1916), 27 Can. Cr. Cas. 402. Keeping a house of ill-fame was an indictable offence at common law, and the change of language is one of form only and not of substance. *R. v. Darroch*, supra; *R. v. McNamara* (1891), 20 Ont. R. 489; see Code sec. 744.

"*Acts of indecency*"—Code secs. 205, 206, 292, 293, 294.

*Summary trial of bawdy-house cases*—See sec. 774.

*Offence of keeping*—See sec. 228.

*Being an inmate*—See sec. 229A.

*Being found in*—See sec. 229.

*Obstructing peace officer*—See sec. 230.

*Landlord's liability*—See sec. 228A.

*Prior law*—In view of the statutory definition contained in sec. 225 in its present extended form, the decisions in the English cases of *Singleton v. Ellison* [1895], 1 Q.B. 607, and *Caldwell v. Leech* (1914), 23 Cox C.C. 510, 109 L.T. 188, do not apply; nor do the Canadian decisions (prior to 1907) in *R. v. Young* (1902), 14 Man. R. 58, 6 Can. Cr. Cas. 42; *R. v. Osberg*, 15 Man. R. 147, 1 W.L.R. 121; *R. v. Mannix*, 10 O.L.R. 303, 10 Can. Cr. Cas. 150.

**Common gaming-house defined.—Effect of part of game only being played there or stake elsewhere.**

**226.** A common gaming-house is,—

- (a) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or,
- (b) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill in which
  - (i) a bank is kept by one or more of the players exclusively of the others; or,
  - (ia) the whole or any portion of the stakes or bets or other proceeds at or from such games is either directly or indirectly paid to the person keeping such house, room or place, or,
  - (ii) any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.

2. Any such house, room or place shall be a common gaming-house, although part only of such game is played there and any other part thereof is played at some other place, either in Canada or elsewhere, and although the stake played for, or any money, valuables, or property depending on such game, is in some other place, either in Canada or elsewhere.

*Origin*—Can. Stat. 1918, ch. 16, sec. 2; Sec. 196, Code of 1892; 58-59 Vict., ch. 40; 9-10 Edw. VII, ch. 10; Gaming Houses Act, 1854 Imp.

*"Kept for gain"*—The importance of the cases dealing with the question of "gain" has been minimized by the amendment of 1918 adding paragraph (ia) to sub-sec. (b). The effect seems to be that no matter how small the share of the stakes or other proceeds which the keeper receives either directly or indirectly, such receiving brings the place within the definition of sec. 226, and the keeper within the penalties of sec. 228. If any rake-off goes to the house or proprietor it would seem to make no difference under the 1918 amendment that in spite of that advantage the proprietor was actually a loser by the play. Furthermore the advantage to the proprietor may be either "at"

or "from" the game under clause (ia) and the words "other proceeds" are probably intended to cover any fixed assessment or contribution collected by the proprietor quite apart from the chances of the game or the keeping of any "bank."

In order to constitute a keeping "for gain," the keeper or ostensible keeper of the house had in some way to gain by the gambling or by permitting the gambling to be carried on, and unless he did so he was not liable under sub-sec. (a). *R. v. Charlie Yee* [1917], 1 W.W.R. 1307; *R. v. Mah Kee* (1905), 6 Terr. L.R. 121, 9 Can. Cr. Cas. 47, 1 W.L.R. 37; and see *R. v. Saunders*, 3 Can. Cr. Cas. 495; *R. v. James* (1903), 6 O.L.R. 35, 7 Can. Cr. Cas. 196; *R. v. Russell*, 11 Can. Cr. Cas. 189; *R. v. Cashen*, 11 Can. Cr. Cas. 183; *Robinson v. McNeill*, 4 E.L.R. 134 (N.S.).

Playing games to determine who shall pay for drinks, food, or cigars, etc., for the use of the players, is gaming. *R. v. Bloomfield* (1916), 27 Can. Cr. Cas. 45 (Que.); *Rex v. James*, 7 Can. Cr. Cas. 196, 6 O.L.R. 35; An hotelkeeper has been held to be a keeper "for gain" because he permitted gaming by others so as to advance his sales of drinks; *R. v. Sala*, 13 Can. Cr. Cas. 198 (Y.T.); so a cigar store proprietor is liable if he obtains "gains" directly or indirectly by advancing his sales. *R. v. James* (1903), 6 O.L.R. 35, 7 Can. Cr. Cas. 196; and see *R. v. Bertrand*, (1918) 52 N.S.B. 127.

*When club-premises within the definition*—Before the introduction of clause (ia) in 1918, it was held that if in playing a game of poker in a *bona fide* club by members coming there as of right and not by invitation, express or implied, the players might institute a voluntary rake-off as a method of paying for their refreshments supplied by the club steward and still the place not be one kept "for gain" by the club. *R. v. Riley* [1917], 1 W.W.R. 325, 23 B.C.R. 192, 26 Can. Cr. Cas. 402, distinguishing *R. v. James* (1903), 7 Can. Cr. Cas. 196, and *R. v. Brady* (1896), 10 Que. S.C. 539. But if persons who were not members were allowed to participate and a rake-off was taken from their winnings for the purposes of the club in the playing of a mixed game of chance and skill, the club became a common gaming house. *R. v. Ham* (1918), 29 Can. Cr. Cas. 431 (B.C.).

It has, indeed, been said that members of a *bona fide* club are not to be considered persons who "resorted" to the club, in construing a penal statute in which "resorting" to a place is an element of the offence. *R. v. Riley* [1917], 1 W.W.R. 325, 327, 23 B.C.R. 192, 26 Can. Cr. Cas. 402, per Macdonald, C.J.A., applying *Downes v. Johnson* [1895], 2 Q.B. 203, 64 L.J.M.C. 238. Paragraph (a) of sec. 226 (a) is "aimed at the keeping of a house for gain to which persons come by invitation, express or implied; the members of a *bona fide* club come as of right." Per Macdonald, C.J.A., in *R. v. Riley*, *supra*.

In the case of an incorporated club, the steward of the club would ordinarily appear to be a person having the management or assisting

in the management of the club premises so as to be amenable under Code sec. 228, sub-sec. 2, in the event of the club premises being conducted as a gaming house; *R. v. Merker and Daniels*, 37 O.L.R. 582, 10 O.W.N. 452; but there is not necessarily a keeping "for gain" under Code sec. 226 (a) because of the club being paid for refreshments supplied to members playing poker, out of a voluntary "rake-off" set apart during the playing. *R. v. Riley* [1917], 1 W.W.R. 325, 23 B.C.R. 192, 26 Can. Cr. Cas. 402. It would make no difference whether the rake-off from the winnings of outsiders was applied to the expenses of the club or given as dividends to the club members. *R. v. Ham* (1918), 29 Can. Cr. Cas. 431 (B.C.), distinguishing *R. v. Riley*, *supra*; and see *R. v. Brady*, 10 Que. S.C. 539.

Under the new clause (ia) if any part of the stakes or bets or other proceeds at or from a game of chance or a mixed game of chance and skill is either "directly or indirectly" paid to the person keeping the place, such constitutes it a common gaming house. The term "person" includes a society or a body corporate, company, etc. Code sec. 2, sub-sec. (13).

*Place to which persons "resort" for the purpose of playing, etc.]—*As to clubs, see *R. v. Riley*, *supra*. Apart from the circumstances set out in clause (b), the mere resorting of persons to a store or other place of which the accused was the proprietor for the purpose of playing games of chance or mixed games of chance and skill will not make the place a common gaming house within the Code definition, unless the accused got some gain out of it. *R. v. Charlie Lee* [1917], 1 W.W.R. 1307; *R. v. Ah Pow* (1880), 1 B.C.R., pt. 1, pp. 147, 152; *Reg. v. Saunders*, 3 Can. Cr. Cas. 495; *R. v. Jung Lee*, 22 Can. Cr. Cas. 64; *R. v. See Woo*, 16 Can. Cr. Cas. 213. This might be shown where others got a rake-off out of the game by giving proof that the proprietor in some way participated in this profit. *Ibid*.

That a house is "common" does not necessarily mean that it is open to everyone; it may be of limited access. *R. v. Ah Pow* (1880), 1 B.C.R., pt. 1, p. 147; *R. v. Laird* (1894), 3 Rev. de Jurisprudence (Que.) 389.

A magistrate might reasonably decide that a room was a common gaming house if it is commonly used or adopted for gaming, frequented by many people promiscuously, especially if by many various persons, by a fortuitous concourse, or without the necessity of any direct or personal invitation from the occupier or other person legally entitled to the sole enjoyment of the room or place, and if thereby a general opportunity of gaming though without any fixed intention or invitation to do so. Per Begbie, C.J., in *R. v. Ah Pow* (1880), 1 B.C.R., pt. 1, p. 152. Such an establishment will be a common gaming house though a large part of the general public are excluded by keys or watch-words, or in any other manner. *Ibid*.

*Game of chance or mixed game of chance and skill*—A game of chance is one in which hazard entirely predominates; and a mixed game of chance and skill is one in which the element of hazard prevails notwithstanding the skill of the gamblers. *R. v. Fortier*, 17 Can. Cr. Cas. 423, 13 Que. K.B. 308; *R. v. Jamieson*, 7 Ont. R. 153. Euchre is a game of chance, and though experience and judgment may make one player more successful than another, it would be a perversion of words to say it was in any sense a game of mere skill. *R. v. Laird*, 7 Can. Cr. Cas. 318, 319, 6 O.L.R. 180.

The game of fan-tan is a game of chance or of mixed chance and skill. *R. v. Hung Gee* (1913), 4 W.W.R. 1128, 6 Alta. L.R. 167, 21 Can. Cr. Cas. 409; *R. v. Ham* (1918), 29 Can. Cr. Cas. 431 (B.C.).

The game of "black jack" is a game of chance. *R. v. Petrie*, 7 B.C.R. 176; but see criticism of the decision on other points in *R. v. Hung Gee* (1913), 4 W.W.R. 1128, 21 Can. Cr. Cas. 404 (Alta.).

The playing of the game of draw poker in a place not kept for the purpose is not prohibited, if there is no "rake-off". *Rose v. Collison*, 16 Can. Cr. Cas. 359 (Alta.); *R. v. Brady* (1896), 10 Que. S.C. 539.

*Game of chance, etc., in which a "bank" is kept*—"Bank," as a gaming term, means the sum of money or the checks which the dealer or banker has as a fund from which to draw the stakes and pay his losses; the pile of money which the player who plays against all the others, has before him. *R. v. Hing Hoy* [1917], 2 W.W.R. 958, at 961, 11 Alta. L.R. 518, 28 Can. Cr. Cas. 229. In forming a conclusion as to whether a "bank" is kept by one exclusively of the others, or whether the "game" being played does not give chances "alike favourable to all the players," much will depend on what is meant by the term "game." Evidence giving a description of the game being played should be adduced to satisfy the court on this point and also to determine whether the game was, on the one hand, a game of chance, or a mixed game of chance and skill, and so within Code sec. 226 (b), or on the other hand, a game of skill only, and so not covered by the Code provision. It is not to be inferred from Code sec. 226 that judges should take judicial notice of the way in which so-called gambling games are played nor can the dictionaries be relied upon for information in regard to a foreign game such as "fan-tan." *R. v. Hing Hoy* [1917], 2 W.W.R. 958, 962, 11 Alta. L.R. 518. With a narrow application of the word "game" as meaning a single round or card deal, it might be said that the "bank" was kept by one of the players exclusively for that deal or game, but the word will more likely receive in this connection the wider interpretation of the series of rounds or other successive parts of the playing at one session. The wider interpretation seems to be indicated by the context in which the words "bank" and "banker" are used in Code sec. 226. In view of the various games in which there is no exclusive banker throughout the entire playing, such as

there is in certain games of hazard in which all play against the proprietor of the gaming table or gaming device, it would seem that the words "exclusively of the others" were inserted in Code sec. 226 (b) to protect players of games in which all start on an equal footing, but in which one is chosen by chance to act as a banker and is displaced by another according to the chances of the game, all with an equal chance to secure the position of banker and any incidental preference which may fall to the banker for the time being. If the banker becomes banker in rotation among the players or by some method of chance at certain stages of the game or, in other words, has an equal chance of becoming banker from time to time; that is, if the method of the game is not that one or more becomes exclusively the banker, then the chances of the game are equal or alike favourable to all the players in the only sense in which it was intended they should be or could be. The constituting of a banker is one of the chances of the game. On one becoming the banker it may be assumed he has acquired an advantage. On the cards being dealt the chances of the players are at once rendered unequal according to the character of the hands dealt. *R. v. Hung Gee*, 4 W.W.R. 1128, 1130, per Beck, J.

Judicial opinions are at variance on the point. It has been held in Alberta that the provisions of sec. 226 (b) are not directed against a game in which though a bank is kept, the chances of being banker are equal to all the players. *R. v. Hung Gee* (No. 1), 4 W.W.R. 1128, 6 Alta. L.R. 167, 21 Can. Cr. Cas. 409; *R. v. Hing Hoy* [1917], 2 W.W.R. 958, 964, per Beck, J. But the contrary view is taken in British Columbia. *R. v. Petrie* (1900), 7 B.C.R. 176, 3 Can. Cr. Cas. 439; and in Alberta was approved by Harvey, C.J., in his dissenting opinion in *R. v. Hing Hoy* [1917], 2 W.W.R. 958, 962.

*Statutory presumptions from finding gaming appliances*—Before the Code amendment of 1918 to secs. 985 and 986, those sections created a statutory presumption from the finding of gaming instruments or contrivances for unlawful gaming, and it was important to ascertain for the purposes of those sections whether the particular game was or was not "unlawful."

The amendment makes secs. 985 and 986 correspond with sec. 226, by eliminating the words "unlawful," and making those sections apply on the finding of instruments of gaming used in playing any game of chance or any mixed game of chance and skill.

*Automatic vending machines*—It was held in *Fielding v. Turner* [1903], 1 K.B. 867, 72 L.J.K.B. 542, that the operation of an automatic machine, in which no person but the player and the machine takes part, may constitute playing an unlawful game. In such a case the keeper, or owner of the machine, backs his chances against the person who uses it. And see *Thompson v. Mason*, 68 J.P. 270.

It has been held that whether or not such a game is one of skill



or of chance is a question of fact: *Thompson v. Mason*, 20 T.L.R. 298. In one case playing a machine was held to be a game of skill, and, therefore, lawful; *Pessers v. Catt*, 29 T.L.R. 381 (1913); whereas in two other cases playing an identical machine was held to be unlawful—*Donaghy v. Walsh*, L.R. [1914], 2 Ir. 261; *Ogilvie v. Benigno* (1906), 7 F. 82; *Thompson v. Mason*, 20 Cox C.C. 641.

So the operation of a "Mills O.K. Counter Gum Vendor" was held not to constitute gaming in *R. v. Langlois*, 23 Can. Cr. Cas. 43 (Que.); *R. v. Stubbs* (1915), 8 W.W.R. 902, 31 W.L.R. 567, 9 Alta. L.R. 26, 24 Can. Cr. Cas. 303, reversing 24 Can. Cr. Cas. 60 (Alta.), and to constitute gaming in *R. v. O'Meara*, 34 O.L.R. 467, 25 Can. Cr. Cas. 16 (Ont.); *Bareham v. The King* (1916), 25 Que. K.B. 354, 26 Can. Cr. Cas. 211, and *R. v. Gerasse*, 10 W.W.R. 1304, 26 Can. Cr. Cas. 246 (Man.). The Court of Appeal for British Columbia was divided on the question. *R. v. Smith* [1917], 1 W.W.R. 553, 26 Can. Cr. Cas. 398.

If a slot machine is in fact a gaming device, the licensing of it under a provincial law dealing with slot machines generally as automatic vending machines, will not remove the liability under the Code for its operation as a gaming contrivance. *R. v. Bernier* (1916), 22 R.L.N.S. 258.

"Place"]—See sec. 227 (2).

*Search order for gaming houses*—See secs. 641, 642.

*Finding of gaming instruments used in playing "unlawful games"*—See secs. 985, 986.

*Immunity certificate to person arrested on search order if he gives evidence*—See Code sec. 642.

*Provincial gaming laws*—There may be special provisions dealing with gaming as a criminal offence, which were contained in pre-Confederation laws of some of the provinces and which are not inconsistent with the Code provisions, and are therefore not repealed by them. These provisions, in so far as they deal with criminal law, can only be repealed or varied by federal legislation. So in Ontario the unrepealed Lord's Day Act, C.S.U.C., ch. 104, sec. 3, makes it a criminal offence in that province to be engaged in playing cards for money even in a private place on a Sunday. *R. v. Quick*, 17 O.W.R. 250.

Some pre-Confederation statutes conferring powers of search on municipal authorities or enabling the latter to pass by-laws or ordinances to that end, may still be operative in some of the provinces; but in Saskatchewan, a province created since Confederation, it has been held that, having regard to the provisions of sec. 641 of the Code a police officer is not justified in forcibly entering a gaming house, without warrant or permission from proper authority, notwithstanding the provisions of a municipal by-law authorizing him so to do. *Win Gat v. Johnson*, 1 Sask. L.R. 81 (affirmed on this point on varying the judgment, *Win Gat v. Johnson*, 1 Sask. L.R. 476.).

A municipal by-law in Quebec which merely repeats or consolidates the prior existing by-laws operative since Confederation and is not inconsistent with any federal or provincial statute, may be effective, although dealing with Sunday observance. *Bischinsky v. Montreal* (1915), 16 Que. P.R. 343.

In any case it is not now competent for a province to enact new legislation which would conflict with the general criminal law. *R. v. Shaw*, 7 Man. R. 518; *R. v. Spiegelman* (1904), 9 O.L.R. 75.

Compare *Upton v. Brown* (1912), 3 W.W.R. 626 to same effect as to disorderly houses generally.

*Gambling in public conveyances*—See sec. 234.

*Bucket shops*—A bucket shop is also a common gaming house. Secs. 231, 232, and notes to same. But it is not a "common gaming house . . . as *hereinbefore* defined" within Code sec. 228.

*Being found in gaming house*—See secs. 229, 985, 986.

*Obstructing officer authorised to enter common gaming house*—See secs. 230, 641, 986.

*Person supporting himself by gaming without other calling*—See sec. 239 (1) (vagrancy).

**Common betting-house defined.—"Place" defined.**

**227.** A common betting-house is a house, office, room or place,—

- (a) opened, kept or used for the purpose of betting between persons resorting thereto, and
  - (i) the owner, occupier or keeper thereof,
  - (ii) any person using the same,
  - (iii) any person procured or employed by, or acting for or on behalf of any such person,
  - (iv) any person having the care or management, or in any manner conducting the business thereof; or,
- (b) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration
  - (i) for any assurance or undertaking, expressed or implied, to pay or give thereafter any money or valuable thing on any event or contingency, of, or relating to any horse-race, or other race, fight, game or sport; or,
  - (ii) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency; or,

- (c) opened, kept or used for the purpose of recording or registering bets upon any contingency or event, horse-race, or other race, fight game or sport, or for the purpose of receiving money or other things of value to be transmitted for the purpose of being wagered upon any such contingency or event, horse-race or other race, fight, game or sport, whether any such bet is recorded or registered there, or any money or other thing of value is there received to be so transmitted or not; or,
- (d) opened, kept or used for the purpose of facilitating or encouraging or assisting in the making of bets upon any contingency or event, horse-race or other race, fight, game or sport, by announcing the betting upon, or announcing or displaying the results of horse-races, or other races, fights, games or sports, or in any other manner, whether such contingency or event, horse-race or other race, fight, game or sport occurs or takes place in Canada or elsewhere.

2. The word 'place' as used in this section and in the preceding section, includes any place, whether inclosed or not, and whether it is used permanently or temporarily, and whether there is or is not exclusive right of user.

*Origin*—Sec. 197, Code of 1892.

*Persons assisting in management deemed keepers*—Code sec. 228 (2).

*Aiding and abetting the offence*—See Code sec. 69. As to the sale or lease by the club controlling a race meet of the betting privileges where the bookmaking to be carried on would be illegal; see *R. v. Hendrie*, 11 O.L.R. 202, 10 Can. Cr. Cas. 298.

"Place"—The declaration of sub-sec. (2) in regard to the interpretation of the word place, in the phrase "house, office, room or place," makes inapplicable a number of the decisions on its interpretation under the law prior to the Code amendment of 1910. Amongst these were *R. v. Moylett* (1907), 15 O.L.R. 348, 13 Can. Cr. Cas. 279, 10 O.W.B. 803; *Saunders v. The King*, 38 S.C.R. 382, 12 Can. Cr. Cas. 174; and see *Powell v. Kempton Park* [1899], A.C. 143; *R. v. Humphrey* [1898], 1 Q.B. 875; *R. v. Fisher* (1913), 9 Cr. App. B. 164; *Brown v. Patch* [1899], 1 Q.B. 892; *R. v. Deaville* [1903], 1 K.B. 468, 72 L.J.K.B. 272.

*Assisting in the making of bets*—The newspaper which prints an advertisement of a customer soliciting bets from the public is included; and the newspaper office becomes a place used for the purpose of

facilitating, encouraging or assisting in the making of bets. *R. v. Smallpeice*, 7 Can. Cr. Cas. 556 (Ont.); *McKenzie v. Hawke* [1902], 2 K.B. 216, 20 Cox, C.C. 305; *Hawke v. McKenzie* [1902], 2 K.B. 225, 20 Cox, C.C. 314; *Hawke v. McKenzie* (No. 3), [1902], 2 K.B. 234, 71 L.J.K.B. 570; *Hawke v. Hulton*, 22 Times L.R. 169.

The keeping of an office within the jurisdiction for the issue of betting coupons which the persons desiring to bet were to forward to a foreign country, would be illegal. *Stoddart v. Hawke* [1902], 1 K.B. 335; *Hodgson v. Macpherson*, 7 Adam (Scot.), 118.

*Exception as to stakeholders in lawful sport*—Code sec. 235 (2).

*"Race, etc. in Canada or elsewhere"*—This clause is intended to prevent the operation of betting houses in Canada taking bets on races, etc., held elsewhere. *R. v. Giles*, 26 Ont. R. 586.

*Other betting offences*—See sec. 235.

*Search of suspected betting house*—Code sec. 641.

*Finding of betting equipment, as prima facie evidence*—Code sec. 986; *R. v. Johnson* (1915), 35 O.L.R. 215, 25 Can. Cr. Cas. 124, 27 D.L.R. 607. The evidence will not be excluded because of the illegality of the search warrant (Code sec. 641) under which the place was entered. *R. v. Honan*, 26 O.L.R. 484, 20 Can. Cr. Cas. 10, 6 D.L.R. 276.

*Landlord's duty after conviction of tenant for keeping*—See Code sec. 228A.

*Confiscation of betting equipment*—Code sec. 641 (2); *O'Neil v. Attorney-General*, 26 S.C.R. 122, 1 Can. Cr. Cas. 303.

*Being found in a betting-house*—Code sec. 229.

*Race-course bets made at the track*—See the latter portion of sub-sec. (2) of Code sec. 235, suspended until six months after the end of the Great War by Order-in-Council, June 7, 1917.

## Opium joint defined.

**227A.** An opium joint is a house, room or place to which persons resort for the purpose of smoking or inhaling opium.

*Origin*—Can. Stat. 1909, ch. 9, sec. 2.

*Finding of appliances for opium smoking as prima facie evidence*—Code sec. 986.

*Raid of opium joints*—Code secs. 642 and 642A.

*Being found in*—Code sec. 229.

*Offence of keeping*—Code sec. 228.

*"House, room or place"*—The word "place" as used in sec. 227A has not the benefit of any extension which may have been given to it by sub-sec. (2) of sec. 227, which was added to the Code in 1910. Sec. 227A had been passed in the previous year, but this fact was probably overlooked in the drafting of the 1910 amendment. The consequence would appear to be that the word "place" as regards opium joints is to

be construed as *ejusdem generis* with the specific words "house" and "room" which precede it in conformity with the doctrine laid down in *Powell v. Kempton Park* [1899], A.C. 143, and *Brown v. Patch* [1899], 1 Q.B. 892.

*The Opium and Drug Act*—See 1-2 Geo. V, Can., ch. 17; *R. v. A. & N.* 16 Can. Cr. Cas. 381, 15 O.W.R. 339.

**Disorderly house.—Who deemed keeper.**

**228.** Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting-house or opium joint, as hereinbefore defined.

2. Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, or as assisting in such care, government or management, shall be deemed to be the keeper thereof and shall be liable to be prosecuted and punished as such although in fact he or she is not the real owner or keeper thereof.

*Origin*—Sec. 198, Code of 1892; Can. Stat. 1909, ch. 9, sec. 2; Can. Stat. 1913, ch. 13, sec. 10; Disorderly Houses Act, 1751, Imp. 25 Geo. II, ch. 36.

*Keeping a disorderly house*—The word keeping implies a continuous offence; the charge may therefore be laid as from one date to another without charging more than offence. *R. v. Keeping*, 34 N.S.R. 442.

A husband and wife may be charged jointly with keeping a house of ill-fame. *Rex v. Bloom* (1913), 5 W.W.R. 897, 7 Alta. L.R. 1, 22 Can. Cr. Cas. 205, 26 W.L.R. 459. A conviction may be either joint or several on summary trial for the one offence of keeping, and separate convictions may be made on an information against several persons jointly. *Ibid.*

*Withdrawal of charge*—The magistrate may, on good grounds shown, permit the withdrawal of a charge laid by a private prosecutor. *R. v. Rousseau* (1915), 24 Can. Cr. Cas. 390 (Que.).

"Common"—The word "common," in describing a bawdy-house, is an essential ingredient of the offence, which is the keeping of a "common bawdy-house." The omission of the word "common" in the information is a defect of substance which is not cured by plea. *R. v. Jousseau* (1915), 24 Can. Cr. Cas. 417 (Que.).

*Penalty on third or subsequent conviction*—Criminal Code Amendment Act, 1915, ch. 12, sec. 6, not assigned a Code section number, but here printed following sec. 229A.

*Amendment of conviction*—See Code sec. 1124.

*Common bawdy-house*—Sec. 225, 229, 229A, 640, 643, 986.

*Common gaming house*—Sec. 226, 229, 235, 641, 642, 643, 985, 986.

*Common betting house*—Sec. 227, 229, 235, 641, 642, 643, 986.

*Opium joints*—Code secs. 227A, 229, 641, 642, 642A, 643, 986.

*Summary trial or indictment*—The offence is triable summarily before a "magistrate" as defined by sec. 771, under Part XVI; Code sec. 773 and 774; and this without the consent of the accused, Code sec. 774; *R. v. Honan*, 26 O.L.R. 484, 20 Can. Cr. Cas. 10, 6 D.L.R. 276; *R. v. Jung Lee*, 5 O.W.N. 80, 22 Can. Cr. Cas. 63, 25 O.W.R. 63; *R. v. James*, 9 W.W.R. 235. There is also the alternative procedure of indictment available, although it is not commonly followed for this offence. *R. v. Sarah Smith*, 9 Can. Cr. Cas. 338 (N.S.); *R. v. McKenzie*, 2 Man. R. 168; *R. v. Bougie* (1899), 3 Can. Cr. Cas. 491.

The accused when arraigned for summary trial has no right to demand a jury trial, which he could have only by the bringing of an indictment. *R. v. Jung Lee*, 5 O.W.N. 80, 22 Can. Cr. Cas. 63, 25 O.W.R. 63.

Prior to 1915 there was also available the process of summary conviction if the offence were the keeping of a bawdy-house, but the part of the vagrancy clause (Code sec. 238 (j)) making it a vagrancy offence on summary conviction to be the keeper of a bawdy-house was repealed in that year. See under the prior law: *R. v. Belmont* (1914), 23 Can. Cr. Cas. 89, 18 D.L.R. 53; *R. v. Spooner* (1900), 4 Can. Cr. Cas. 209.

The jurisdiction of summary trial is exercisable under secs. 773, 774, without the consent of the accused, and the accused is not to be asked to elect. (Code sec. 774.) This latter provision seems to exclude the possibility of bringing the case under sec. 777, because the magistrate has extended jurisdiction under the last-mentioned section exercisable only on election of the accused. See *R. v. Davidson* [1917] 2 W.W.R. 160 (Alta.); *R. v. Davidson* [1917] 2 W.W.R. 718 (Alta.); *R. v. Hayward*, 5 O.L.R. 65; *ex parte McDonald*, 9 Can. Cr. Cas. 68; *R. v. Crawford* (1912), 2 W.W.R. 952, 20 Can. Cr. Cas. 49 (Alta.); *R. v. Booth* (1914), 31 O.L.R. 539, 23 Can. Cr. Cas. 224.

*Jurisdiction of commissioners of police in Alberta*—A commissioner of police appointed under R.S.C. 1906, ch. 92, has absolute jurisdiction in like manner as a city police magistrate in Alberta, subject to the provincial law governing magistrates. *R. v. Bloom* (1913), 5 W.W.R. 897; *R. v. Alexander*, 5 W.W.R. 17, 21 Can. Cr. Cas. 473. Such commissioner is, by reason of the express application of the provincial law under the Federal Act, subject to a restriction by provincial statute whereby jurisdiction in any particular case shall exclusively attach in the first instance in the first justices of the peace (or magistrate exercising the powers of justices), having "possession and cognizance of the fact," as by taking an information and dismissing the charge so laid. Alta. Stat. 1906, ch. 13, sec. 9 (a); Alta. Stat. 1907, sec. 7; *R. v. Bloom* (1913), 5 W.W.R. 897 (Alta.) Compare *R. v. Coyne* [1917], 3 W.W.R. 267, 28 Can. Cr. Cas. 428; *R. v. Coyne* [1917], 3 W.W.R. 622, 29 Can. Cr. Cas. 216.

*Formalities of conviction*—If the conviction on summary trial before a city magistrate shows a street address as the place of the offence, it will not be quashed because of the omission to add the name of the city to the street address. *R. v. Marceau* (1915), 7 W.W.R. 1174, 23 Can. Cr. Cas. 456, applying *R. v. C.P.R.*, 1 Alta. L.R. 341; and see *Sorgius v. Bouchard*, 26 Que. K.B. 242, and 55 S.C.R. 324 (quashing appeal); *R. v. Nolan*, 28 Can. Cr. Cas. 100 (N.S.).

*Wrongful arrest as affecting summary trial jurisdiction in disorderly house cases*—Where there is no search order or search warrant (Code secs. 640-643), there should be an information on oath to authorize the issue of a warrant for the offence of keeping, and an arrest by a police officer on suspicion of the offence is not justifiable. Sec. 648 would, however, justify a peace officer in arresting without warrant anyone whom he "finds committing" any criminal offence. See *Altman v. Majury* (1916), 27 Can. Cr. Cas. 398, 37 O.L.R. 608, 11 O.W.N. 21. And Code sec. 652A authorizes a peace officer to arrest without warrant a person whom he has good cause to suspect of having committed or being about to commit the offence of procuring (Code sec. 216), or of the analogous offences set forth in sec. 216. There are authorities both for and against the proposition that the illegality of the arrest on a charge of keeping a disorderly house goes to the jurisdiction of a magistrate exercising summary trial powers under Part XVI of the Code. The weight of authority in Alberta is in favour of setting aside a conviction because of the illegal arrest. *R. v. Young Kee* (No. 1), [1917], 2 W.W.R. 442, 28 Can. Cr. Cas. 162; *R. v. Baptiste Paul* (No. 2), 20 Can. Cr. Cas. 161; *R. v. Wilson* (alias Wallace) (1915), 9 W.W.R. 47, 32 W.L.R. 264, 24 Can. Cr. Cas. 370; *R. v. Davis*, 32 W.L.R. 837, 20 Can. Cr. Cas. 293; *R. v. Miller* (1913), 25 Can. Cr. Cas. 151, 25 W.L.R. 297; but see contra, *R. v. Hurst* (1914), 7 W.W.R. 994, 30 W.L.R. 176, 23 Can. Cr. Cas. 389; *R. v. Baptiste Paul* (No. 1), 20 Can. Cr. Cas. 159 (Alta.); *R. v. Pudwell* (1916), 10 W.W.R. 205, 26 Can. Cr. Cas. 47 (Alta.). In *R. v. Hurst*, supra, the prosecution was for vagrancy offence punishable under Part XV.

*Aiding or counselling an offence to procure evidence*—Men representing a so-called "morality department" of the police who engage in the disreputable practice of procuring evidence by enticing a woman to agree to their nefarious proposals and make appointments accordingly for the purpose of proving her guilty of keeping a common bawdy-house, can have their testimony given no higher respect than that of ordinary accomplices. *R. v. Sands*, 9 W.W.R. 129, 130, 25 Man. R. 690, 25 Can. Cr. Cas. 116, per Galt, J. The detectives, by so doing, place themselves under the risk of prosecution as aiders and abettors under Code sec. 69. See also Code sec. 873, under which the judge of a criminal court may give leave to prefer a bill of indictment to a private prosecutor without any preliminary committal, but after an indictment

found, a *nolle prosequi* might be entered by the Attorney-General. Code sec. 962; *R. v. Edwards*, 17 Man. R. 288, 13 Can. Cr. Cas. 202.

*Limited appeal from summary trial*—Code sec. 797.

*Search orders and police raids*—Code sec. 641 and see 640, 642A, 643.

*Presumption from wilful obstruction of officer authorized to enter*—Code sec. 986; *R. v. Jung Lee*, 5 O.W.N. 80, 22 Can. Cr. Cas. 63.

*Presumption from finding gaming house or betting house equipment*—Code secs. 985, 986; *R. v. O'Meara*, 34 O.L.R. 467, 25 Can. Cr. Cas. 16; *R. v. Hung Gee* (1913), 4 W.W.R. 1128 and 1133, 24 W.L.R. 862, 21 Can. Cr. Cas. 404; *R. v. See Woo*, 16 Can. Cr. Cas. 213; *R. v. Gerasse*, 10 W.W.R. 1304, 26 Can. Cr. Cas. 246 (Man.); *R. v. Honan*, 26 O.L.R. 484, 20 Can. Cr. Cas. 10; *R. v. Jung Lee* (1913), 5 O.W.N. 80, 22 Can. Cr. Cas. 63. It seems clear that the statutory presumption under sec. 985 arises only where a search order has been made or a search warrant issued; *R. v. Jung Lee*, *supra*; but sec. 986 has been applied where there was no search order or warrant. *R. v. O'Meara*, *supra*.

*Examination on oath of persons found in*—Code sec. 642.

#### **Use of premises as disorderly house.—Liability of landlord.**

**228A.** Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house shall be liable upon summary conviction to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment.

2. If the landlord, lessor or agent of premises in respect of which any person has been convicted as the keeper of a common bawdy-house fails, after such conviction has been brought to his notice, to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and subsequently any such offence is again committed on the said premises, such landlord, lessor or agent shall be deemed to be a keeper of a common bawdy-house unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

*Origin*—Can. Stat. 1913, ch. 13, sec. 11.

*Landlord permitting tenant to use as disorderly house*—Prior to the enactment of sec. 228A it had been held that a landlord wilfully letting premises for use as a bawdy-house became an aider and abettor



run thereon, or to the sale by such association of information or privileges to assist in or enable the conducting of book-making, pool-selling, betting or wagering upon the race-course of such association during the actual progress of a race-meeting conducted by such association upon races being run thereon, or to book-making, pool-selling, betting or wagering upon such race-course during the actual progress of a race-meeting conducted by such association upon races being run thereon. Provided that as to race-meetings at which there are running races no such race-meeting continues for more than seven days of continuous racing on days on which such racing may be lawfully carried on; and provided that no such association holds, and that on any one race-track there be not held, in any one calendar year more than two race-meetings at which there are running races and that there is an interval of at least twenty days between meetings; and provided that as regards race-meetings held upon the race-course of any association incorporated after the fourth day of May, 1910, the said race-course be located in or within three miles of a Canadian town or city having a population of not less than fifteen thousand people. Provided also that as to race-meetings at which there are trotting or pacing races exclusively, no such race-meeting continues for more than three days, on which racing may be carried on, in any one calendar week, and that no race-meetings at which there are trotting or pacing races are held on the same grounds for more than fourteen days in all in any one calendar year.\*

[The operation of that portion of sub-sec. 2 of sec. 235 included between the asterisks was suspended by an Order in Council of June 7, 1917, under the War Measures Act until six months after the conclusion of the Great War. Can. Stat. 1918, xxxiv.]

*Origin*—Can. Stat. 1913, ch. 13, sec. 13; Can. Stat. 1912, ch. 19, sec. 1; Can. Stat. 1910, ch 10, sec 3; Sec 204, Code of 1892, R.S.C. 1886, ch. 159, sec. 9.

"*Lawful race, sport, game or exercise*," (sub-sec. 2)]—The question of whether a game or race, etc. is lawful or not is one for the judge. *R. v. Davies* [1897], 2 Q.B. 199; *Donaghy v. Walsh* [1914], 2 Irish R. 275. Sub-sec. (2) does not protect the person who "engages in the business of betting" (sec. 235 (e)), which connotes a series of acts. *R. v. Hynes*, (1919) 15 O.W.N. 341

Money may legally be deposited with a stake-holder to abide the result of a footrace, and no action will lie against the winner of the bet, who has received the money from the stake-holder after the decision of the event. *Seely v. Dalton* (1904), 36 N.B.R. 442.

*Race-track betting*—The exception as to race-track betting on association tracks, and the sale of bookmaking privileges for same, was suspended by Order-in-Council of June 7, 1917, operative Aug. 1, 1917, until six months after the conclusion of the great war. The exception by sub-sec. (2) applies also to secs. 227 and 228, and supersedes the decision in *Saunders v. The King* (1907), 38 S.C.B. 382, 12 Can. Cr. Cas. 33 and 174, under the former statute. As to sale of betting privileges under the former law, see *Stratford Turf Association v. Fitch* (1897), 28 Ont. R. 579.

The operation of a "pari-mutuel" machine at the race-track of an authorized association seems to be protected under sub-sec. (b) during the actual progress of the race-meeting if the wagering under the "mutuel" system is restricted to the races being run there.

*Incorporation by special Act of a provincial legislature*—For an example of a provincial statute confirming and validating as an incorporation under special Act, a charter previously granted under the Quebec Companies Act, see Quebec statutes, 1916, 7 Geo. V, ch. 103.

*Associations incorporated before March 30, 1912*—The date of incorporation is the criterion on the exemption contained in sub-sec. (2) and not the fact of the race-course being in operation before the date named. *Hepburn v. Connaught Park Jockey Club* (1916), 10 O.W.N. 333.

*Ontario tax on race-meetings*—See Corporations Tax Act, 4 Geo. V, (Ont.), ch. 11, sec. 2, as amended 1916, ch. 8.

*Race meeting licenses in Quebec*—The issuing of a license under sub-sec. (7a) of the Quebec License Law is not to be considered as indicating that the Government or any of the officials thereof are of the opinion that any bet, wager, or pool recorded, received or sold by any person is not prohibited by the Criminal Code or otherwise, and should any holder of a race meeting license be convicted in the Criminal Courts for an offence in respect of any such bet, wager or pool so recorded, received or sold, then his license, *ipso facto*, becomes null and void. 7 Geo. V, Que., ch. 17, amending the Quebec License Law.

No person recording, receiving or selling any bet, wager, or pool, under the *pari mutuel* system in Quebec, shall retain more than ten per cent. of the amount so deposited or recorded; and any person retaining more than ten per cent. shall be guilty of an offence, and be liable to a fine of not less than five hundred dollars nor more than five thousand dollars, and costs, and, on failure to pay such fine and costs, to imprisonment for not more than three months. R.S. Quebec, 1909, as amended 1916, ch. 17.

*Summary trial*].—An offence under sec. 235 is triable summarily under sec. 773, sub-sec. (g), and this jurisdiction is absolute in British Columbia, Alberta, Saskatchewan, the Territories, and Prince Edward Island, under sec. 776. In Ontario and the other provinces, the accused may only be tried under Part XVI, with his own consent; *R. v. Helliwell* (1914), 23 Can. Cr. Cas. 146, 30 O.L.R. 594; the alternative being a trial on indictment with a jury or a trial under the "Speedy trials" clauses, Part XVIII of the Code, by a county or district judge without a jury.

**Printing lottery scheme.—Selling lottery tickets, etc.—Conducting lottery scheme.—Buying lottery tickets, etc.—Lottery sale void.—*Bona-fide* purchases for value.—Foreign lottery included.—Dividing real estate by lot.—Raffles at church bazaar.—London Art Union, etc.**

**236.** Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars who,—

- (a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever; or,
- (b) sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property, by lots, tickets or any mode of chance whatsoever; or,
- (c) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

3. Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending

upon or to be determined by chance or lot, is void, and all property so sold, lent, given, bartered or exchanged, is liable to be forfeited to any person who sues for the same by action or information in any court of competent jurisdiction.

4. No such forfeiture shall affect any right or title to such property acquired by any *bonâ fide* purchaser for valuable consideration without notice.

5. This section includes the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

6. This section does not apply to,—

(a) the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests (*droits indivis*) in any such property; or,

(b) raffles for prizes of small value at any bazaar held for any charitable or religious object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve or other chief officer of the city, town or other municipality, wherein such bazaar is held, and the articles raffled for thereat have first been offered for sale and none of them are of a value exceeding fifty dollars;

(c) the Art Union of London, Great Britain, or the Art Union of Ireland. 55-56 V, c. 29, s. 205.

*Origin*—Sec. 205, Code of 1892; 58-59 Vict., Can., ch. 40, sec. 1; 1 Edw. VII, Can., ch. 42, sec. 2; 6 Edw. VII, Can., ch. 6, sec. 1.

*Conducting a lottery*—If the charge be for conducting a lottery scheme, sub-sec. (1c), and not for publishing a lottery or selling lottery tickets, the prosecution must prove that the accused carried on the alleged lottery and not merely that agents of the accused had been instructed to so represent to the public. *R. v. Lumgair* (1911), 3 O.W.N. 309, 19 Can. Cr. Cas. 123. The offence of publishing a proposal for the sale of lottery tickets is distinct from that of advertising a lottery. *Bottomley v. Director of Public Prosecutions* (1915), 84 L.J.K.B. 354.

Selling lottery tickets is an offence whether sold for profit or not. *R. v. Parker*, 9 Man. R. 203.

An absolutely free and gratuitous distribution of chances by lot, none of which have been paid for, would not be a lottery. *R. v. Robinson* [1918] 1 W.W.R. 258. The three essential elements of a lottery are, consideration, prize and chance. *Ibid.*; *Bartlett v. Parker* [1912] 2 K.B. 497, 81 L.J.M.C. 857, 23 Cox C.C. 16, and *Willis v. Young* [1907] 1 K.B. 448.

*Legislative power*—A provincial legislature cannot authorize a lottery or grant any exemption from the federal law. *St. Jean Baptiste Association v. Brault*, 30 S.C.R. 598, 4 Can. Cr. Cas. 284; *Pigeon v. Mainville*, 17 Montreal L.N. 68.

*Search orders and police raids*—Code sec. 641 and 642.

*Real estate lotteries*—Subject to the exception of sub-sec. (6), paragraph (a), it is illegal to dispose of real estate by a lottery. *Bedard v. Phoenix Land and Improvement Co.*, 42 Que. S.C. 1. For definition of "property" see Code sec. 2 (32).

The entire transaction will be looked at where there were purchases and returns of goods along with the payment of a premium by the customer for the privilege of returning and exchanging for other goods with another chance of a prize. *R. v. Freeman* (1889), 18 Ont. R. 524; followed in *R. v. Parker*, 9 Man. R. 203.

*Finding of lottery equipment*—The finding of lottery tickets under a search order does not bring as a consequence a statutory presumption of guilt under sec. 985, as would a finding of gaming instruments on a disorderly house charge. *R. v. Hong Guey* (1907), 12 Can. Cr. Cas. 366 (B.C.).

*Confiscation of lottery paraphernalia*—The legislation by which confiscation of lottery equipment may be ordered (Code sec. 641), has been held to be within the legislative power of the Federal Parliament. *O'Neil v. Attorney-General of Canada*, 26 S.C.R. 122, 1 Can. Cr. Cas. 303.

*Mode of Chance*—A mode of chance involves the absence of any skill. *Stoddart v. Sagar* [1895]; *R. v. Stoddart*, 70 L.J.Q.B. 189. *Hall v. Cox* [1899] 1 Q.B. 198; 68 L.J.Q.B. 167; *Hall v. McWilliam* (1901), 20 Cox C.C. 33, 85 L.T. 239, distinguished in *R. v. Robinson* [1918] 1 W.W.R. 258, 29 Can. Cr. Cas. 153 (Sask.); *Barclay v. Pearson* [1893] 2 Ch. 154, 62 L.J. Ch. 636.

A sweepstake on a horse-race may be a lottery. *Hardwick v. Lane* [1904] 1 K.B. 204; Guessing the number of votes which will be cast at a public election is a matter of skill. *R. v. Johnston*, 7 Can. Cr. Cas. 525. Guessing the number of beans or buttons in a jar fully exposed to view is a matter of skill and not of chance. *R. v. Dodds* (1884), 4 Ont. R. 390; *R. v. Jamieson* (1884), 7 Ont. R. 149. So is guessing the number of cash sales in a store on a given day; *R. v. Fish*, 11 Can. Cr. Cas. 201; or the correct weight of an article; *Dunham v. St. Orox*

Soap Co. (1897), 33 C.L.J. 444; or the number of registrations of births, marriages and deaths in a given time in a district under a compulsory registration law. *Hall v. Cox*, 68 L.J.Q.B. 167.

A systematic distribution of prizes along with goods sold may be a lottery although not advertised in any way except by the public finding the prizes. *Hunt v. Williams*, 52 J.P. 821; *Barratt v. Burdon* (1893), 63 L.J.M.C. 33.

It makes no difference that, instead of the drawing or chance distribution being for a sum certain or for specific articles or property, the winner gets only a privilege of choosing from certain prizes; *R. v. Lorrain*, 28 Ont. R. 123, 2 Can. Cr. Cas. 144; or is to get a prize of an unknown kind or amount. *Taylor v. Smetten*, 11 Q.B.D. 207, 57 L.J.M.C. 101.

A drawing by lot under circumstances which would otherwise be a lottery is none the less such because of an added condition that the person drawing the winning number should do some act pretended to be an act of skill, but which was to be done under such easy conditions that it was found not to involve a real contest of skill, but intended merely to evade the law. *R. v. Johnson*, 14 Man. R. 27, 6 Can. Cr. Cas. 48. Prizes given by a newspaper on a selection at the editor's sole discretion in the composition of sentences illustrative of a particular selected word might be considered as dependent on chance if the number of competitors was so large that it could not have been intended to consider the compositions on the merits. *Scott v. Director of Public Prosecutions* [1914] 2 K.B. 868, 83 L.J.K.B. 1025.

It would seem that the carrying on of certain unlawful games may be prosecuted either as for a lottery or for maintaining a common gaming house under secs. 226 and 228. See *Barrett v. Flynn* [1916] 2 Irish R. 1.

"Bons Panama" carrying the chance of obtaining prizes are lottery tickets under Canadian law. *R. v. Picard*, 17 Man. R. 343, 13 Can. Cr. Cas. 298.

*Coupon Schemes*—The lottery clauses include schemes for giving numbered coupons with purchases of goods and the disposal of the prize to a selected coupon number, although each person receives full value in goods for the money he spends and runs no risk of loss. *R. v. Hudson's Bay Co.* (1915), 9 W.W.R. 522, 25 Can. Cr. Cas. 1 (Alta.); *Willis v. Young* [1907] 1 K.B. 448, 76 L.J.K.B. 390, applied.

*Charge against a corporation*—In the province of Alberta which has no grand jury system, a corporation may be compelled to answer by a formal written charge in lieu of indictment, such charge being laid by the Attorney-General or by his direction or with the consent or order of a judge and notice thereof being served on the corporation under sec. 918 of the Code. *R. v. Standard Soap Company*, 12 Can. Cr. Cas. 290. Secs. 919 and 920 provide for the event of the corporation's default.

*Private prosecutor*—The informant in the preliminary enquiry proceedings has no status, after the indictment and acquittal of the accused, to take an appeal by way of reserved case without the concurrence of the Crown Counsel. *R. v. Fraser* (1914), 30 O.L.R. 598; and see *R. v. Gilmore* (1903), 6 O.L.R. 286, *R. v. Patteson* (1875), 36 U.C.Q.B. 129.

**Not burying the dead.—Indignity to dead body.**

**237.** Every one is guilty of an indictable offence and liable to five years' imprisonment who,—

- (a) without lawful excuse, neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human body or human remains; or,
- (b) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

*Origin*—Sec. 206, Code of 1892.

*Stranger undertaking to bury*—The neglect to decently bury a dead human body by a person who has undertaken to do so and has removed the body with that expressed intent is an indictable offence under this section, although such person was, apart from such undertaking, under no legal obligation in respect of the burial. *R. v. Newcomb* (1898), 2 Can. Cr. Cas. 255.

*Coroner's right*—A coroner has a legal right to direct a disinterment for the purposes of holding an inquest. *R. v. Clerk* (1702), Holt 167; *R. v. Bond* (1716), 1 Str. 22; *Jervis on Coroners*, 6th ed. 37. Any disposition of a corpse to obstruct or prevent a coroner's inquest when one ought to be held is a common law misdemeanour. *R. v. Stephenson*, 13 Q.B.D. 331; *R. v. Price*, 12 Q.B.D. 247.

*Limited property rights to a corpse*—The proposition found in English law cases that there can be no property in a corpse (*Williams v. Williams*, 51 L.J. Ch. 385) does not rest upon a sound foundation, and is not sustainable at least as a general proposition. The English decisions rest to a large extent upon ecclesiastical law, which has no application or effect in Alberta. The true rule is, that, inasmuch as there is a legal right of custody, control, and disposition, the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. The property in a corpse is subject, on the one hand, to the obligations of proper care and decent burial, and the restraints upon its voluntary or involuntary disposal and use provided by law, or arising out of the fact that the thing in question is a corpse; and, on the other hand, the nature and extent of the right or

obligation of the person for the time being claiming property; and the Courts will give appropriate remedies against interference with the right of custody, possession, and control of a corpse awaiting burial, presupposing a right of property therein, subject to the obligations and restrictions indicated. *Miner v. Canadian Pacific Railway Co.*, 15 W.L.R. 161 (Alta.); *Foster v. Dodd*, L.R. 3 Q.B. 77, and *R. v. Price*, 12 Q.B.D. 247, 252 distinguished; *Pettigrew v. Pettigrew* (1904), 207 Pa. 313, 64 L.R.A. 179, approved. Compare *Haynes case*, 12 Co. Rep. 113, 77 Eng. Rep. 1389; *R. v. Sharpe*, 7 Cox C.C. 214.

*Indecent exhibition of corpse*—See Code sec. 238, sub-sec. (c); *R. v. Clark*, 15 Cox C.C. 171.

### *Vagrancy*

#### **Vagrant defined.**

**238.** Every one is a loose, idle or disorderly person or vagrant who,—

- (a) not having any visible means of subsistence, is found wandering abroad or lodging in any barn or out-house, or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment;
- (b) being able to work and thereby or by other means to maintain himself and family, wilfully refuses or neglects to do so;
- (c) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;
- (d) without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms;
- (e) loiters on any street, road, highway or public place, and obstructs passengers by standing across the foot-path, or by using insulting language, or in any other way;



- (f) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers;
- (g) by discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;
- (h) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;
- (i) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself; or,  
[Sub-secs. (j) and (k) were repealed in 1915.]
- (l) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.

*Origin*—Sec. 207, Code 1892; Code Amendment Act, 1900, Can.; Code Amendment Act, 1904, Can.; Vagrancy Act, 1824, Imp., 5 Geo. IV, ch. 83; 1-2 Vict. Imp. ch. 38, sec. 2; 32-33 Vict. Can. ch. 28; R.S.C. 1886, ch. 157, sec. 8; 49 Vict. Can. ch. 157, sec. 8.

*Arrest*—Unless the officer making the arrest found the accused committing the particular act relied upon as founding the offence he should arrest only upon a warrant; Sec. 652 does not apply to this offence so as to justify an arrest on suspicion.

*Describing the offences in words of statute*—See Code secs. 723 and 1124; *Smith v. Moody* [1903] 1 K.B. 56; *R. v. Jackson* (1917), 40 O.L.R. 173, 29 Can. Cr. Cas. 352; *Re Effie Brady* (1913), 3 W.W.R. 914, 23 W.L.R. 333, 21 Can. Cr. Cas. 123.

The exact language of the statute need not be used in the information or conviction so long as there is sufficient in it to embody the elements of the offence. *R. v. Governor of Holloway Prison*, 85 L.J.K.B. 689, 80 J.P. 244.

*Procedure and punishments*—See sec. 239.

*Provincial legislation for similar offences*—Unless the provincial statute dealing with the same state of facts as a matter of merely local concern, conflicts with the provisions of the Code, both may be operative. *Ex parte Pelchat* (1915), 49 Que. S.C. 195, 26 Can. Cr. Cas. 75; *Mercier v. Plamandon*, 20 Que. S.C. 288; *Leonard v. Pelletier*, 24

Que. S.C. 331; and see *John Deere Plow Co. v. Wharton* [1915] A.C. 330, 7 W.W.R. 706, 29 W.L.R. 917; *R. v. Thorburn* (1917), 41 O.L.R. 39.

But it would not be competent for a provincial legislature to enact laws for the punishment of persons for the precise offence already covered by the Code. *R. v. Lorette* [1918] 3 W.W.R. 324 (Man.); *R. v. Shaw*, 7 Man. R. 518; *R. v. Laughton*, 22 Man. R. 620, 22 W.L.R. 199; *Onimet v. Bazin*, 46 S.C.R. 502; *Attorney-General v. Hamilton Street Ry.* [1903] A.C. 524, 72 L.J.P.C. 165, 7 Can. Cr. Cas. 328.

"*Loose, idle, or disorderly person, or vagrant*"—It is not enough that the information should charge the accused in these words alone. The particular class of vagrancy should be designated by reference to the particular fact which is relied upon as constituting the offence in the particular case. *R. v. McCormack* (1903), 9 B.C.R. 497, 7 Can. Cr. Cas. 135; *R. v. Jackson* (1917), 40 O.L.R. 173, 29 Can. Cr. Cas. 352.

The first principles of the administration of justice in criminal cases make it plain that the real offence with which a person is charged shall be set out; that there must be certainty as to the offence charged, certainty as to the offence tried, and certainty as to the offence of which the accused person is convicted or acquitted. *R. v. Jackson* (1917), 40 O.L.R. 173, 186, per Meredith, C.J.C.P.; Code secs. 853, 723, 724, 725. But while a conviction or a commitment in general terms for being a loose person or vagrant, is bad on its face, sec. 1124 enables the court on removal of same by *certiorari* to consider the defect cured if the accused was given full opportunity of making a defence, and the depositions returned satisfy the court that the offence actually tried was proved. *R. v. Jackson*, *supra*.

To charge a person merely with being a loose, idle or disorderly person, does not alone describe an offence "in the words of the Act" under sec. 723. *R. v. Jackson*, *supra*, per Meredith, C.J.C.P. The lettered sub-sections or paragraphs define the different conditions, the existence of any one of which would bring the person accused within the penalty of sec. 239. The designation of what constitutes the offence under any one of the sub-sections may possibly be upheld without more, as a sufficient description of the offence under Code sec. 1124, (but see *R. v. Harkness*, 12 Can. Cr. Cas. 54 Que.). It is preferable, however, that the charge should also indicate whether the particular act or default constitutes the person a loose person, an idle person, a disorderly person, or a vagrant. The offence of wandering abroad without any visible means of subsistence (sub-sec. (a)) would make the person a "vagrant"; and the same might be said about an offence under sub-sec. (i), as to prostitutes wandering in the streets and not giving a satisfactory account of themselves. *R. v. Jackson* (1917), 40 O.L.R. 173, 186. On the other hand, the person in default under sub-sec. (b) for wilful refusal to work for the support of his family, may not in strictness be called a "vagrant," but he is an "idle person"

within the penalties of secs. 238 and 239, although he may not be disorderly and may not wander around as a vagrant. The general term "vagrancy" has come to be applied to all of these cognate offences, because of their being dealt with for many years in England under a statute called the Vagrancy Act, and the similar heading of Vagrancy given to secs. 238 and 239 in the Canadian Criminal Code. The offence is in "being" a loose, idle, or disorderly person, or vagrant. *R. v. Jackson* (1917), 40 O.L.R. 173, 191, per Rose, J., distinguishing *R. v. Arscott*, 9 Ont. R. 541, and *Arscott v. Lilley*, 11 Ont. R. 153, 180. The opinion is hazarded that there is but one offence at any one trial under secs. 238 and 239, and that the offence is that the accused at the date of the information or charge was either a loose person, an idle person, a disorderly person or a vagrant, using the appropriate term in its statutory significance; that guilt became affixed because of one or more of the conditions set forth in paragraph (a) to (l) inclusive, and that more than one of these conditions might be conjoined in the charge without contravening sec. 710 (3) as being for more than one offence. Compare *R. v. Brouse*, 4 O.W.N. 640, 21 Can. Cr. Cas. 17; *R. v. Irving*, 14 Can. Cr. Cas. 489; *R. v. McKenzie*, 2 Man. R. 168.

In this view it would not be permissible after a conviction in respect of one of the lettered paragraphs of sec. 238 to bring another charge in respect of another of them antedating the information or charge in respect of which the prior conviction had been made.

In Saskatchewan it has been held contra, that a summary conviction is multifarious if it charges infractions of both paragraphs (e) and (l). *R. v. Code* (1908), 1 Sask. L.R. 295, 13 Can. Cr. Cas. 372. That case was followed in Quebec by *Langelier, J.S.P. in R. v. St. Armand* (1915), 25 Can. Cr. Cas. 103.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Amending irregular conviction*—Code secs. 754, 1124; *R. v. Code* (1908), 1 Sask. L.R. 295, 13 Can. Cr. Cas. 372; *R. v. Jackson* (1917), 40 O.L.R. 173, 29 Can. Cr. Cas. 352; *R. v. Kilgore* (1917), 13 O.W.N. 287.

*Sub-sec. (a)—Found wandering abroad without means of subsistence and not giving a good account of himself*—It is not a sufficient description of the offence to state that the accused was a loose, idle person, found wandering abroad and not giving a good account of himself, thereby being a vagrant; the charge or the conviction, as the case may be, must go further and allege that the accused had no visible means of subsistence. *R. v. Kolencznik* (1914), 7 W.W.R. 382, 7 Sask. L.R. 321, 23 Can. Cr. Cas. 265 (Sask.).

The English Vagrancy Act of 1898, sec. 1, also contained the phrase

"visible means of subsistence," with reference to the offence thereunder of a male person being habitually in the company of a prostitute and having no "visible means of subsistence."

The phrase has been changed to "visible means of support" in Code sec. 216 (2), introducing a similar clause in Canada. Can. Stat. 3-4 Geo. V, ch. 13, sec. 9.

To constitute the offence of being "found" lodging in any barn, etc., without means of subsistence, the accused must be discovered upon the premises doing the act or thing which constitutes the offence, but actual apprehension upon the premises is not necessary. *Moran v. Jones*, 27 Times L.R. 421.

*Sub-sec. (a)*—*Not having any visible means of maintenance, lives without employment*—The words "maintaining himself" seem to be equivalent to "support" (*sub-sec. (1)*), and to include lawful maintenance by another as well as by the employment or other source of income of the person maintained. An exception as to aged or infirm persons of a certain class is contained in sec. 239.

Referring to the corresponding English legislation, *Boyd, C.*, whose decision was affirmed on appeal, said: "It is inherently evident from this legislation that the man who makes a living by begging or by gambling or by trickery, is not regarded as a person who maintains himself by honest work or other lawful means. Begging is stamped as being a disreputable mode of life and an offence against the good order of society." *E. v. Munroe*, 25 O.L.R. 223, 19 Can. Cr. Cas. 86.

He added: "Our Code declares a man to be a vagrant who, not having any visible means of maintaining himself, lives without employment. The maintaining himself by means of begging, and the gathering of such gains to the extent of a few dollars, would not seem reasonably sufficient to exonerate him from punishment because with the dollars he might be said to have visible means of maintaining himself for a few days or weeks. He would be still living as a beggar, not having any legal means of subsistence, the same as before he had begun to save. As said by Mr. Justice Osler in *E. v. Bassett* (1884), 10 P.R. 386 (Ont.) it is the general trend of his life that is to be looked at, the sort of character he is exhibiting. I am persuaded that the true meaning of the section in the Code, 238 (a), that every one is a vagrant 'who . . . not having any visible means of maintaining himself, lives without employment,' is visible lawful means of support. This word 'lawful' is expressed in the criminal laws of Australia relating to idle and disorderly persons or vagrants: *Appleby v. Armstrong* (1901), 27 Vict. L.R. 136, and *Lee Fan v. Dempsey* (1907), 5 Commonwealth L.R. 310. I am willing to adopt the language of *Wurtele, J.*, in *Regina v. Riley* (1898), 2 Can. Cr. Cas. 129, Q.R. 7 Q.B. 198, 200, where it is said: 'The paragraph of the article of the Code relating to vagrancy, which makes it an offence for any one not having visible means of maintaining

himself to live without employment, is founded on the ground that persons who live without labour or visible means of support and idle away their time are mischievous and dangerous persons, who must either support themselves by unlawful means or become an undue charge on the public charity, and who are consequently nuisances to society in general. The mere fact of living without employment is not an offence against the law, if the person . . . is able to do so, because he has sufficient means either belonging to himself or which are provided for him in a legitimate way.' See also, *Regina v. Organ* (1886), 11 P.R. 497, 500. In *Rex v. Collette* (1905), 10 Can. Crim. Cas. 286, 10 O.L.R. 718, there was evidence that the defendant had means of earning a livelihood." *R. v. Munroe*, 19 Can. Cr. Cas. 86 (Ont.), per Boyd, C. A British Columbia decision is to the effect that evidence that money found on the accused had been obtained by gambling was immaterial to a charge under sub-sec (a). *R. v. Sheehan*, 14 B.C.R. 13, 14 Can. Cr. Cas. 119. A conviction under sub-sec. (a) may be made concurrently with a conviction for begging in contravention of a municipal by-law. *R. v. Munroe* (1911), 25 O.L.R. 223, 19 Can. Cr. Cas. 86. A deaf mute unable to work was, in that case, held to have been properly found to be without visible means of maintenance, although he had upon him \$28 gathered by his illegal begging. *R. v. Sheehan* (1908), 14 Can. Cr. Cas. 119, not followed. It would, of course, be an offence under sub-sec. (1) if it were shown that the person "for the most part supported himself by gaming."

A feeble-minded person of full age is not to be considered as without visible means of support under the Mental Deficiency Act, 1913, Imp., merely because he has no means of his own and is incapable of earning his own living if he is being maintained by his parents although they are not under a legal obligation to maintain him. *R. v. Radcliffe* [1915] 3 K.B. 418, 84 L.J.K.B. 2196.

The words "visible means of maintaining himself" in Code sec. 238 (a), are held to be interchangeable in their interpretation so as to apply to a female; *R. v. Cyr* [1917] 3 W.W.R. 849, 29 Can. Cr. Cas. 77 (Alta.), affirming *R. v. Cyr* [1917] 2 W.W.R. 1185, (Alta.); and it has been held that a woman may be convicted as a vagrant under sub-sec. (a) if she maintains herself by her own prostitution. *R. v. Cyr*, supra.

*Sub-sec. (b)*—"Family"]—Stroud's Judicial Dictionary says:—"The primary legal meaning of family means children, but it may, however, without difficulty, be controlled by the context and is, in itself, a word of most loose and flexible description."

Abbott's Law Dictionary:—"The word is used in many diverse senses. The meaning intended can only be determined by considering the context and also all the extrinsic facts bearing upon the general purpose of the entire writing in which it occurs."

An illegitimate child is not to be included in the term "family," the corresponding English statute from which this enactment is derived, having been held not to extend to illegitimate children. *R. v. Maude*, 11 L.J.M.C. 120. But see contra, *R. v. Barthos* (1911), 17 Can. Cr. Cas. 459, Que., per Leet, K.C. (P.M. of Montreal).

*Sub-sec. (b)—Refusal to work for maintenance of self and family*—In order to constitute a wilful refusal or neglect on the part of a husband to maintain his family, it is necessary that he should be under a legal obligation to do so, and his failure to maintain his wife, who had left him without valid cause and refused to return, is not an offence under that section. *R. v. Leclair* (1898), 2 Can. Cr. Cas. 297; *Flannagan v. Overseers* (1857), 3 Jurist N.S. 1103; *Morris v. Edmonds*, 18 Cox C.C. 627; *H— v H—* (1902), 6 Can. Cr. Cas. 163.

The liability of the father to maintain his children will remain unaffected by a separation order under which his wife was no longer bound to cohabit with him and was awarded the custody of the children. *Shaftesbury Union v. Brockway* [1913] 1 K.B. 159, 82 L.J.K.B. 222, 23 Cox C.C. 318. And if the father has been ordered in the separation proceedings to make periodical payments for the family's maintenance and has failed to do so, a prosecution will lie for wilful neglect and refusal to maintain when he has means to maintain them. *Shaftesbury Union v. Brockway*, supra. See also Code sec. 242A, making special provision for the offence of non-support of a wife and of the children under sixteen years of age, if they are in destitute or necessitous circumstances.

*Sub-sec. (c)—Indecent exhibition in public place*—For definition of a "public place" see Code sec. 197 (c).

*Sub-sec. (d)—Begging*—It must be shown that the wandering about and begging is a mode of life with the accused, and the section does not apply where persons with regular occupations temporarily out of employment through a "strike" go about seeking public contributions in aid of a general fund to sustain the strikers and their families. *Pointon v. Hill*, 12 Q.B.D. 306.

So it was held not to be an offence against sec. 3 of the Vagrancy Act, Imp., 1824, for a trade unionist to place himself in a street and solicit contributions for the funds of the union during a strike, inasmuch as the provision is not directed against persons collecting for an object of a charitable nature. *Mathers v. Penfold*, [1915] 1 K.B. 514, 84 L.J.K.B. 627.

A person who is found in the street making or assisting to make a *bona fide* collection for a charitable object is not within either the mischief or the language of the statute. *Mathers v. Penfold*, supra.

In order to establish that a person has committed an offence within the section it is not necessary to prove that he has before the particular occasion been in the habit of begging, nor that he intends in the future

to follow the habit of begging. He may adopt the calling for one day only and may, by his conduct on the particular occasion complained of so behave himself as to afford evidence—either by the nature of his request, the persistence or importunity of his manner, the whining tone adopted, or the deceptive devices employed—upon which a magistrate may be satisfied that the act is not merely an isolated act, but is such an act of begging, within the meaning of the statute, as to prove that he placed himself in a public place, etc., to beg or gather alms. *Mathers v. Penfold*, *supra*.

*Sub-sec. (e)—Loitering and obstructing passengers*—A licensed cabman who, contrary to a city ordinance, loitered on the street near the entrance of a hotel and solicited passengers to hire his cab was held not within this provision where no obstruction of passengers was shown. *Smith v. The Queen*, 4 Montreal L.R. 325.

*Sub-sec. (f)—Causing disturbance in public place*—It is not sufficient to charge merely that the accused was drunk on a public street without alleging further that he caused a disturbance in such street by being drunk. *Ex parte Despatie*, 9 Legal News (Montreal), 387; *R. v. Daly*, 12 Ont. Prac. R. 411. The disturbance incommoding persons passing by is of the essence of the offence. *R. v. Mercier* (1901), 20 Que. S.C. 28. The sub-section is not intended to apply to persons of good character holding a street meeting which may lawfully be held. *R. v. Kneeland*, 11 Que. K.B. 85, 6 Can. Cr. Cas. 81.

For definition of "public place," see sec. 197 (c). The present definition supersedes the decision in *R. v. Mercier* (1901), 20 Que. S.C. 28, and declares the law in accordance with *R. v. Kearney* (1907), 12 Can. Cr. Cas. 349, in which a licensed billiard hall was held to be a "public place."

*Sub-sec. (g)—Wantonly disturbing inmates of dwelling-house by disorderly conduct in street*—"Disturbing the inhabitants" of a town was held by Wilson, C.J., to mean annoying them, as by making a noise which interferes with the thoughts or proceedings of others. *R. v. Martin* (1886), 12 O.R. 800. It is distinguishable from the term "creating a disturbance," which applies either to raising a clamour, commotion, quarreling or fighting, and refers to conduct of the nature of a breach of the peace. *Ibid*. The disturbance should be of the nature of a nuisance. *Thomson v. Mayor of Croydon*, 16 Q.B. 708; compare *R. v. Geiger* (1917), 11 O.W.N. 66.

*Sub-sec. (h)—Damaging windows, etc.*—See also sec. 539, 540 and 541, as to the summary conviction offence of wilful damage to property.

*Sub-sec. (i)—Being a common prostitute or night-walker, wanders in streets, etc., and does not give a satisfactory account of herself*—A conviction for vagrancy as a "common prostitute or night-walker," wandering the streets, is not void because of the alternative description, if the evidence proves either of them, the defect if any being within the

curative provisions of secs. 724 and 1124. *Re Effie Brady* (1913), 3 W.W.R. 914, 23 W.L.R. 333, 21 Can. Cr. Cas. 123; compare *Smith v. Moody* [1903] 1 K.B. 56. The two expressions are not synonymous. *Ibid.*

The term "night-walker" has received many interpretations and would apply to any one habitually walking abroad at night to commit wrongful acts. Taken alone it would not be limited to females. The context indicates that in sec. 238 it means a woman who walks up and down the streets by night to pick up men. See *Lawrence v. Hedger*, 3 Taunt. 15; 2 Stroud's Jud. Dict. 1281; 5 Words and Phrases, 4809.

The public may be excluded from a trial under sub-sec. (i). Code sec. 645.

In *R. v. Harris* (1908), 13 Can. Cr. Cas. 393, 397 (Y.T.), Craig, J., said in reference to sub-sec. (i): "It limits the rights of this class of people to walk in the streets, inasmuch as any police officer, knowing what their character is, may accost them and demand an explanation which he is not at liberty to demand of any other citizen." Prostitutes have as much right to walk in the streets as any other person, provided they are not so walking for immoral purposes, and to ascertain their purpose, the officer before he puts the person charged on her defence, is to demand of her that she state the purpose for which she is on the street; *R. v. Harris*, *supra*; *Re Effie Brady* (1913), 3 W.W.R. 914, 21 Can. Cr. Cas. 123, 23 W.L.R. 333, 10 D.L.R. 424; *R. v. Leveque*, 30 U.C.Q.B. 509; *R. v. Arscott*, 9 Ont. R. 541; unless indeed the woman is caught in the act of soliciting or plying her trade. *Arscott v. Lilly*, 11 Ont. R. 153; *R. v. Harris* (1908), 13 Can. Cr. Cas. 393, 396 (Y.T.); *R. v. Jackson* (1917), 40 O.L.R. 173, 29 Can. Cr. Cas. 352.

It is not, however, necessary that the formal conviction should state that the accused on being arrested was asked to give an account of herself. That is to be implied if the conviction follows the wording of sub-sec. (i), and states that she did not give a satisfactory account of herself; *Re Effie Brady* (1913), 3 W.W.R. 914, 917; or that the circumstances were such that the asking would be a useless formality because of the accused being caught in the act. *R. v. Jackson* (1917), 40 O.L.R. 173, 29 Can. Cr. Cas. 352. Furthermore, sec. 723 of the Code provides that the description of any offence in words of the Code section creating the offence shall be sufficient in a conviction or commitment. *R. v. Jean Campbell* (1916), 22 B.C.R. 601, 26 Can. Cr. Cas. 196; *R. v. Leconte*, 11 Can. Cr. Cas. 41; *re Effie Brady* (1913), 3 W.W.R. 914. The cases of *R. v. Regan* (1908), 14 B.O.R. 12, 14 Can. Cr. Cas. 106, and *R. v. Pepper*, 15 Can. Cr. Cas. 314, are distinguishable on that point.

But a conviction for the offence cannot follow on a plea of guilty to an information which omitted all reference to the giving of an account. *R. v. Pepper*, 16 Man. R. 209, 15 Can. Cr. Cas. 314.



The offence of being a night-walker is necessary and two or more persons should not be joined. *R. v. Lachance* (1915), 24 Can. Cr. Cas. 421, Que. joinder is not a mere irregularity and is not valid. *Lachance*, supra; *R. v. Clarke*, 20 Ont. R. 642; *R. v. Lachance*, 127.

*Sub-sec. (j)*—Repealed 1915.

*Sub-sec. (k)*—Repealed 1915.

*Sub-sec. (l)*—*Supporting himself by gaming*].—Personal bets with individuals on horse-races is valid. *Ellis*, 15 Can. Cr. Cas. 379, 20 O.L.R. 218.

In *R. v. Davidson*, 8 Man. R. 325, defendant was convicted under the legislation as it then stood, R.S.C. ch. 10, offence similar to that declared by Code sec. 238. Writ of habeas corpus was heard by Killam, J.

The circumstances relied on to support the conviction now appearing in sub-sec. (l), and, of these means, only that there was any pretence that the defendant was practising gaming. For this purpose said Killam, J., "it was necessary to be evidence of four distinct propositions: (1) that the defendant was peaceable profession or calling to support himself by practising gaming; (2) that from this practice he derived substantial profit; (3) that these profits constituted his means of support. This evidence might be derived from the evidence might be of the very circumstances to be proved, or such as to raise merely presumptions of the existence of these circumstances. Evidence of some character to support each of these propositions was necessary; but, if there was any reasonable evidence of any of these characters in support of each, the conviction and sentence cannot be interfered with in a proceeding such as this." This was followed and approved by Robson, J., in *R. v. Kolotyla*, 19 Can. Cr. Cas. 25, 21 Man. L.R. 197.

*Sub-sec. (l)*—*Supporting himself by crime*].—There must be proof that the accused supported himself by crime; the inference does not arise from his consorting with thieves and his not having any peaceable profession or calling. *R. v. Organ*, 11 P.R. (Ont.), 497.

*Sub-sec. (l)*—*Supported by avails of prostitution*].—A similar provision in the English Vagrancy Act, 1898, is restricted to male persons living on women's earnings of prostitution.

In Ontario it has been held that clause (l) is not aimed at the prostitute. *R. v. Weller* (1917), 40 O.L.R. 296, 13 O.W.N. 19; but see contra, *Bedard v. The King* (1916), 22 Rev. Leg. Que. 302, 22 Can. Cr. Cas. 99; *R. v. Rehe* (1897), 1 Can. Cr. Cas. 63 Que., in which there are dicta in support of the view that a prosecution might be brought under sub-sec. (l) against a prostitute for maintaining herself by the

avails of her prostitution. Compare *R. v. Knowles* (1913), 4 W.W.R. 1341, 25 W.L.R. 294, 21 Can. Cr. Cas. 321 (Alta.), decided under the repealed clause (k).

A woman is not necessarily the accomplice of a man convicted of living on her immoral earnings. *R. v. King* (1914), 10 Cr. App. R. 117.

Under the English Act, a charge against a man of living on the earnings of prostitution is not invalid because charged as of one day only; nor will the prosecution be debarred thereby from giving evidence as to his relations with the woman both before and after the day named, for the purpose of determining whether he was or was not living on the earnings of her prostitution on that particular day. *R. v. Hill* (1914), 10 Cr. App. R. 56.

The amendment to sec. 216, made in 1913, made it an indictable offence for a male person to live wholly or in part on the earnings of prostitution. An added sub-sec. (2) to Code sec. 216, further provides that where a male person is proved to live with or to be habitually in the company of a prostitute or prostitutes, and has no visible means of support, or to live in a house of prostitution, he shall, unless he can satisfy the court to the contrary, be deemed to be living on the earnings of prostitution.

#### **Penalty for vagrancy.—Proviso.**

**239.** Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both: Provided that no aged or infirm person shall be convicted for any reason within paragraph (a) of the last preceding section, as a loose, idle or disorderly person or vagrant in the county of which he has for the two years immediately preceding been a resident.

*Origin*—4-5 Geo. V, Can., ch. 12, sec. 7; 63-64 Vict. Can., ch. 46, sec. 3; 57-58 Vict. Can., ch. 57; sec. 208, Code of 1892; R.S.C. 1886, ch. 157, sec. 8.

*"Loose, idle or disorderly person or vagrant"*—See sec. 238.

*Locality of offence*—The proceedings must indicate that the offence was committed within the territorial jurisdiction of the magistrate. *R. v. Picard* (1913), 3 W.W.R. 1007, 21 Can. Cr. Cas. 250; *R. v. Oberlander*, 15 B.C.R. 134, 16 Can. Cr. Cas. 244.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

*Origin*—Sec. 209, Code of 1892.

*Duty of parent, guardian or head of family*—Code secs. 242, 242A, 242B.

*Non-support of wife*—Code secs. 242, 242A, 242B.

*Criminal responsibility of person to maintain another of whom he has charge who is unable to provide for himself*—If a person having the care and custody of another who is helpless, neglects to supply him with the necessaries of life, and thereby causes or accelerates his death, he was guilty of a criminal offence even before the statute. *R. v. Nasmith* (1877), 42 U.C.Q.B. 242. But if a person over the age of sixteen and having the exercise of free will, chose to stay in a service where bad food and lodging were provided, the master was not criminally responsible if the neglect was not premeditated and did not continue to a period when the servant was helpless and dependent because of disease or otherwise. *R. v. Friend*, Russ. & Ry. 20; *R. v. Ridley*, 2 Camp. 650; *R. v. Brown*, 1 Terr. L.R. 475. *R. v. Charlotte Smith*, 10 Cox 94; Code sec. 243.

If the neglect was premeditated and there has been a deliberate omission to supply food to the helpless person in the custody or charge of the accused and death results from the omission, it is murder. *R. v. Condé*, 10 Cox C.C. 547; *R. v. Bubb*, 4 Cox C.C. 457; *R. v. Self*, 1 Leach 137; but if by gross neglect and without deliberate intent, the offence is only manslaughter. *R. v. Dalke* (1915), 33 W.L.R. 113, 25 Can. Cr. Cas. 98; *R. v. Instan* [1893] 1 Q.B. 450; *R. v. Senior* [1899] 1 Q.B. 283.

If a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy or other infirmity, he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence that person is guilty of manslaughter. *R. v. Nicholls*, 13 Cox C.C. 75. In such a case mere negligence will not establish the offence of manslaughter; there must be wicked negligence, that is, negligence so great as to satisfy a jury that the prisoner had a wicked mind in the sense that he was reckless and careless whether the creature died or not. *Ibid.*, per Brett, J.

If the death of an apprentice labouring under disease is caused by want of care of and harsh treatment by the master who has charge of him the master is guilty of murder. *R. v. Squire*, 3 Russ. Cr. 6th ed., 13.

As to failure to supply a midwife's services, see *R. v. Shepherd*, 81 L.J.M.C. 102.

*Necessaries*—Medical aid is a "necessary" within this section. *R. v. Brooks* (1902), 9 B.C.R. 13, 5 Can. Cr. Cas. 372, 1 Brit. R.C. 725; *R. v. Lewis* (1903), 6 O.L.R. 132, 7 Can. Cr. Cas. 261, 1 Brit. R.C. 732. Compare *R. v. Senior* [1899] 1 Q.B. 283, 68 L.J.Q.B. 175.

The language of sec. 243 as to the duty of servants and apprentices when their condition is such that they are not brought within the operation of sec. 241, is more restricted, the words there used being "necessary food, clothing or lodging."

Care and attention to prevent an invalid's death from exposure are also "necessaries," *R. v. Dalke* (1915), 33 W.L.R. 113, 25 Can. Cr. Cas. 98, and see secs. 242 and 242A.

"*Without lawful excuse*"—Conscientious scruples on the part of the accused against calling in medical aid for any physical ailment, will not constitute a lawful excuse. *R. v. Brooks* (1902), 9 B.C.R. 13, 5 Can. Cr. Cas. 372, 1 Brit. R.C. 725; *R. v. Lewis* (1903), 6 O.L.R. 132, 7 Can. Cr. Cas. 261, 1 Brit. R.C. 732; *R. v. Senior* [1899] 1 Q.B. 283, 68 L.J.Q.B. 175; *R. v. Morley*, 8 Q.B.D. 571; *R. v. Instan* [1893] 1 Q.B. 450.

An inference that the accused had means wherewith to provide at the date of the offence, may be drawn from proof that he had means at a prior date so close that the jury could properly infer that the means were not exhausted at the time of the offence. *R. v. Jones* (1901), 19 Cox C.C. 678.

The phrase "without lawful excuse," is also used in secs. 229, 237, 242, 242A, 243, 244, 246, 247, 248, 252.

*Culpable homicide*—Code secs. 252, 259-262.

Where the child's death ensued after conviction for the neglect, a subsequent conviction for manslaughter was upheld in *R. v. Tonks* [1915] W.N. 387, 32 Times L.R. 137; and see *R. v. Tonks* [1916] 1 K.B. 443, 85 L.J.K.B. 396, 11 Cr. App. R. 284.

*Punishment where not culpable homicide*—Code sec. 244.

#### **Duty of head of family to provide necessaries.—Criminal responsibility.**

**242.** Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is or is likely to be permanently injured, by such omission.

2. Every one who is under a legal duty to provide necessities for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission.

*Origin*—Sec. 210, Code of 1892; 32-33 Vict., Can., ch. 20, sec. 25, 24-25 Vict., ch. 100, sec. 26.

*"Guardian"*—Sec. 240 (c).

*"Head of a family"*—The case of a master under a contract for a child's services in return for his maintenance is not within sec. 242, but comes under sec. 243. *R. v. Coventry*, 3 Can. Cr. Cas. 541.

*"Under a legal duty to provide"*—Secs. 241 and 243 impose and declare under the sanction of federal criminal law, the legal duty incident to certain circumstances, but in the main it is left to the provincial legislatures to regulate the legal duty as a matter of civil rights.

*Necessaries*—What are to be considered as "necessaries" under Code sec. 242, must be determined by the circumstances of each particular case. *R. v. Sidney* (1912), 2 W.W.R. 761, 20 Can. Cr. Cas. 376 (Sask.). The term "necessaries" is to be read in connection with the general heading "duties tending to the preservation of life" and is to be given an interpretation in harmony therewith. *R. v. Brooks* (1902), 9 B.C.R. 13, 5 Can. Cr. Cas. 372, 1 Brit. E.C. 725; *R. v. Sidney*, *supra*.

"Necessaries" have been held to include food, clothing, shelter and medical attendance. *R. v. Sidney* (1912), 2 W.W.R. 761, (Sask.), citing *R. v. Lewis*, 7 Can. Cr. Cas. 261, 6 O.L.R. 132, 1 Brit. E.C. 732; *R. v. Wolfe* (1908), 13 Can. Cr. Cas. 246 (N.S.); *R. v. Nasmith* (1877), 42 U.C.Q.B. 242.

In deciding whether there has been criminal neglect in refusing to permit a surgical operation, the nature of the operation and the reasonableness of the refusal to have it performed are to be considered. *Oakey v. Jackson*, 30 T.L.R. 92 [1914] 1 K.B. 216.

At the common law, even the father was under no civil obligation to supply his infant children with necessities not required for the preservation of life. See *Bazeley v. Forder* (1868), L.R. 3 Q.B. 559, at p. 565. That obligation was first imposed by 43 Eliz., ch. 2 (a poor law statute, not in force in Ontario), which imposed a similar obligation upon the widowed mother, if of sufficient means. But the common law did impose a duty, not only upon parents, but upon every one of sufficient means having the care and custody of another who was helpless, to supply necessities required for the preservation of life, for the breach of which such person was made criminally responsible. And this is the duty which sec. 242, sub-sec. 1, of the Criminal Code recognizes, in the words: "Every one who as parent, guardian or head of a family is under a legal duty to provide necessities for any child under the age of sixteen

years is criminally responsible for omitting, without lawful excuse, to do so," etc. (*Wilson v. Boulter*, 26 A.R. 184, distinguished). *Young v. Gravenhurst* (1911), 24 O.L.R. 467, C.A.

A husband who omits without lawful excuse to provide necessaries for his wife is not guilty of an offence under sec. 242 (2) of the Criminal Code if her life is not endangered or her health is not, or is not likely to be, permanently injured by his neglect, nor is he guilty under sec. 242A if his wife be not in destitute or necessitous circumstances. Therefore, an information which omits reference to such ingredients is not sufficient under sec. 242 (2) or 242A. *R. v. McAuley* [1918] 3 W.W.R. 178 (Man.);

*Omitting without lawful excuse*—The fact that the wife has obtained an order of separation under a provincial law so that she is not obliged to cohabit with her husband, will not bar a criminal prosecution for his failure to provide necessaries. *Buteau v. Hamel* (1915), 24 Can. Cr. Cas. 53 (Que.); and see Quebec Civil Code, sec. 213; *Shaftesbury Union v. Brockway* [1913] 1 K.B. 159, 82 L.J.K.B. 222, 23 Cox C.C. 318.

If a husband offers to return and live with his wife whom he had deserted and the wife can show no good cause for not living with him, her refusal of the offer unless he gives financial security, not to desert her again will constitute a "lawful excuse" in answer to a charge under sec. 242. *R. v. Wolfe* (1908), 13 Can. Cr. Cas. 246 (N.S.); —

The husband living apart from his wife is still under a duty to maintain the children who are left in the mother's care. *R. v. Connor* [1908] 2 K.B. 26.

The responsibility of the husband who has deserted his wife while domiciled in Canada will not cease because of his having obtained a foreign divorce if he left Canada without intending to remain away longer than the time required to obtain the foreign divorce and in consequence there was no real change of domicile. *R. v. Wood* (1911), 19 Can. Cr. Cas. 15, 20 O.W.R. 576.

The jury must be satisfied that the omission was without lawful excuse, and that the death, if death followed, was caused, or, if death had not happened, that the person's life was endangered or that his or her health was or was likely to be permanently injured, by reason of the neglect or omission. *R. v. Wilkes* (1906), 12 O.L.R. 264, 11 Can. Cr. Cas. 226; *R. v. Wolfe* (1908), 13 Can. Cr. Cas. 246; *R. v. Yuman* (1910), 17 Can. Cr. Cas. 474, 22 O.L.R. 500.

The question of lawful excuse is to be determined upon all the facts and circumstances, the onus being upon the Crown. *R. v. Yuman*, *supra*.

The inability of the accused to support his wife by his earnings or otherwise may be shown in defence. *R. v. Robinson* (1897), 28 Ont. R. 407, 1 Can. Cr. Cas. 28; *R. v. Ryland* L.R., 1 C.C.R. 99.

*Health permanently injured or likely to be so*—There seems no good reason why the word "health" used in this connection should not include physical well-being by having the fingers or toes complete without the

necessity of amputation of any of them, but a Territories case on the subject gives a narrow interpretation to the word, the court holding that it could not assume, in the absence of expert testimony, that a child, some of whose toes were so badly frozen because of the guardian's neglect that they had to be amputated, had thereby had his "health" permanently injured or that his health was likely to be injured in consequence. *R. v. Coventry* (1898), 3 Can. Cr. Cas. 541 (Terr.).

That permanent injury was "likely" to result is a question of fact and inference from circumstances proved. *R. v. McIntyre* (1898), 31 N.S.B. 403, 3 Can. Cr. Cas. 413; *R. v. Bowman* (1898), 3 Can. Cr. Cas. 410.

*Prima facie evidence of marriage or parentage*—Code sec. 242B, and see *R. v. Holmes* (1898), 29 Ont. R. 362, 2 Can. Cr. Cas. 131; *Daye v. McNeill* (1904), 6 Terr. L.R. 44.

*Proof or inference of age of child*—See sec. 984.

*Culpable homicide*—Code secs. 252, 259-262.

*Punishment where not culpable homicide*—Code sec. 244.

**Neglect to provide for wife and children.—For ward.**

**242A.** Every one is guilty of an offence and liable on summary conviction to a fine of five hundred dollars, or to one year's imprisonment, or to both, who—

- (a) as a husband or head of a family, is under a legal duty to provide necessaries for his wife or any child under sixteen years of age; or,
- (b) as a parent or guardian, is under a legal duty to provide necessaries for any child under sixteen years of age;

and who, if such wife or child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries.

*Origin*—Code Amendment of 1913, ch. 13, sec. 14.

*"Guardian"*—The statutory definition in sec. 240 (b) makes the word "guardian" include any person who has in law or in fact the custody or control of the child. The father of an illegitimate child living with him may thus be liable as the child's guardian under sec. 242A although the mother is, as regards the civil law, the sole legal guardian. *Liverpool Society v. Jones* [1914] 3 K.B. 813, 12 L.G.R. 1103.

*Neglects or refuses to provide*—In the *Queen v. Byland*, L.R. 1 C.C.R. 99, it was decided that the word "neglect" imported ability, in a case of neglecting to provide food and clothing for a child: see also *Regina*

v. Chandler, Dears. C.C. 453; *Regina v. Ruggs*, 12 Cox. C.C. 16; and *The Queen v. Shepherd* (1862), 31 L.J.M.C. 102.

An offence is not disclosed where the charge reads that the defendant did "neglect his wife." *R. v. Chitnita*, 27 W.L.R. 268, 23 Can. Cr. Cas. 344 (Alta.). If a plea of guilty has been made to an information disclosing no offence before any evidence has been taken which might cure the defect, the conviction will be set aside. *R. v. Chitnita*, supra.

The duty of the father to provide for his young children has been held, under a somewhat similar enactment (the Childrens Act 1908 Imp.), not to be discharged by supplying his wife with the money for the children's maintenance if he finds they are neglected and the money misappropriated by her. *Poole v. Stokes* [1914] W.N. 123, 12 L.G.R. 629, 110 L.T. 1020.

"*Destitute or necessitous circumstances*" ]—Under sec. 242 the gravamen of the offence was that it endangered or injured the health of the complainant. But that is not the gravamen of the offence under sec. 242A. In the latter case the offence is complete if the accused has neglected his legal obligation. To be in "necessitous circumstances" simply means to be in need. If the complainant has no legal claim upon her father and mother for the support which she is receiving from them, and if it be proved that they are little able to provide that support, it cannot be said that she is not in necessitous circumstances because she has been receiving from them her daily food and lodging. *Algiera v. Traaey* (1916), 26 Can. Cr. Cas. 178.

*Prima facie evidence of marriage or parentage*]—Code sec. 242B.

*Wife a competent witness*]—The wife is a competent witness against her husband, Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4, as amended Can. Stat. 1917, ch. 14, sec. 1. The decision in *R. v. Allen* (1914), 23 Can. Cr. Cas. 67 against the admissibility of the wife's evidence was superseded by that amendment. See also, under the prior law, *R. v. Bissell*, 1 Ont. R. 514; *Mulligan v. Thompson*, 23 Ont. R. 54; *Reeve v. Wood*, 10 Cox C.C. 58.

*Adjudication*]—The proceedings being under Part XV of the Code, the magistrate is to convict or dismiss, Code sec. 726. Sec. 729 gives the magistrate a discretion, if it be a first offence and the accused is convicted, to discharge the accused from the conviction upon his making such satisfaction to the person aggrieved for damages or costs or both, to be ascertained by the justice. Sec. 1081 as to suspended sentences probably does not apply to summary conviction proceedings; but see *R. v. Knight* (1916), 11 O.W.N. 190, 27 Can. Cr. Cas. 111.

*Juvenile Delinquency*]—In cities or districts in which the Juvenile Delinquents Act 1908 Can. is in force reference should also be had to the provisions of that Act. 7-8 Edw. VII, Cap., ch. 40; 2 Geo. V, Can., ch. 30, 4-5 Geo. V, Can., ch. 39.



**Evidence of marriage and parentage.**

**242a.** Upon any prosecution under sections 242 or 242A, evidence that a man has cohabited with a woman or has in any way recognized her as being his wife shall be *prima facie* evidence that they are lawfully married, and evidence that a man has in any way recognized children as being his children shall be *prima facie* evidence that they are his legitimate children.

*Origin*—Code Amendment of 1913, ch. 13, sec. 14.

*Prima facie evidence of legitimacy*—The presumption declared by the latter part of sec. 242s which makes the man's recognition of the children as his own, the equivalent of *prima facie* evidence of legitimacy for the purposes of his criminal responsibility under secs. 242 and 242A, is of course rebuttable. Its practical effect seems to be that if the man declines to give evidence on his own behalf or to call other witnesses to satisfy the court that the children are illegitimate, he may be fixed with criminal responsibility for neglect to provide for them if he lives in concubinage with the children's mother. Similarly, the neglect to provide necessaries for the woman who passes as his wife may be the subject of prosecution, and on proof of cohabitation, the onus of proving that they were not married is placed upon the accused. See also, as to offences under 242 and 242A, the statutory definition of the word "guardian" in sec. 240 (b).

**Duty of masters.—Criminal responsibility.**

**243.** Every one who, as master or mistress, has contracted to provide necessary food, clothing or lodging for any servant or apprentice under the age of sixteen years is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

*Origin*—Sec. 211, Code of 1892; 32-33 Vict., Can., ch. 20, sec. 25; 24-25 Vict., Imp., ch. 100, sec. 26.

*At common law*—An indictment did not lie against a master at common law for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated, unless it alleged that the servant was of tender years and under the dominion and control of the master. *B. v. Friend*, Russ. & Ry. 20; *B. v. Ridley*, 2 Camp. 650; *B. v. Smith*, 10 Cox C.C. 94. The reason of the restriction is, that

if the servant be not of tender years, he may if not provided with proper nourishment remonstrate, and, if necessary, leave the service. *R. v. Naamith* (1877), 42 U.C.Q.B. 242, 245; *R. v. Brown* (1893), 1 Terr. L.R. 475. The present section does not appear to have changed the law in that respect except in fixing the age limit at sixteen.

*"Without lawful excuse"*—See Code secs. 241, 242, 242A.

*Proof or inference of child's age*—See sec. 934.

*Culpable homicide*—Code secs. 252, 259-262.

*Punishment where not culpable homicide*—Code sec. 244.

*Doing bodily harm to servants and apprentices*—Code sec. 249.

*Neglect to provide necessaries to person in charge of another by reason of sickness, etc.*—Code secs. 241, 244.

#### Omission of those duties.—Penalty.

**244.** Every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in the three last preceding sections, without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide.

*Origin*—Code of 1892, sec. 215; Code Amendment of 1893, ch. 32, sec. 1.

*Three last preceding sections*—The addition of secs. 242A and 242B after the enactment of sec. 244 in its present form, does not affect this reference applying as before to secs. 241, 242 and 243. *R. v. Allen* (1914), 23 Can. Cr. Cas. 67.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness, for the prosecution.

#### Abandoning children under two years.

**245.** Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered or its health is permanently injured.

*Origin*—Code of 1892, sec. 216; R.S.C. 1886, ch. 162, sec. 20; Offences against the Person Act, 1861, Imp., 24-25 Vict., ch. 100, sec. 27.

*"Abandon"*—Code sec. 240 (c).

*"Expose"*—Code sec. 240 (c).

*Abandoning child under two years*—The statutory definition of "abandon" and "expose" is framed in accordance with the two leading English cases of *R. v. White*, L.R. 1 C.C.R. 311, 40 L.J.M.C., 134, and *R. v. Falkingham*, L.R. 1 C.C.R. 222, 39 L.J.M.C. 47.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Proof or inference of age*—See sec. 984.

*Culpable homicide*—Code secs. 250-268.

### Duty of persons undertaking acts dangerous to life.

**246.** Every one who undertakes, except in cases of necessity, to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty if death is caused by such omission.

*Origin*—Sec. 212, Code of 1892.

*Manslaughter through surgical or medical malfeasance*—It seems that if a person, whether he be a regular practitioner or not, honestly and *bona fide* performs an operation, or uses a dangerous instrument, which causes the patient's death, he is not guilty of manslaughter; *R. v. Van Butchell*, 3 C. & P. 629; but if he is guilty of criminal misconduct, arising from gross ignorance or criminal inattention, and not from mere error of judgment, then he will be guilty of manslaughter. *R. v. Williamson*, 3 C. & P. 635; *R. v. Spiller*, 5 C. & P. 333; *R. v. Chamberlain*, 10 Cox 486.

In *R. v. Webb*, 1 Moo. & Rob. 405; 2 Lewin 196, Lord Lyndhurst laid down the following rule:—"In these cases there is no difference between a licensed physician or surgeon and a person acting as a physician or surgeon without license. In either case if a party having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is thereby not guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough in *R. v. Williamson*, 3 C. & P. 635. I shall leave it to the jury to say

first, whether death was occasioned or accelerated by the medicine administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence." See also *R. v. Macleod*, 12 Cox 584.

It is not "surgical or medical treatment" within the meaning of sec. 246 for a Christian Science practitioner to sit by the patient; *R. v. Beer*, 32 C.L.J. 416; but the failure to supply medical aid may render the person who is under a duty to supply necessities to a dependant liable under secs. 241-244, and any person abetting the latter offence might be charged with the offence itself under sec. 69.

*Failure to provide medical or surgical aid*—See secs. 241, 242, 242A, 244.

*Reasonable knowledge, skill and care*—See also sec. 65.

*Negligently causing bodily injury*—Code sec. 284.

*Homicide by neglect*—Code secs. 252, 262, 268.

#### **Duty of persons in charge of dangerous things.**

**247.** Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

*Origin*—Sec. 213, Code of 1892.

"*Every one*"—See the statutory definition in Code sec. 2 (13), which includes in this term bodies corporate in relation to such acts and things as they are capable of doing and owning, respectively.

*Neglect of person in charge of dangerous things*—If a person fails to take proper precautions when doing anything which is in its nature dangerous, he will be responsible though he had not the least intention of bringing about the consequences of his act. *R. v. Great West Laundry Co.* (1906), 13 Man. B. 66, 3 Can. Cr. Cas. 514; *R. v. M.C.B.* (1907), 17 Can. Cr. Cas. 483; *Union Colliery Co. v. The Queen*, 31 S.C.R. 81, affirming 7 B.C.R. 247.

The manager of a company might cause the company's trains to be run or controlled under circumstances where human life is put in hazard so recklessly and with so little regard for the safety of individuals as to expose himself to indictment for manslaughter in case of loss of life being occasioned by literal obedience to his orders. *Ex p. Brydges*, 18

(3) of sec. 252 declares that "homicide which is not culpable is not an offence."

*Homicide by misadventure*—Homicide by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. 1 East P.C. 5, p. 221, and sec. 36, pp. 260, 261, Fost. 258, 1 Hawk. P.C., ch. 29, sec. 1. The act must be lawful; for if it be unlawful, the homicide will amount to murder or manslaughter, and it must not be done with intention of great bodily harm, for then the legality of the act, considered abstractedly, would be no more than a mere cloak of pretence, and consequently would avail nothing. The act must also be done in a proper manner and with due caution to prevent danger. 1 East P.C., ch. 5, sec. 36, p. 261, 3 Russell 206.

Thus, if people following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately, to kill anyone, such killing will be homicide by misadventure. 1 Hale 472, 475, 1 Hawk. P.C. ch. 629, secs. 2 and 4. Thus, where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused. Fost. 263, 1 Hale 476. In a case where a person was riding a horse, and the horse, being whipped by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse. 1 Hawk. P.C., ch. 29, sec. 3.

Where parents, masters, and other persons having authority in *foro domestico*, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the circumstances; but if the correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure. 1 Hale 454, 473, 474, 4 Blac. Com. 182.

*Matters of justification or excuse*—Code secs. 16-68.

*Manslaughter through surgical or medical malfeasance*—See secs. 65, 246, 252.

#### **When a child becomes a human being.—Killing child.**

**251.** A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not.

2. The killing of such child is homicide when it dies in consequence of injuries received before, during or after birth.

*Origin*—Sec. 219, Code of 1892.

*Culpable homicide*—Code secs. 252-268.

*Killing unborn child*—Code sec. 306.

### **Homicide when culpable.**

**252.** Homicide may be either culpable or not culpable.

2. Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined, or by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person.

3. Culpable homicide is either murder or manslaughter.

4. Homicide which is not culpable is not an offence.

*Origin*—Sec. 220, Code of 1892.

*Culpable homicide*—If the death of a human being results from any action of any person, that person is said to have committed homicide. Sec. 250.

A person is criminally responsible for homicide unless he can show some legal excuse; the consent of the person killed is no excuse. Sec. 67.

Death must result, either directly or indirectly, from the act. Whether it does so or not must depend on the circumstances of the case, but if death occurs more than a year and a day after the act, the law presumes that death did not result from the act, but from some other cause; Code sec. 254; and the accused cannot be made responsible.

Further, a person is not responsible for causing death unless death naturally results from his conduct. For instance, if a person wounds another dangerously, and the other dies, whether from neglect of proper treatment, or from improper treatment, applied in good faith, for the purpose of effecting a cure, the person causing the injury is legally responsible for the death. Code sec. 258. On the other hand, if the wound is not dangerous in itself, but is rendered so by improper treatment, he is not responsible.

A person is guilty of causing death even if he merely accelerated the other's death, and it is no excuse that the person killed must have died very shortly from some other cause. Sec. 256. 172

The fact that the blame is shared by another will not relieve from responsibility a person contributing to the death. Code sec. 69.

*By an unlawful act or by an omission without lawful excuse to perform a legal duty*—A conviction for manslaughter was upheld when a girl under the age of consent jumped from a window and was killed in escaping from her ravisher. *E. v. Valade* (1915), 26 Can. Cr. Cas. 233 (Que.).

The circumstances under which culpable homicide is murder are set forth in secs. 259, 260.

Under English law, no devisee can take under the will of a testator, whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. *Lundy v. Lundy*, 24 S.C.B. 650, reversing *McKinnon v. Lundy*, 21 A.R. 560 (Ont.); and see *Standard Life v. Trudeau*, 31 S.C.B. 376, and 9 Que. Q.B. 499; *Cleaver v. Mutual Reserve Fund Life* [1892] 1 Q.B. 147, 61 L.J.Q.B. 128; *re Cora Crippen* [1911] P. 108, 80 L.J. P. 47; *Hall v. Knight* [1914] P. 1, 83 L.J. P. 1; *re Maude Mason* [1917] 1 W.W.R. 329, 23 B.C.R. 329.

*Causing a person by threats, etc., to do an act which causes that person's death*—See *E. v. Valade* (1915), 26 Can. Cr. Cas. 233 (Que.).

*Death caused by anger or excitement produced by the blow*—Code sec. 255; *E. v. Howard* (1913), 5 W.W.R. 838.

*When culpable homicide is murder and when manslaughter*—See secs. 259-262.

*Punishment for culpable homicide*—See secs. 263, 268.

*Attempts, conspiracies and threats to murder*—See secs. 264, 265, 266.

*Death from criminal neglect of corporation*—See secs. 222, 247 and 284.

#### **Procuring death by false evidence.**

**253.** Procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.

*Origin*—Sec. 221, Code of 1892.

*Perjury to procure conviction for capital offence*—Code sec. 174.

#### **Death within a year and a day.—How reckoned.**

**254.** No one is criminally responsible for the killing of another unless the death takes place within a year and a day of the cause of death.

2. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place.

3. Where the cause of death is an omission to fulfil a legal duty the period shall be reckoned inclusive of the day on which such omission ceased.

4. When death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened last.

*Origin*—Sec. 222, Code of 1892.

#### **Killing by influence on the mind.**

**255.** No one is criminally responsible for the killing of another by any influence on the mind alone, nor for the killing of another by any disorder or disease arising from such influence, save in either case by wilfully frightening a child or sick person.

*Origin*—Sec. 223, Code of 1892.

*Death from fright*—See sec. 252, sub-sec. 2.

*Death from excitement of altercation*—If death was caused by the increased heart action arising from anger or excitement of the deceased who was in a low condition of health, and the death was not accelerated by the striking of deceased during the altercation there must be an acquittal under sec. 255. *E. v. Howard*, 5 W.W.R. 838; and see, prior to the Code, *E. v. Dugal*, 4 Que. L.R. 350, by a divided court.

#### **Acceleration of death.**

**256.** Every one who, by any act or omission, causes the death of another, kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

*Origin*—Sec. 224, Code of 1892.

*Acceleration of death*—The slightest acceleration of death due to improper treatment is in law *prima facie* manslaughter. There is no discrimination in law between degrees of criminal inattention. *Rex. v. Burdee*, 12 Cr. App. R. 153; *E. v. Hammond* (1913), 5 W.W.R. 704, 22 Can. Cr. Cas. 120 (Sask.); see also *re Weir*, 14 Ont. R. 389,



**Death which might have been prevented.**

**257.** Every one who, by any act or omission, causes the death of another, kills that person, although death from that cause might have been prevented by resorting to proper means.

*Origin*—Sec. 225, Code of 1892.

*"By an act or omission"*—Sec. 257 is explanatory in part of the definition of homicide in sec. 250. The fact that proper treatment after the "act or omission," which was the cause of the death which later resulted, would ordinarily have cured the effect of the act or omission, at least, in so far as the fatality was concerned, does not prevent the killing being attributed to the person whose act or omission was the cause. But to ascertain whether such homicide by omission was culpable or not, one must refer to sec. 252, sub-sec. (2), defining culpable homicide, and to secs. 241-249, dealing with duties tending to the preservation of life. If the omission which causes death was "without lawful excuse," and was of the "performance or observance of any legal duty," the homicide is culpable. Sec. 252 (2). Declarations of "legal duty" arising under certain circumstances, are contained in secs. 241, 242, 246, 247 and 248.

If a man be wounded and the wound turn to a gangrene or fever for want of proper applications, or from neglect, and the man die of the gangrene or fever: see *R. v. Flynn*, 16 W.R. 319 (Irish); or if it become fatal from the refusal of the party to undergo a surgical operation; *R. v. Holland*, 2 M. & Rob. 351; or if death result from an operation rendered advisable by the act of the accused; *R. v. Davis*, 15 Cox C.C. 174; this is a homicide, and culpable or not, according to the circumstances under which the wound was given. 1 Hale, 421, 428; Archbold Crim. Evid., 22nd ed., 478.

**Causing injury the treatment of which brings death.**

**258.** Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results, kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.

*Origin*—Sec. 226, Code of 1892.

*Bodily injury "of a dangerous nature"*—As to "grievous bodily injury," see secs. 274, 284, and as to acts or omissions "endangering" life, see secs. 241, 242, 243, 245, 247, 249. Secs. 246 and 248 use the phrase "dangerous to life"; sec. 283, the phrase "endangers the safety of any person," and sec. 287 to unguarded places, "dangerous to human life."

*Subsequent treatment applied in good faith*—See *R. v. Markuss*, 4 F. & F. 356; *R. v. Pym*, 1 Cox C.C. 339.

*Murder and Manslaughter.***Murder defined.****259. Culpable homicide is murder,—**

- (a) if the offender means to cause the death of the person killed;
- (b) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
- (c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;
- (d) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

*Origin*—Sec. 227, Code of 1892.

*The crime of murder*—Murder, according to the old common law definition is unlawfully killing with malice aforethought, and manslaughter was defined as unlawful killing without malice aforethought. Malice aforethought was explained to mean not necessarily premeditation, but an intention which must necessarily precede the act intended. These definitions were misleading because the expression "malice aforethought" taken in its popular sense would be understood to mean that, in order that homicide might be murder, the act of killing must be premeditated, whereas murder might be committed without what is commonly called a premeditated design to kill. This element of doubt and fiction introduced into the common law by the use of the expression "malice aforethought" was removed by the Criminal Code, which became the law of Canada in 1892, and which codified, explained and simplified, and in some respects, modified the common law of homicide. *R. v. Krafchenko* (No. 1), 22 Can. Cr. Cas. 277, 285, per Mathers, C.J.

Homicide, which consists in the killing of one human being by another, is divided into two classes, namely, "culpable homicide" and "non-culpable homicide." That means killing which is unlawful and killing which is not unlawful, or excusable. Non-culpable homicide is again divided into two classes, justifiable and excusable. Justifiable homicide is when the act of killing is done pursuant to the orders of

some higher lawful authority, as when the soldier in time of war shoots to kill the enemy by command of his officer. It is excusable homicide where a man being violently attacked is obliged to kill his assailant in order to save his own life, or where a man in doing a lawful act without negligence and with no intention to injure, unfortunately kills another. Instances of such excusable homicide by misadventure occur almost every game shooting season by the accidental discharge of firearms. *Ibid.*

If a person attempted to commit suicide by shooting, and in a struggle with another who attempted to prevent the shooting, the revolver went off and the other party was killed, it may still be murder. *R. v. Hopwood* (1913), 8 Cr. App. B. 143.

In support of a plea of self-defence on a charge of murder, previous assaults of the deceased on the prisoner and on members of the prisoner's family are admissible to show the nature of the assault he had reason to fear. *R. v. Drouin*, 15 Can. Cr. Cas. 205.

If, in a homicide case by shooting, nothing appeared in the evidence to indicate the intention with which the accused shot the deceased, the jury would be justified in inferring an intention to kill from the fact that he fired the fatal shot, or gave the fatal blow with a lethal weapon, because, until the contrary is shown, every person is presumed to intend the natural and probable consequences of his own act. *R. v. Hoo Sam* (1912), 1 W.W.R. 1049, 1059, 19 Can. Cr. Cas. 259, 20 W.L.R. 571 (Sask.); *R. v. Blythe* (1909), 19 O.L.R. 386.

Wilfully negligent treatment by the putative father of an illegitimate child, hastening, if not causing, its death, will support a charge of murder. *R. v. Hammond* (1913), 5 W.W.R. 704 (Sask.).

*Proof of threats*—If one threatens to kill another, and gives a reason for it, the evidence may be admissible on a murder charge on two grounds: (1) to prove malice; and (2) to prove a motive. If it be a mere threat, it is evidence of malice, an ingredient in the crime of murder, and furthermore, it may be important for the purpose of showing that the killing was not accidental, where that issue is raised. See *Makin v. Attorney-General* [1894] A.C. 57; *Regina v. Stephens* (1888), 16 Cox C.C. 387; *The Queen v. Hammond* (1898), 29 O.R. 211; *Phillips on Evidence*, 10th ed., p. 514; and *Phipson on Evidence*, 3rd ed., pp. 109 *et seq.* and 137.

*Sub-sec. (d)—Unlawful act likely to cause death*—It is not enough that there were unlawful acts by the accused which caused the deceased to club his gun and strike his assailants, with the result that the gun was discharged in his hands and killed him; the unlawful acts of the accused must have been known by him to be likely to cause death or such that he ought to have known, if he did not in fact know it, that such a result was likely. *Graves v. The King* (No. 4), 47 S.C.R. 568, 12 E.L.R. 332, 21 Can. Cr. Cas. 44, reversing *R. v. Graves* (No. 3), 20 Can. Cr. Cas. 438, 9 D.L.R. 175 (N.S.); *R. v. Krafchenko* (No. 1), 22

Can. Cr. Cas. 277 (Man.); and see *R. v. Serné*, 16 Cox C.O. 311; *R. v. Rice*, 4 O.L.R. 223, 5 Can. Cr. Cas. 509.

*Accessories to the offence*—A person who aids or abets, counsels or procures the commission of the offence is punishable as a principal. Cr. Code, sec. 69; *R. v. McNulty*, 17 Can. Cr. Cas. 26 (Ont.).

*The medical testimony*—On a preliminary enquiry in a homicide charge it is the duty of the Crown to put in the whole of its medical evidence and not merely that of the medical expert who conducted the post-mortem. The Crown should place all the evidence in its possession before the magistrate, so that he may be enabled to say whether the accused should be sent up for trial or not. *R. v. Howard* (1913), 5 W.W.R. 838. (Man.).

The medical practitioner should examine all the important organs for marks of natural disease and note down any unusual pathological appearances or abnormal deviations although they may at the time appear to have no bearing on the cause of death.

Mr. Clark Bell, in his 12th Amer. edition of *Taylor's Medical Jurisprudence*, 1897, p. 23, says: "In medico-legal cases involving questions of life and death, the examination of the body cannot be too thorough and exhaustive; the omission of any one organ is a radical and sometimes a fatal defect. This was well illustrated in 1872 by two leading cases in the United States—that of *Mrs. E. G. Wharton*, charged with poisoning General Ketchum, and that of *Dr. Paul Schoeppe*, charged with poisoning Miss Steinneke. In neither case was the post-mortem sufficiently complete."

The body is inspected not merely to show that a person has died as a result of the criminal act, but to prove that he has *not* died from any natural cause. Medical practitioners commonly give their attention exclusively to the first point, while lawyers, defending accused parties, very properly direct a most searching examination to the last mentioned point, i.e., the healthy or unhealthy state of those organs which are essential to life. If the cause of death is obscure after the general examination of the body, there is good reason for inspecting the condition of the spinal marrow. In certain obscure cases it may become necessary to institute a microscopic examination, especially of the brain and heart. *Taylor's Medical Jurisprudence*, 1897, 12th Am. ed. 23.

In a trial for murder by committing an abortion resulting in the woman's death, it appeared that the post-mortem examination was insufficient, and that, so far as the medical evidence was concerned, it was possible that death might have been occasioned by some undiscovered disease which a post-mortem examination of other organs than those examined might have disclosed, and none of the medical men would swear positively to the cause of death; but there was other evidence tending to show that death was caused by a criminal operation, and

connecting the prisoners therewith. It was held, that such last-mentioned evidence was properly submitted to the jury. *R. v. Garrow* (1896), 1 Can. Cr. Cas. 246, 5 B.C.R. 61.

If a medical man is called to give expert evidence on hypothetical questions based upon the testimony of other witnesses, he should first be examined as to qualifications as an expert, so as to establish his capacity to speak authoritatively on such questions. *R. v. Preeper* (1888), 15 S.C.R. 401.

The expert witness is not to be asked his opinion on the very point which is to be determined by the jury, that is, he is not to be asked whether, in his opinion, the accused killed the deceased; but hypothetical questions may be put so that the expert's opinion is based upon testimony already given in his hearing, and he can then say whether the blows described by one witness could produce the fractures described by another witness. *R. v. Jones*, 28 U.C.Q.B. 416.

On a trial for homicide, an expert medical witness, who has not seen the dead body, but has heard its condition described in the witnesses' evidence in Court, may state his opinion that death was not self-inflicted. *R. v. Mason* (1911), 7 Cr. App. R. 67.

On principle, nothing may be given from a text-book, other than as the opinion of a witness who gives it. On cross-examination the judge should be careful to see that an improper use is not made of text-books, practically to give in evidence opinions of absent authors at variance with those of the witness. It is quite apparent that if the witness is asked about a text-book and he expresses ignorance of it, or denies its authority, no further use of it can be made by reading extracts from it, for that would be in effect making it evidence, but if he admits its authority, he then in a sense confirms it by his own testimony, and then may be quite properly asked for explanation of any apparent differences between its opinion and that stated by him. *R. v. Anderson* (1914), 5 W.W.R. 1052, 1053, 7 Alta. L.R. 102, 22 Can. Cr. Cas. 455, per Howey, C.J.; *R. v. Neigel* [1918] 1 W.W.R. 477, 29 Can. Cr. Cas. 232 (Alta.).

A medical expert may be examined as to what is in standard medical text-books. Counsel may confront an expert with such books for the purpose of showing either that the witness is mistaken, or that he may explain and reconcile, if he can, the real or apparent difference between what he has said and what is found in the books. *R. v. Anderson*, *supra*; *Brownell v. Black*, 31 N.B.R. 594.

No more than five professional or other experts may be called upon either side without leave of the court, which leave is to be applied for before the examination of any of the experts who may be examined without such leave. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 7.

*Reasonable doubt*].—The jury must be convinced of the defendant's guilt beyond a reasonable doubt. *R. v. Krafchenko* (No. 1), 22 Can.

Gr. Cas. 277 (Man.); R. v. Charles King, 6 Terr. L.R. 139, 9 Can. Cr. Cas. 426, 1 W.L.R. 348; R. v. Shortall, 12 O.W.N. 94, 28 Can. Cr. Cas. 98.

The onus of proving a defence of insanity is merely to give a preponderance of evidence on that question to the satisfaction of the jury; the defence is not required to prove insanity by the greater degree of evidence which by usage has come to be known as proof "beyond a reasonable doubt." R. v. Anderson (1914), 5 W.W.R. 1052, 7 Alta. L.R. 102, 26 W.L.R. 783, 22 Can. Cr. Cas. 455; and see R. v. Myhrall, 8 Can. Cr. Cas. 474 (as to an alibi); R. v. Stoddard, 2 Cr. App. R. 217; Macnaghten's case, 10 Cl. & F. 200; R. v. Cavendish, Irish R., 8 C.L. 178. Contra, see R. v. Jefferson (1898), 72 J.P. 467, reversed on other grounds, 1 Cr. App. R. 95.

*Dying declarations as evidence in homicide cases*—In criminal cases a dying declaration is only admissible in the case of homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declaration. R. v. Inkster (1915), 8 W.W.R. 1098, 24 Can. Cr. Cas. 294, 8 Sask. L.R. 233; R. v. Hutchinson (1822), 2 B. & C. 605; R. v. Mead (1824), 2 B. & C. 608 (note); R. v. Lloyd (1830), 4 C. & P. 233; Reg. v. Hind (1860), 29 L.J.M.C. 147, 8 Cox C.C. 300; R. v. Woodcock, 1 Leach C.C. 500.

So if other counts are joined with that of manslaughter, then as soon as the dying declaration was made use of by the prosecution, the other counts should have been withdrawn. R. v. Inkster (1915), 8 W.W.R. 1098, 1099. Where this was not done nor was the jury directed to disregard the dying declaration upon the counts joined with manslaughter, and the jury disagreed on that charge, a new trial was ordered, as it was impossible to say that the admission of that declaration on the charge of unlawfully administering a drug, did not occasion some substantial wrong. *Ibid.* at 1100.

The pre-requisite to the admission of proof of a dying declaration is that the declarant was under a "settled, hopeless expectation of death"; that is a question for the judge. R. v. Woods, 2 Can. Cr. Cas. 159, 5 B.C.R. 585; R. v. Aho, 11 B.C.R. 114, 8 Can. Cr. Cas. 453; but the declaration need not be in prospect of "immediate death" if all hope of surviving any longer than a short time has been abandoned. R. v. Perry [1909] 2 K.B. 697; R. v. Smith, 23 U.C.C.P. 312; R. v. Sparham (1875), 25 U.C.C.P. 143; R. v. Osborne, 15 Cox C.C. 169; R. v. Magyar, 12 Can. Cr. Cas. 114, 7 Terr. L.R. 491.

The question is whether at the time the declarant made the statement, he was in hopeless expectation of death. If he were, it is immaterial that subsequently his bodily and mental condition became better and he cherished hopes of recovery. R. v. Austin (1912), 8 Cr. App. R. 27; R. v. Davidson (1898), 30 N.S.R. 349, 1 Can. Cr. Cas. 351; R. v. Smith, 23 U.C.C.P. 312.

The witness need not have stated that he spoke under a sense of impending death; his realization of that condition may be shown from the other circumstances. *R. v. Smith*, 23 U.C.C.P. 312; *R. v. Sparham*, 25 U.C.C.P. 143; *R. v. Sunfield*, 15 O.L.R. 252, 13 Can. Cr. Cas. 1.

Where an injured woman said to another Indian woman, "Fellowes hurt me and make me die," and to her father she said, "I am going to die, hurry up and get the priest"; "Sure, I am going to die, hurry up and get the priest for me." Held, that this was sufficient indication of apprehension of imminent death and hopelessness of recovery to be admitted in evidence as a dying declaration. *Rex v. Walker*, 15 B.C.R. 100, 13 W.L.R. 47, 16 Can. Cr. Cas. 77.

*Exact words of dying declaration not essential*—In *Regina v. Mitchell*, 17 Cox C.C. 503, Cave, J., held that a statement to be admissible must be in the actual words of the deceased, and if questions are put, both the questions and answers must be given. The case, however, does not appear to be in accord with either the earlier or the later authorities which are mentioned in Archbold's Criminal Pleading and Evidence, 23rd ed., p. 324, nor, with sound reason. *R. v. Magyar*, 12 Can. Cr. Cas. 114 at 119, per Harvey, J. It is clear from the authorities that a dying declaration need not be in writing, and if evidence of such a declaration were being given by a person who heard it, he could not be expected to give the exact words with any degree of accuracy, but what he would give necessarily would be in his own words, the substance of what was said to the best of his recollection. But where the statements, after being written down, were read over to the deceased and accepted and signed by him, they did in effect become his own words. *Ibid.*

In *R. v. Louie*, 10 B.C.R. 1, 7 Can. Cr. Cas. 347, the Supreme Court of British Columbia declined to follow *Regina v. Mitchell*, and held that a statement in narrative form obtained by questions through an interpreter, and not read over to the deceased after being written down, was admissible.

*Intent negatived by proof of insanity or drunkenness*—As to insanity as an excuse for crime, see Code sec. 19. Where a defence of insanity is raised in a homicide case, the Crown is under no obligation to call the prison doctor or the official alienist by whom the accused has been under observation while in custody; but the Crown should place at the disposal of the prisoner's counsel any evidence in its possession on the question of insanity to be used by him if he thinks fit. *R. v. Keirstead* (1918), 42 D.L.R. 193, 201 (N.B.).

In an English case, the general rule was laid down that the Crown's evidence as to the condition of the prisoner's mind should be given in reply and not in chief; *R. v. Smith*, 8 Cr. App. B. 72; but when it is clear from the cross-examination on behalf of the prisoner that the defence to a murder charge will be insanity, and it is ascertained that

no witnesses will be called to prove it, it is the proper practice for the judge, at the close of the case for the Crown, to allow medical evidence as to the prisoner's sanity to be then called by the prosecution. *R. v. Abramovitch* (1912), 7 Cr. App. R. 145.

Where the sole question raised was whether the accused was insane or whether he knew what he was doing, and so was guilty of murder, and on the facts it was impossible for any jury reasonably to return a verdict of manslaughter instead of murder, the trial judge is not bound to indicate to the jury in his charge to them, that they might find the accused guilty of manslaughter. *R. v. Honeyands* (1914), 10 Cr. App. R. 60; *R. v. Meade* [1909] 1 K.B. 895.

Murder may be reduced to manslaughter if a man is so drunk as to make him unable to form any intention. *R. v. Sparkes* (1917), 51 N.S.R. 482, 29 Can. Cr. Cas. 116; *R. v. Kane*, 25 Can. Cr. Cas. 443; *R. v. Wilson*, 21 Can. Cr. Cas. 448, 46 N.S.R. 59; *R. v. Meade* [1909] 1 K.B. 895; *R. v. Doherty*, 16 Cox C.C. 306; or if the accused was too drunk to form any definite purpose at all. *R. v. Bentley* (1913), 9 Cr. App. R. 109; or if the accused because of his extremely drunken state did not know the difference between right and wrong. *R. v. Galbraith* (1912), 8 Cr. App. R. 101.

An acquittal would not be justified on the ground of the prisoner's insanity unless his mind was so affected that he was not capable of appreciating the nature and quality of his act and of knowing that his act was forbidden by law. *R. v. Jessamine*, 19 Can. Cr. Cas. 214 (Ont.).

No person can be rightly tried, sentenced or executed while insane. If there be sufficient reason to doubt whether an accused person is unable, on account of insanity, to conduct his defence, the question whether by reason of such insanity he is unfit to take his trial should first be tried. *R. v. Leys*, 16 O.W.R. 544; Code sec. 967.

*Compulsion by threats*—See Code sec. 20. Threats of death or of grievous bodily harm made by the principal offender would not form an excuse for assistance given in killing another. *R. v. Farduto*, 21 Can. Cr. Cas. 144, 19 Rev. Leg., Que., 165, 10 D.L.R. 669.

*Admissions and confessions of the accused*—As to proof of admissions or confessions alleged to have been made by the accused, see note to sec. 685. When the accused becomes a witness on his own behalf he may be cross-examined as to whether he has been convicted of any indictable offence, even though the conviction is altogether irrelevant to the matter in issue; Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 12; the inquiry being relevant as affecting the credibility of the accused. *R. v. D'Aoust* (1902), 5 Can. Cr. Cas. 407, 3 O.L.R. 653; *R. v. Mulvihill* (1914), 5 W.W.R. 1229 (B.C.); and see *Ward v. Sinfield*, 49 L.J.C.P. 696. An unfair statement featured in a newspaper item that the accused had confessed a homicide charge was held a good ground for postponing the trial as it had indirectly deprived the accused of the benefit of



having any alleged confession ruled out as inadmissible. *B. v. Willis* (1913), 4 W.W.B. 761, 23 W.L.R. 702, 23 Man. R. 77; *B. v. Davies* [1906] 1 K.B. 32.

*Evidence of similar facts and of other criminal acts*—Evidence that the person accused of an offence committed a like offence or acted in a similar manner on another occasion, is not admissible merely for the purpose of showing that he has a general disposition to commit such offences. But where several offences are so connected with each other as to form part of an entire transaction, evidence of one is admissible as proof of another. *R. v. Ellis*, 6 B. & C. 145; *R. v. Beardon*, 4 F. & F. 76; *R. v. Maclean* (1906), 11 Can. Cr. Cas. 283, 1 E.L.R. 334; *R. v. Brown*, 21 U.C.Q.B. 338; *R. v. Chasson*, 3 Pugs. (N.B.) 546; So also where there is a *nexus* between the two acts sufficiently proximate in point of time to show a systematic course of conduct. *Perkins v. Jeffery* [1915] 2 K.B. 702, 84 L.J.K.B. 1554, 25 Cox C.C. 59; *R. v. Bond*, 75 L.J.K.B. 693 [1906] 2 KB. 389; *Thompson v. Director of Public Prosecutions* [1918] A.C. 221, 87 L.J.K.B. 478, affirming *R. v. Thompson* [1917] 2 K.B. 230, 86 L.J.K.B. 1321; *R. v. Crippen*, 27 Times L.B. 69. And in *Brunet v. The King* (1918), 30 Can. Cr. Cas. 16 on a charge of abortion the Supreme Court of Canada upheld a conviction where in answer to a defence of innocent intent in performing a surgical operation, the Crown gave evidence to show criminal operations to procure miscarriage performed two and four years previously on two other women. Where there was no probability of the defence of innocent purpose being set up until the prisoner gave his testimony, the Crown could not properly adduce evidence of that class; *Bunet v. The King*, *supra*; *Perkins v. Jeffery*, 25 Cox C.C. 59, 66; *R. v. Christie* [1914] A.C. 545; *Thompson v. Director of Public Prosecutions* [1918] A.C. 221, 87 L.J.K.B. 478 (H.L.). It has therefore been held proper that the accused should be offered an opportunity of meeting the evidence so given by the Crown in rebuttal by calling any further evidence in sur-rebuttal and offering an adjournment for that purpose. *Brunet v. The King* (1918), 57 S.C.R. 83, 30 Can. Cr. Cas. 16, 41 (Can.).

Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the charge is admissible—(1) Where the prosecution seeks to prove a system or course of conduct. (2) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake. (3) Where the prosecution seeks to prove knowledge by the prisoner of some fact. And in all cases, such evidence is never admitted as proof that the prisoner did the act charged, but only as showing the quality of that act and the guilty intention of the prisoner. See judgment of Bray, J., in *Rex v. Bond* [1906] 2 K.B. 389.

It is the general rule, in justice to a person accused of an offence, that he shall not, on his trial therefore, be called upon to answer other

charges not connected therewith, nor shall evidence of an unconnected offence be given merely to prove his vicious character or his readiness to commit such a crime as he is upon trial for. As put by the House of Lords in *Rex v. Ball* [1911] A.C. 47, 71, "You cannot convict a man of one crime by proving that he had committed some other crime." Nevertheless, evidence of facts relevant to the immediate charge against him is not the less admissible because it necessarily discloses the commission of other crimes by him (*Rex v. Ball*). But it must be evidence of facts relevant to that immediate charge. *R. v. Gibson* (1913), 29 O.L.R. 56, 21 Can. Cr. Cas. 477, 484, distinguishing *R. v. Rooney*, 7 C. & P. 517 and *R. v. Birdseye*, 4 C. & P. 386.

It is a recognized principle of the criminal law that, apart from special conditions or statutory enactment, evidence is not admissible merely to prove that the person accused has a general propensity to commit a crime similar in character to that with which he is charged. *Thompson v. Director of Public Prosecutions* [1918] A.C. 221, 87 L.J.K.B. 478, 486, affirming *R. v. Thompson* [1917] 2 K.B. 230, 86 L.J.K.B. 1321; *R. v. Bond*, 75 L.J.K.B. 693, [1906] 2 K.B. 389; *Makin v. Atty.-Gen. of N.S.W.*, 63 L.J.P.C. 41, [1894] A.C. 57; *R. v. Oddy* (1851), 20 L.J.M.C. 198. On the other hand, such evidence is admissible if there is any connecting relationship between it and the particular crime with which a prisoner is charged. *Thompson v. Director of Public Prosecutions* [1918], A.C. 221, 87 L.J.K.B. 478, 486, (H.L.) per Lord Parmoor. If such evidence is admissible it cannot be excluded on the ground that it may incidentally introduce considerations which may tend to prejudice the trial of the person accused. *Ibid.* Sometimes for one reason, sometimes for another, evidence is admissible notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example in proving guilty knowledge or intent or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. *Ibid.* per Lord Sumner, 87 L.J.K.B. at 484. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretenses and sundry species of frauds, such evidence is admitted. But before an issue can be said to be raised which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance, if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. *Thompson v. Director etc.* (1918), 87 L.J.K.B. 478 at 484, per Lord Sumner.

"The mere theory that a plea of not guilty puts everything material in issue, is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice. No doubt it is paradoxical that a man whose act is so nakedly wicked as to admit no doubt about its character may be better off in regard to admissibility of evidence than

a man whose acts are, at any rate, capable of having a decent face put upon them, and that the accused can exclude evidence that would be admissible and fatal if he ran two defences, by prudently confining himself to one. Still, so it is." Per Lord Sumner (1918), 87 L.J.K.B. 478 at 484.

In cases of robbery or embezzlement, the need of money or the greed for money may be proved in evidence to show that the accused who had that need or entertained those feelings of greed, committed the crime. As said by Lord Atkinson in *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478, at 481, "these things are not the less 'states of mind and feeling because they are described as motives for the commission of the crime.'" See also *R. v. Gibson*, 28 O.L.B. 525; *R. v. Spain* [1917], 2 W.W.B. 465, 27 Man. R. 473, 28 Can. Cr. Cas. 113.

In the leading case of *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, 63 L.J.P.C. 41, 6 B. 373, 17 Cox C.C. 704, 69 L.T. 778, it was decided by the Judicial Committee of the Privy Council that evidence of other crimes was admissible under certain circumstances. In the judgment it is stated:—

"In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other. The principles which their Lordships have indicated appear to be on the whole consistent with the current of authority bearing on the point, though it cannot be denied that the decisions have not always been completely in accord." (1894 A.C. 57 at 65). This decision was applied in *R. v. Collyns* (1898), 3 Terr. L.R. 82, 4 Can. Cr. Cas. 572.

In *Rex v. Bond* [1906] 2 K.B. 389, 95 L.T. 296, 21 Cox C.C. 252, the evidence in question was considered admissible, but there was in addition to the evidence of one similar act evidence of a statement of the accused of the commission of several such acts. In *R. v. Pollard* (1909), 15 Can. Cr. Cas. 86, 19 O.L.B. 96, the evidence was that of a single act and the Judges who gave opinions refrained from answering

the question asked by the reserved case, whether the evidence was properly admitted, but said that the conviction should be set aside and a new trial ordered. In both the cases mentioned the charge was abortion, or attempted abortion, and the act itself was not in dispute. In the Pollard case all of the Judges, and in the Bond case some of the Judges, held that to establish guilt it was necessary to establish a system which could not be done by evidence of a single additional case. In the Bond case, Bray, J., points out the distinction between such cases and those in which the evidence is given for the purpose of proving intent as negating accident or mistake. It is also considered at length in Wigmore on Evidence, vol. 1, p. 301 *et seq.* 320, 321, and 365.

The Makin case *supra*, decides that for the purpose of proving that the accused designed or intended to commit the crime, evidence of a similar act is relevant to prove that design. One act is as admissible as more, the difference being the weight to be attached. *R. v. Wilson* (1911), 1 W.W.R. 272, 19 W.L.R. 657, 21 Can. Cr. Cas. 105 (Alta.).

So if a defence of innocent motive and want of design has been suggested by the defence in its line of cross-examination of the Crown witnesses, the Crown may anticipate the defence so indicated by adducing evidence to rebut the theory of defence without waiting for the defence to call witnesses. *R. v. Howes* (1914), 7 W.W.R. 683, 23 Can. Cr. Cas. 358 (Sask.). The evidence will have been legally received although the defence elects to call no witnesses. *R. v. Howes, supra*.

And it has been said that if the theory of the defence on a charge of theft from his employer throws the crime upon a fellow-employee of the accused, evidence might properly be received of another theft by the accused from the same employer at about the same time. *Rivet v. The King* (1916), 24 Que. K.B. 559, 25 Can. Cr. Cas. 235.

The principle is that the prosecution are not allowed to prove that a prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible, because it is relevant to the issue; and it is admissible, not because, but notwithstanding that, it proves that the prisoner has committed another offence. Channell, J., in *R. v. Fisher*, [1910] 1 K.B. 149, 79 L.J.K.B. 187, approved in *R. v. Rodley* (1913), 9 Cr. App. R. 69 at 74; *Minchin v. The King* (1914), 6 W.W.R. 800, 23 Can. Cr. Cas. 414, affirming 5 W.W.R. 1028, 7 Alta. L.R. 148; *R. v. Gibson* (1913), 28 O.L.R. 525, 21 Can. Cr. Cas. 477. So evidence of an assault and robbery of one person may be evidence on a charge of the murder of another committed in pursuance of a scheme to rob them both and to get them separated for that purpose. *R. v. Gibson, supra*.

Whether such a connection between the various acts is proved or not so as to admit the evidence is a question for the trial judge to decide. *R. v. Iman Din*, 18 Can. Cr. Cas. 82; *R. v. McDonald*, 10 Ont. R. 553; *R. v. Colclough*, 15 Cox 92, 98. If the criminal intent which it is sought to affirm is manifest without it in the event of the evidence for the prosecution being believed, and the intent is practically not in issue because of the defence relying altogether on a denial of the evidence for the prosecution, it would seem that evidence of other similar acts should be rejected. *R. v. McDonald*, 10 Ont. R. 553; *R. v. McDonnell*, 5 Cox 153; *R. v. Bond* [1906] 2 K.B. 389, 75 L.J.K.B. 693, 70 J.P. 424, 21 Cox C.C. 252; *R. v. Chitson*, 25 Times L.R. 816; The judge is to direct the jury on the limits of the use which they can make of evidence of similar acts where such testimony is adduced. *R. v. Smith* (1915), 11 Cr. App. R. 230; *R. v. Lovitt*, 13 Can. Cr. Cas. 15.

Evidence which would properly be admissible of similar prior acts under the doctrine laid down in *Makin v. N.S.W.* [1894] A.C. 57, 17 Cox C.C. 704 and *R. v. Ball* [1911] A.C. 47, 22 Cox C.C. 366, does not cease to be so because a prosecution for such prior acts has become barred by lapse of time. *R. v. Shellaker* [1914] 1 K.B. 414, 9 Cr. App. R. 240, (*R. v. Beighton*, 18 Cox C.C. 535, not approved); and see *R. v. Smith* (1915), 84 L.J.K.B. 2153; *R. v. Francis*, 30 L.T. 503.

Where evidence of similar facts would otherwise be admissible, the evidence will not be barred because it is the subject of separate indictments pending. *R. v. Jones*, 14 Cox 3; *R. v. Stephens*, 16 Cox 387; 58 L.T. 776, 52 J.P. 823; *R. v. McDonald*, 10 Ont. R. 553.

Evidence of subsequent criminal acts of the accused showing that they were intended to cover up the disappearance of the murdered man and of his effects which the accused had appropriated are admissible to negative a plea of killing in self-defence. *R. v. Letain* (1918), 1 W.W.R. 505, 29 Can. Cr. Cas. 389 (Man.).

The prosecution may, in order to prove the quality of the act charged in the indictment, give evidence of subsequent criminal acts by the prisoner, and the facts and circumstances surrounding the same, other than that covered by the indictment, when a *prima facie* case in law has been established against the prisoner of the act charged in the indictment. *R. v. Smith* (1915), 84 L.J.K.B. 2153, 11 Cr. App. R. 229.

*Res gestae*].—On a trial for murder by shooting, evidence of statements made by the person shot immediately after the shooting and while under apprehension of further danger from the accused and requesting assistance and protection therefrom, is admissible as part of the *res gestae*, even though the person accused of the offence was absent at the time when such statements were made. *Gilbert v. The King*, 38 S.C.R. 284, 12 Can. Cr. Cas. 127.

Even if a statement of the deceased is not admissible as part of the *res gestae* because not coincident in point of time with the main facts to be proved, the words may be admissible if uttered in the presence and hearing of the accused, and under such circumstances, in the light of what he had previously stated to another of the parties present that he might have been reasonably expected to make some answer or remark in reply thereto. *Gilbert v. The King* (No. 2), 12 Can. Cr. Cas. 127, at 140, 38 S.C.R. 284.

To prove the alleged motive of securing life insurance moneys, in a trial for murder, evidence is properly admissible, as a part of the *res gestae* of all applications for insurance made practically at the same time and forming parts of one transaction, although some of the applications were refused and no insurance effected thereupon. *R. v. Hammond* (1898), 29 Ont. R. 211, 1 Can. Cr. Cas. 373. But evidence of an attempt made some time previously by the accused to insure for his own benefit the life of a person other than the deceased is not admissible. *R. v. Hendershott* (1895), 26 Ont. R. 678.

When two similar acts, separately charged in two indictments, are done at practically the same time, on the trial of the former, evidence of the latter may be admissible as part of the *res gestae*. *Rex v. Greenley*, 10 Cr. App. R. 274.

In *Thompson v. Trevanion*, *Skinner's Reports*, p. 4022 (1693), tried before Chief Justice Holt sitting at *Nisi Prius*, it was held that what a woman said immediately on a hurt being received by her, and before she had time to contrive anything for her own advantage, might be given in evidence. The rule is here stated to rest on the absence of time or opportunity for concoction. In *Regina v. Bedingfield*, 14 Cox C.C. 341 (1879), a woman rushed out of a room with her throat almost cut through, made a statement to some women she met, and expired in a very short time. Her husband was found in this room with his throat cut also. The question at issue was murder or suicide. Chief Justice Cockburn said: "The woman's statement was not admissible, for it was not part of anything done, but something said after something done. It is not as if, while being in the room and the act was being done, she said something which was overheard." In other cases, such as *Rex v. Foster*, 6 C. & P. 325 (1834); *Rex v. Lunny*, 6 Cox C.C. 477 (1854), the rule was applied with less strictness. And a statement of the complainant made after the assault complained of and after the complainant had returned with a police officer and found the accused, was rejected, although only a few moments had elapsed, for the statement was separated by time and circumstance from the actual commission of the crime. *Christie's Case*, *Director of Public Prosecutions v. Christie* (1914), 10 Cr. App. R. 141; *R. v. Foster*, 6 C. & P. 325; *Aveson v. Kinnaird*, 6 East 188; *R. v. McMahon* (1889), 18 Ont. R. 502; *R. v. Christie*, [1914] A.C. 545, 556.

*Misdirection*.—Misdirection as to the essential constituents of the crime will be a cause for a new trial if prejudice to the accused resulted therefrom. *Graves v. The King* (No. 4), 47 S.C.R. 568, 12 E.L.R. 332, 21 Can. Cr. Cas. 44, reversing *R. v. Graves* (No. 3), 20 Can. Cr. Cas. 438, 9 D.L.R. 175; *R. v. Theriault* (1894), 32 N.B.R. 504, 2 Can. Cr. Cas. 444. And failure to instruct the jury as to the difference between the offence charged and any lesser offence of which it would be competent for them to find the accused guilty on the same indictment, would be ground for a new trial. *R. v. Wong On*, 10 B.C.R. 555, 8 Can. Cr. Cas. 423.

Ordinarily on a charge of murder the judge will find occasion to instruct the jury also as to the lesser crime of manslaughter; but if there was no evidence upon which the jury could reasonably have found a verdict of manslaughter, and the verdict must be either one of guilty of murder or an acquittal, the judge's charge would not be open to exception for not dealing with the law of manslaughter. *Gilbert v. The King*, 38 S.C.R. 284; 12 Can. Cr. Cas. 127; *Eberts v. The King*, 3 W.W.R. 37, 47 S.C.R. 1, 22 W.L.R. 901; *R. v. Barrett* (1908), 1 Sask. L.R. 373.

Where the jury in a murder case would not have been justified, on the evidence, in coming to any other conclusion than that the killing was intentional, there being no evidence which would reduce the killing to manslaughter or non-culpable homicide, and the defence being a denial that the accused did it, the trial judge is justified in telling the jury that the accused is guilty of murder if he killed the deceased. *R. v. Hoo Sam* (1912), 1 W.W.R. 1049, 20 W.L.R. 571, 19 Can. Cr. Cas. 259 (Sask.); and see *R. v. Gorges*, 85 L.J.K.B. 1049, 25 Cox C.C. 218.

If a material question was raised on the evidence and a failure to give a proper direction upon it may have induced the jury to return a verdict of murder instead of manslaughter, a new trial will be ordered. *R. v. Blythe*, 19 O.L.R. 386, 15 Can. Cr. Cas. 224; *R. v. Daley*, 16 Can. Cr. Cas. 177. When evidence at a trial for murder shows that the jury may reasonably infer a case of manslaughter, the judge should instruct the jury with reference to the crime of manslaughter, and this although the defence was that the shooting was in self-defence. *R. v. Jagat Singh* (1915), 9 W.W.R. 514, 32 W.L.R. 637 (B.C.).

It is a paramount principle of law that the defence must be put fairly before the jury. *R. v. Hill* (1911), 7 Cr. App. R. 26; *R. v. Dinnick* (1909), 3 Cr. App. R. 77, 26 Times L.R. 74; *R. v. De Marco* (1906), 17 Can. Cr. Cas. 497 (Ont.); *R. v. Collins*, 38 N.B.R. 218; *R. v. Swyrda* (1909), 15 Can. Cr. Cas. 138 (Ont.).

The defence in a criminal trial, although a weak one, must be fully and fairly put to the jury in the charge, that is, the substantial defence, not every part or particular of it. *R. v. Trueman* (1913), 9 Cr. App. R. 20, explaining *R. v. Dinnick* (1909), 3 Cr. App. R. 77; and see *R. v. McDougall* (1912), 7 Cr. App. R. 130.

The trial judge may give his own appreciation of the evidence to the jury which may or may not be accepted by them; the essential point is, that the whole evidence be submitted to the jury, who must finally decide as to the guilt of the accused. *Rex v. Carlin*, 6 Can. Cr. Cas. 507, 12 Que. K.B. 483.

It is not error for the judge to put forward a new theory as to the mode of killing in a capital case, but it is inadvisable for him to do so. *R. v. Smith* (1915); 25 Cox C.C. 271, 276.

In *R. v. Mowbray* (1912), 8 Cr. App. R. 8, Darling, J., said, that if the judge misstated the evidence in his summing up, and counsel knew it was a misstatement, he should have interrupted him at the time to have the statement corrected.

A slight inaccuracy in the judge's charge which could not have prejudiced the accused will not be a ground for a new trial. *R. v. Haynes* (1914), 23 Can. Cr. Cas. 101, 48 N.S.R. 133; and see Code sec. 1019.

If the appellate court is convinced that the jury could not have returned any other verdict had the correct instruction been given, the verdict must be affirmed under sec. 1019, notwithstanding its incorrectness, as the errors in that case would not be prejudicial. *R. v. Letain* [1918] 1 W.W.R. 505; 29 Can. Cr. Cas. 389; *R. v. Duckworth* (1916), 37 O.L.R. 197, 10 O.W.N. 267, 26 Can. Cr. Cas. 314; *R. v. Romano*, 24 Can. Cr. Cas. 30; *Eberts v. The King*, 47 S.C.R. 1, 20 Can. Cr. Cas. 273. The appellate court is to consider the possible or probable effect upon the jury of an erroneous charge or of the admission of irrelevant testimony. *Ibid.* *R. v. Letain* [1918] 1 W.W.R. 505, 29 Can. Cr. Cas. 389; *R. v. Spain*, 27 Man. R. 473; *Ibrahim v. The King* [1914] A.C. 599, 83 L.J.P.C. 185, 24 Cox C.C. 174.

In a trial for murder, counsel for the Crown in opening the case, directed the attention of the jury to the blood-stained clothing of one of the prisoners. It developed later in the trial that the witness capable of proving the ownership of the clothing was the wife of the prisoner in question, and she was not examined. The subject was not brought to the attention of the jury in any way, nor did the trial judge refer to it in his summing-up; nor was the charge objected to by either side: Held, that the counsel for the Crown should not have in his opening indicated evidence of such gravity which he subsequently was unable to submit to the Court and jury, and that omission by the trial judge to advise the jury to ignore the remarks of counsel was non-direction, causing a substantial wrong within the meaning of sec. 1019 of the Code, so as to entitle the accused to a new trial. *R. v. Walker*, 15 B.C.R. 100, 13 W.L.R. 47, 16 Can. Cr. Cas. 77.

*Alibi*—The identification of a suspected person must be carefully conducted; it is wrong to point out the suspected person and ask "Is that the man?" *R. v. Chapman*, 7 Cr. App. R. 53.



For the purpose of identification the suspected person should not be presented alone. *R. v. Williams*, 8 Cr. App. R. 84.

The defence of an alibi must be left to the jury; it is a misdirection if the judge rules it out. *R. v. Bufno* (1911), 7 Cr. App. R. 47.

Where the defence to a criminal charge is an alibi, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to show beyond all question that he could not have been present at the commission of the crime. *R. v. Myshrall*, 35 N.B.R. 507; 8 Can. Cr. Cas. 474.

*Bail on murder charge*—See note to sec. 263.

*Punishment for murder*—Code sec. 263.

*Provocation reducing crime to manslaughter*—Code sec. 261.

*Attempts to murder*—Code secs. 72, 264.

*Accessories to murder*—Code secs. 69-71, 266, 267.

*Disqualification of murderer to take property benefits of deceased on succession*—The person found guilty of causing the death of another by a criminal and felonious act, is disqualified from taking under the will of the deceased, at least in provinces in which doctrines of the English common law prevail. *Lundy v. Lundy*, 24 S.C.R. 650.

It would seem that there is no distinction in this respect between benefits accruing under a will and benefits by succession upon an intestacy. See *re Maude Mason* [1917] 1 W.W.R. 329 (B.C.), citing *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, 61 L.J.Q.B. 128, *Hall v. Knight* [1914] P. 1, 83 L.J.P. 1, *re Cora Crippen* [1911] P. 108, 80 L.J. P. 47, and *Standard Life v. Trudeau*, 31 S.C.R. 376, and 9 Que. Q.B. 499.

Where a woman killed her daughter and then suicided, a case was submitted to the court in which it was admitted that the mother was "temporarily insane." On this state of facts it was held that the benefit which would have accrued to the mother from the daughter's estate passed to the mother, and on her suicide to her representatives on an intestacy. If a person commits homicide when unable, because of mental disease, to distinguish right from wrong and quite unable to appreciate the nature and quality of the act, this would form an excuse under the Criminal Code and the person would not be guilty of a "crime" and could not be convicted; she could, therefore, inherit the estate of the person killed if entitled by relationship to inherit. *Re Maude Mason* [1917] 1 W.W.R. 329, 23 B.C.B. 329.

**Certain other classes of culpable homicide constitute murder.**

**260.** In case of treason and the other offences against the King's authority and person mentioned in Part II, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape,

forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue,—

- (a) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or,
- (b) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or,
- (c) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

*Origin*—Sec. 228, Code of 1892.

**Homicide reduced to manslaughter.—Provocation.—Question of fact.**

**261.** Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. The illegality of an arrest shall not necessarily reduce an offence of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation.

*Origin*—Sec. 229, Code of 1892.

*Provocation reducing murder to manslaughter*—It must be clearly established in all cases where provocation is put forward as an excuse,

that at the time when the crime was committed the offender was actually so completely under the influence of passion arising from the provocation, that he was at that moment deprived of his power of self-control; and with this view it will be necessary to consider carefully the manner in which the crime was committed, the length of the interval between the provocation and the killing, the conduct of the offender during that interval, and all other circumstances tending to show his state of mind. *R. v. Eagle*, 2 F. & F. 827; *R. v. Sherwood*, 1 C. & K. 556; *R. v. Smith* 3, F. & F. 1066; *R. v. McDowell*, 25 U.C.Q.B. 108.

The test to be applied in order to determine whether homicide which would otherwise be murder is manslaughter by reason of provocation is whether the provocation was sufficient to deprive a reasonable man of his self-control, not whether it was sufficient to deprive the particular person charged with murder (*e.g.*, a person afflicted with defective control and want of mental balance) of his self-control. *R. v. Lesbini* [1914] 3 K.B. 1116, 11 Cr. App. R. 7; *R. v. Alexander*, 9 Cr. App. R. 139; *R. v. Welsh*, 11 Cox C.C. 338.

The plea of provocation is not established where many hours had elapsed since the provocative incident and where the later attack on the deceased took the form of revenge. *R. v. Albis* (1913), 9 Cr. App. R. 158.

It is not the want of *mens rea* that reduces the crime from murder to manslaughter; it is the provocation. *R. v. Birchall* (1913), 9 Cr. App. R. 91, at 93. The decision in *R. v. Rothwell*, 12 Cox C.C. 145, was in an extreme case and is not to be extended. *R. v. Birchall*, 9 Cr. App. R. 91. The suggestion was made in *R. v. Palmer* [1913] 2 K.B. 29, 82 L.J.K.B. 531, that the sudden discovery of adultery as constituting provocation would apply equally to a case where the person killed was the mistress of the accused as to a case where she was lawfully married to him, but the question was not there decided. In the later case of *R. v. Greening* [1913] 3 K.B. 846, the Court of Criminal Appeal held that the law on that point does not apply to the case of two persons living together though not married.

Provocation by one person followed by the homicide of another person by the person provoked will not reduce such homicide to manslaughter. *R. v. Simpson* (1915), 11 Cr. App. R. 218, 84 L.J.K.B. 1893. So a verdict of murder of a dying child of the accused was sustained where the father killed the child because he could not see it suffer and leave it to the continuous neglect of the mother. *R. v. Simpson*, *supra*.

While slight provocation has frequently been held to reduce the offence from murder to manslaughter where a man in consequence does an act which proves fatal though he did not use a deadly weapon nor intend to kill, the same result will not necessarily follow where death

was the direct consequence of the act complained of, *ex. gr.* strangulation; it is not the same as if the act had been a push which unexpectedly caused a fatal fall. *E. v. Philpot* (1912), 7 Cr. App. R. 140.

Words alone cannot constitute sufficient provocation except in very special circumstances. *R. v. Palmer* [1913] 2 K.B. 29, 82 L.J.K.B. 531; *R. v. McDowell*, 25 U.C.Q.B. 108; *R. v. Phillis* 32 Times L.R. 414.

Violent temper does not reduce homicide from murder to manslaughter though words of provocation accompanied by such an act as spitting may do so. *R. v. Mason*, 8 Cr. App. R. 121.

The question of provocation must be put to the jury if the question arises upon the evidence, although not raised by defendant's counsel and regardless of the line of defence. *R. v. Hopper* [1915] 2 K.B. 431, 84 L.J.K.B. 1371, 11 Cr. App. R. 136. See also *R. Barrett*, 1 Sask. L.R. 373, 14 Can. Cr. Cas. 464, where it was held that the evidence did not raise a case of provocation, no such claim being set up at the trial when the defence proceeded upon the ground of accidental shooting.

It is for the jury and not for the judge to determine any question of fact, upon which the legal right referred to in sub-sec. (3) of sec. 261 depends; any question of fact on which the right of the deceased to forcibly eject the accused, including the questions whether the deceased first ordered him to leave, whether there was a refusal or unreasonable delay in leaving, and whether unnecessary force was used, are to be decided by the jury. *R. v. Brennan* (1896), 27 Ont. R. 659, 4 Can. Cr. Cas. 41; and see Code sec. 66 as to excess of force, and secs. 60 and 61 as to defence of dwelling-house.

#### **Manslaughter defined.**

**262.** Culpable homicide, not amounting to murder, is manslaughter.

*Origin*—Sec. 230, Code of 1892.

*Manslaughter*—When culpable homicide is not murder (Code secs. 259, 260), it is manslaughter. Code secs. 252, 262,

Where a person strikes another wantonly and unlawfully, but without any intention of doing him bodily harm, and thereby caused the other to fall and dislocates his spine, and death results therefrom shortly afterwards, the assaulting party is guilty of manslaughter, although death would not ordinarily result either from the blow or the fall: *R. v. Chisholm* (1908), 14 Can. Cr. Cas. 15 (N.S.).

Any person, whether a manager, agent, or holding no official relation to the railway, may be guilty of manslaughter, not merely for violation of law, or disobedience to rules established by the company according to law, but even in doing what is in itself legal, if the act or acts are done with malice or gross negligence whereby a life is lost. *Ex parte Brydges*, 18 L.C. Jur. 141. The act or gross negligence must have some

direct agency with the death; a case might occur in which the manager of a company might cause the company's trains to be run or controlled under circumstances where human life is put in hazard so recklessly and with so little regard for the safety of individuals as to expose himself to indictment for manslaughter in case of loss of life being occasioned by literal obedience to his orders. *Ibid.*

It is a question for the jury on a charge of manslaughter against a police officer for shooting a person fleeing from arrest whether the officer intended only to wound the fugitive and so stop his flight, and acted reasonably in shooting, or whether there was excess of force and no necessity for shooting in the way he did to prevent the escape. *R. v. Smith*, 17 Man. R. 282.

The criminality of negligence leading to manslaughter may be mitigated by the negligence of the deceased. *R. v. Stubbs*, 8 Cr. App. R. 238, 29 Times L.R. 421.

Shooting and killing a person in the heathen belief that he was shooting an evil spirit which had assumed human form is manslaughter. *R. v. Machekequonabe* (1897), 28 Ont. R. 309, 2 Can. Cr. Cas. 138.

If a person feloniously fires at another in such circumstances as would make the killing of that other person manslaughter, but by accident he hits and kills a third person whom he never intended to hit at all, he is guilty of manslaughter. *Rex. v. Gross*, 23 Cox C.C. 455.

The principle under which a homicide may be held justifiable cannot be carried to the length of holding that, because one man has abused and threatened another, even to the point of making him reasonably apprehensive that on some future occasion he may be killed or suffer grievous bodily harm, he may take advantage of an opportunity to kill the aggressor when the latter is helpless and he is well armed. *R. v. Moke* [1917] 3 W.W.R. 575, 28 Can. Cr. Cas. 296 (Alta.).

*Manslaughter by neglect of a duty tending to the preservation of life*—See Code secs. 241-249 for declarations of criminal responsibility in various cases. The neglects referred to in secs. 241, 242 and 243 are punishable as culpable homicide (murder or manslaughter, according to the circumstances), in the event of death resulting. If death did not result, sec. 244 would apply to fix the punishment. Secs. 247 and 252 do not extend the criminal liability of a corporation as regards the maintenance of dangerous things beyond the liability at common law; *R. v. Great West Laundry Co.* (1900), 13 Man. R. 66, 3 Can. Cr. Cas. 514; and a corporation cannot be guilty of manslaughter. *Ibid.*; *Union Colliery Co. v. The Queen*, 31 S.C.R. 81, 4 Can. Cr. Cas. 400. A corporation neglecting its duty of avoiding danger to human life under circumstances under which an individual doing the same would be guilty of manslaughter, will be liable on indictment under sec. 284 for causing grievous bodily injury. *Union Colliery Co. v. The Queen*, *supra*; Code sec. 920, 1029.

The accidental shooting of a man in mistake for a moose while hunting will be manslaughter if due care was not exercised; but the gravity of the charge is not increased by the fact that the hunting was in the close season. *R. v. Oxley* (1914), 23 Can. Cr. Cas. 262.

*Matters of justification or excuse*—Code secs. 16-66; *R. v. Scott*, 15 Can. Cr. Cas. 442; *Graves v. The King*, 47 S.C.R. 568, 12 E.L.R. 332, 21 Can. Cr. Cas. 44.

A mere error of judgment in the navigation of a ship will not make its master or pilot liable for manslaughter because a fatal collision ensues. *R. v. Delisle* (1896), 5 Can. Cr. Cas. 210 (Que.); *R. v. Mackey* (1918), 29 Can. Cr. Cas. 167 (N.S.).

*No second indictment for same homicide*—Code sec. 909, as to indictment for manslaughter after indicting for murder, or *vice versa*.

*Proof of part only of the offence charged*—Under sec. 951, if the commission of the offence charged includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or the jury may convict of an attempt of the full offence or of an attempt of the lesser offence according to the evidence. Secs. 949, 951. If the charge be for murder, a count for another offence cannot be joined, sec. 856; but the jury may find the accused not guilty of murder but guilty of manslaughter. Code sec. 951. The jury may not, however, on a count for murder, find the accused guilty of any other offence than murder or manslaughter. If the indictment be for manslaughter, counts may be joined for other offences subject to the right of the court to order a separate trial; Code secs. 856, 857; and even on the manslaughter count the verdict may be for any offence included in the offence charged in that count or for an attempt to commit any such lesser offence included. Code sec. 951. It has been held, however, that the offence of inflicting grievous bodily harm could not be returned on a manslaughter count; and, consequently, an acquittal on the manslaughter charge would not be a bar to a subsequent charge of inflicting grievous bodily harm based upon the same circumstances. *R. v. Shea*, 14 Can. Cr. Cas. 319; and see Code sec. 907.

When, on a trial for murder, the judge has recommended a verdict of manslaughter in the event of the jury finding the accused not guilty of murder, the judge may ask the jury whether they find manslaughter. *R. v. Baxter*, 9 Cr. App. R. 60.

*Plea of summary conviction for the assault conducing to the homicide*—Sec. 734 provides that if the person pays the amount adjudged on a charge laid by the party aggrieved, he shall be released "from all further or other proceedings, civil or criminal, for the same cause." Similarly as to the criminal responsibility, sec. 792 provides that, in the event of the summary trial of an indictable offence under Part XVI, every person who obtains a certificate of dismissal or is convicted under

the provisions of Part XVI shall be released from all further or other "criminal proceedings for the same cause." *Green v. Henneghan* [1918] 3 W.W.R. 658 (Alta.).

It was held by the Court for Crown Cases Reserved in *R. v. Morris* (1867), L.R. 1 C.C.R. 90, that a summary conviction for assault and the imprisonment consequent thereon are not either at common law or under 24-25 Vict., c. 100, s. 45 (Code sec. 734), a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault; (per Martin, B., and Byles and Shee, JJ.; Kelly, C.B., dissenting). In the last-mentioned case, Martin, B., considered the word "cause" in the statute corresponding to s. 666 of the Code, as used synonymously with the words "accusation" or "charge"; while Byles, J., said that the word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also and, perhaps, with greater propriety, be held to mean "cause for the accusation"; and in that view the cause for the indictment for manslaughter comprehended more than the cause in the summons before the magistrates, "for it comprehends the death of the party assaulted." *R. v. Morris*, L.R. 1 C.C.R. 95; *R. v. Friel*, 17 Cox C.C. 325.

*Ontario*—Homicide is excepted from the general jurisdiction of courts of general sessions of the peace in Ontario. R.S.O. 1914, ch. 60, sec. 3.

#### **Punishment for murder.**

**263.** Every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death.

*Origin*—Sec. 231, Code of 1892; R.S.C. 1886, ch. 162, sec. 2.

*The crime of murder*—Code sec. 259.

*Extradition*—See *Attorney-General v. Fedorenko*, [1911] A.O. 735, reversing *re Fedorenko* (No. 2), 20 Man. R. 224, and see *re Fedorenko* (No. 1), 20 Man. R. 221, 17 Can. Cr. Cas. 268; *re Castioni*, [1891] 1 Q.B. 156.

*Statutory form of stating the offence*—Code form 64; Code secs. 1152, 844, 852, 855, 856.

*Ontario*—Homicide is excepted from the general jurisdiction of courts of general sessions of the peace in Ontario. R.S.O. 1914, ch. 60, sec. 3.

*Bail on murder charge*—The general rule is that on a charge of murder, bail will not be granted. *R. v. Gentile* (1915), 8 W.W.R. 1091 (B.C.); An exception to the rule may be made if the court, in the exercise of its discretion deems it proper. *Dictum of Macdonald, J.*, in *R. v. Gentile*, *supra*.

It is not enough that it appears from the depositions taken on the

preliminary enquiry that the accused may be able to convince the jury that his act was done in self-defence. *R. v. Monvoisin*, 20 Man. R. 568.

The probability of the accused voluntarily appearing to take his trial does not, in contemplation of law, exist when the crime charged is of the highest magnitude, the evidence in support of the charge strong, and the punishment is the highest known to the law. In such case the judge will not interfere to admit to bail. *Baronnet's Case* (1852), 1 E. & B. 1; but when either of these ingredients is wanting, the judge has a discretion which he will exercise. *Ex parte Maguire* (1857), 7 L.C.R. 57; *R. v. Spicer* (1901), 5 Can. Cr. Cas. 229. But if these elements be combined in any case bail will be refused. *Ex parte Corriveau* (1856), 6 L.C.R. 249; *Ex parte Robinson* (1854), 25 Eng. Law & Eq. R. 215; same case, *re Robinson*, 23 L.J.Q.B. 286; and see *R. v. Rose*, 68 L.J.Q.B. 289, 18 Cox C.C. 717; *R. v. Chapman*, 8 C. & P. 558; *Re Barthelemy*, 1 E. & B. 8, Dears. C.C. 60.

If a true bill has been found by the grand jury, that fact will have great weight in the question of admitting to bail, but it is not conclusive as to the prisoner's right to bail; and if upon reading the depositions against him, they are found to create but a very slight suspicion of the prisoner's guilt, he should be admitted to bail, notwithstanding the refusal of the Crown officers to consent. *Ex parte Maguire* (1857), 7 L.C.R. 57.

If the depositions afford a presumption of guilt, at least so strong that a grand jury would in the opinion of the judge hearing the application for bail, find a true bill for murder against the accused, the application should be refused. *R. v. Mullady and Donovan* (1868), 4 Ont. Pr. 314, per Draper, C.J. *R. v. Monvoisin*, 20 Man. R. 568. Prisoners charged with murder will not be admitted to bail unless it be under very extreme circumstances, as where facts are brought before the court to show that the indictment cannot be sustained. *R. v. Murphy* (1853), 2 N.S.R. 158. But the court has undoubted power to admit to bail in cases of murder. *Re Barthelemy* (1852), 1 E. & B. 8, Dears. C.C. 60.

In Newfoundland some of the persons charged with murder alleged to have been committed during a riot were admitted to bail on the postponement of their trial, where the witnesses for the defence, numbering about seventy, were engaged to prosecute their employment in the sea fishery and their detention would deprive them of their means of livelihood at the only season when they could earn it for themselves, the court discriminating as to the parties to be liberated on an analysis of the testimony. *R. v. Coady* (1885), *Morris' Newfoundland Decisions* 58.

In *ex parte Baker* (1872), 3 *Revue Critique* (Que.) 46, a verdict of wilful murder had been returned at a coroner's inquest, and a true bill subsequently found by the grand jury against the accused. He was tried and the jury differed in opinion and were discharged. It did not appear how the jury were divided, or what was the precise obstacle to



their unanimity. Application was made by the prisoner's counsel for permission to give bail for his appearance to take another trial, and on the return of a writ of habeas corpus before the full Court of Queen's Bench (Duval, C.J., Caron, Drummond, Badgley and Monk, JJ.), the accused was admitted to bail.

The mere circumstances that the accused is able to give any reasonable amount of bail which may be asked of him is not *per se* a ground for the application. *R. v. McCormick*, 17 Irish Common Law Rep. 411.

It is for the court to exercise a sound discretion, and if satisfied that notwithstanding the ordering of bail, the prisoners are, in view of all the circumstances, likely to be forthcoming at the proper time to answer the charge, bail may be ordered. *R. v. Keeler* (1877), 7 Ont. Pr. 117, 120, per Harrison, C.J.; *R. v. Wood*, 9 Ir. L.R. 71; *R. v. Gallagher*, 7 Ir. C.L. 19; *R. v. McCartie*, 11 Ir. C.L. 188.

If the offence be not very serious and the depositions disclose no more than slender grounds of suspicion, bail may be allowed. *R. v. Jones*, 4 U.C.R. (O.S.) 18.

The court should not, on an application for bail, weigh and decide the question of credibility of witnesses. *R. v. Keeler* (1877), 7 Ont. Pr. 117, 123.

*Motion to quash indictment*—Code sec. 898.

*Special pleas*—Code secs. 905-909.

*Joint indictment*—If two persons are indicted jointly, and one is called as a witness for the other, it is in the power of the jury to acquit the former and to convict the latter, and the judge is not bound to direct them that if they accept the evidence on behalf of the deponent they must accept it on behalf of the other defendant. *R. v. Seddon* (1912), 7 Cr. App. R. 207.

Leave to change a plea of guilty to a plea of not guilty may be granted after a verdict of acquittal of the person jointly indicted, if the case were such that the verdict in effect negated the plea of guilty. *R. v. Herbert* (1903), 6 Can. Cr. Cas. 214.

*Challenging the array*—Code secs. 925 and 926; Code form 69.

*Challenges of jurors*—Code secs. 927-939.

*Arraignment and trial*—Code secs. 940-946, 949-952, 958-962, 965.

*Defence of insanity*—Code secs. 19, 966-970.

*Witnesses and attendance*—The provincial laws of evidence apply subject to the provisions of the Criminal Code or other federal law. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 35. The accused and the husband or wife of the accused are competent witnesses for the defence, but the failure of the accused, or of the wife or husband of the accused, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution. Can. Evidence Act, R.S.C. 1906, ch. 146, sec. 4.

While, under the criminal law, the accused person is not called upon to explain suspicious circumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned. *R. v. Jenkins*, 14 B.C.R. 61, 14 Can. Cr. Cas. 221.

As to procuring the attendance of witnesses, see Code secs. 971-977. A witness asked a question the answer to which may tend to criminate him must answer notwithstanding his objection taken upon that ground, but the fact of objecting will prevent the use of his testimony against himself in a subsequent charge except for perjury in such testimony. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 5; *re Ginsberg* 40, O.L.R. 136.

The evidence of a young child may be taken without oath in certain cases. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 16; and any witness objecting on grounds of conscientious scruples may take a solemn affirmation in place of an oath. *Ibid.* sec. 14.

A witness may be cross-examined as to former written statements made by him relative to the subject matter, but if it is intended to contradict the witness by the writing, his attention is to be called to the parts of the writing to be so used; and the judge may order the production of the writing for his inspection. Can. Evidence Act, R.S.C. 1906, ch. 145. A witness may also be cross-examined as to previous oral statements made by him relative to the subject matter of the case. If the previous statement is inconsistent with his present testimony and he does not "distinctly admit" that he made it, proof may be given that he did in fact make it, but the circumstances of the alleged previous statement are to be disclosed to the witness in such cross-examination and he is to be asked whether or not he made it. Can. Evid. Act, R.S.C. 1906, ch. 145, sec. 11; see *R. v. Webb* (1914), 6 W.W.R. 358, 24 Man. R. 437, 27 W.L.R. 313, 22 Can. Cr. Cas. 424, sec. 10; *R. v. Duckworth*, 37 O.L.R. 197, 26 Can. Cr. Cas. 314, 10 O.W.N. 267.

Evidence may be taken out of Canada under commission where the witness is resident out of Canada. Code sec. 997. A commissioner may also be appointed to take in Canada the evidence of a material witness who is dangerously ill. Code secs. 995, 996, 998.

As to the use of depositions taken on the preliminary enquiry, see Code secs. 999-1001.

*Comment on failure to testify in his own defence*—Can. Evid. Act. R.S.C. 1906, ch. 145, sec. 4.

A new trial may be granted if the trial judge commented on the failure of the accused or of his wife to testify for the defence; and this although the judge before verdict withdrew the comment. *R. v. Romano* (1915), 24 Que. K.B. 40, 24 Can. Cr. Cas. 30; *R. v. Hill* 33 N.S.B. 253, 7 Can. Cr. Cas. 38; *R. v. Coleman*, 30 Ont. R. 108, 2 Can. Cr. Cas. 523; *R. v. Corby*, 1 Can. Cr. Cas. 457.

*Testimony of accomplices*—The jury should be cautioned against acting on the uncorroborated testimony of an accomplice. *R. v. Tate* [1908] 2 K.B. 680, 77 L.J.K.B. 1043; *R. v. Ratz* (1913), 4 W.W.R. 1231, 21 Can. Cr. Cas. 343, 24 W.L.R. 908.

An accessory before the fact is an accomplice within this rule. *E. v. Ratz*, *supra*; 12 Cyc. 445, 446.

If the judge charges the jury that their verdict depends on which witness they believe, and because no reference was made to the one being an accomplice, the effect of the charge was to place the accomplice on the same footing as the ordinary witness, there is a miscarriage of justice. *R. v. Tate*, *supra*.

Evidence which is consistent with two opposite views is not corroborative of either, but if the accused has denied one of these views it then becomes corroborative of the other theory of the case. *R. v. Peterson* [1917] 1 W.W.R. 600, 9 Sask. L.R. 432, 35 W.L.R. 600, 27 Can. Cr. Cas. 3, affirmed in *Peterson v. The King* [1917] 3 W.W.R. 345, 55 S.C.R. 115, 28 Can. Cr. Cas. 332. But the failure of the jury to follow the advice of the judge not to convict on the uncorroborated testimony of an accomplice will not alone be ground for a new trial. *R. v. Betchel* (1912), 2 W.W.R. 624, 21 W.L.R. 665, 19 Can. Cr. Cas. 423. And see generally as to an accomplice's testimony; *R. v. Stubbs*, 25 L.J.M.C. 16; *R. v. Frank* (1910), 21 O.L.R. 196, 16 O.W.R. 50, 16 Can. Cr. Cas. 237; *R. v. McNulty* (1910), 22 O.L.R. 350, 17 O.W.R. 611, 17 Can. Cr. Cas. 26; *R. v. Tansley*, 3 O.W.N. 411; *R. v. Reynolds* (1908), 1 Sask. L.R. 480, 9 W.L.R. 299, 15 Can. Cr. Cas. 209; *R. v. Betchel* (1912), 2 W.W.R. 624, 21 W.L.R. 665; *Amsden v. Rogers* (1916), 10 W.W.R. 1337, 9 Sask. L.R. 323, 26 Can. Cr. Cas. 389; *R. v. Dumont*, 54 Que. S.C. 9, 29 Can. Cr. Cas. 442; *R. v. Quinn* (1918), 14 O.W.N. 342.

*Prisoner without counsel*—On a trial for murder if the prisoner has no means with which to fee counsel and his friends have not provided counsel for him, it is usual for the court to assign him counsel from the junior Bar to act gratuitously. The court copy of the depositions on the preliminary enquiry should in such cases be placed at counsel's disposal or a copy of same supplied to him by the Crown.

*Addresses of counsel to the jury*—Code secs. 942, 944.

*Juries in capital cases*—The jury is not to be permitted to separate; Code sec. 945 (5); and directions must be given by the judge on any adjournment that the jury be kept together and provision made for preventing them from holding communication with anyone on the subject of the trial. Code sec. 945. The verdict may be taken on a Sunday or holiday. Code sec. 961. If the court is satisfied that the jury are unable to agree an order may be made discharging them and a new jury may be called. Code sec. 960.

*Taking the verdict*—Code secs. 965, 1004.

*Death sentence*—Code secs. 1062, 1063, 1008.

*Appeals*—Code secs. 1013-1025.

*Application for executive clemency*—Code secs. 1063; 1076-1080.

*Execution of death sentence*—Code secs. 1064-1075.

**Attempts to commit murder.**

**264.** Every one is guilty of an indictable offence and liable to imprisonment for life, who, with intent to commit murder,—

- (a) administers any poison or other destructive thing to any person, or causes any poison or destructive thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken; or,
- (b) by any means whatever wounds or causes any grievous bodily harm to any person; or,
- (c) shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge at any person any kind of loaded arms; or,
- (d) attempts to drown, suffocate, or strangle any person; or,
- (e) destroys or damages any building by the explosion of any explosive substance; or,
- (f) sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or to any goods or chattels being therein; or,
- (g) casts away or destroys any vessel; or,
- (h) by any other means attempts to commit murder.

*Origin*—Sec. 232, Code of 1892; R.S.C. 1886, ch. 162, sec. 12; 24-25 Vict., Imp., ch. 100, sec. 11; 7 Wm. IV, and 1 Vict., Imp., ch. 85, sec. 2.

*Jurisdiction of sessions excluded*—See sec. 583. The offence is not subject to summary trial under Part XVI, because it is not triable by the Sessions. Code sec. 777.

*Attempt to murder*—If two persons are engaged in a common unlawful enterprise, and one of them, to avoid apprehension, attempts murder, both may be found guilty of the felony if the jury are satisfied from their conduct at the time that at any moment there was a determination on the part of each to aid the other in escaping arrest; but if it can be ascertained which actually made the attempt, the sentence on him should be the heavier; *R. v. Pridmore* (1913), 8 Cr. App. R. 198; and see as to constructive complicity, *R. v. Skeet* (1866), 4 F. & F. 931; *R. v. Doddridge*, 8 Cox C.C. 335; *R. v. Rice*, 4 O.L.R. 223, 5 Can. Cr. Cas. 509.

On an indictment for wounding with intent to murder, the jury should be directed in a proper case that they were entitled to find a verdict of unlawful wounding. *R. v. Parks* (1914), 10 Cr. App. B. 50.

In *R. v. Connor* (1913), 8 Cr. App. B. 152, four men were indicted on five counts arising out of a faction vendetta in Birmingham. Two counts were for shooting with intent to murder, one for shooting with intent to maim, one for shooting with intent to do grievous bodily harm, and one for felonious wounding with intent to do grievous bodily harm. The case was opened, and the evidence supported the view that it was one affray committed within the space of a minute, and that four people took part. In the course of this affray some one shot, and others helped in the shooting of the prosecutor and some one struck him. The court held that where, without objection, the circumstances arising out of one affray are proved before the jury, the verdict may be that the prisoners are guilty of different acts of violence arising out of that affray, where there was no question of embarrassment or that the whole matter could not be tried properly. One man could be found guilty of shooting with intent to murder, and another man with striking with intent to cause grievous bodily harm. *R. v. Connor* (1913), 8 Cr. App. B. 152.

*Prisoner's confession induced by false statement of police*—In *R. v. White*, 18 O.L.R. 840, the prisoner, White, was tried for attempting to murder J.P., whose wife, M.P., was tried at the same time for aiding and abetting in the attempt. Before the trial, and while White was in custody, a police officer made an untrue statement to him, that M.P. had “done some talking” about the matter, upon which White voluntarily made statements to the officer as to the key of J.P.’s house, and as to a club which he said he had used. It was held that evidence was properly admitted as to the statements made by White with regard to the key and the club. Subsequently to the making of the untrue statement by the police officer, conversations were overheard between W. and his father and between White and M.P., in which the former admitted his guilt. That evidence was held to have been properly admitted as to these conversations. *R. v. White*, 18 O.L.R. 840, 15 Can. Cr. Cas. 30. Though the practice is not to be approved of, it is, generally speaking, no objection to the admissibility of a prisoner’s confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made. *R. v. White*, *supra*.

*Sub-sec. (a)*—“*Administers any poison, etc.*”—Where a servant in preparing breakfast for her mistress put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and the mistress drank the coffee, it was held that this was an “administering” within the corresponding English statute, 7 Wm. IV, and 1 Vict., ch. 85, sec. 2, re-enacted 24-25 Vict., ch. 100, sec. 11. *R. v. Harley* (1830), 4 C. & P. 369. And it has been held that a poisonous berry

given with intent to kill is "administered" although by reason of being given entire in the pod which will not dissolve in the stomach no injurious effects followed. *R. v. Cluderay* (1849), 1 Den. C.C. 514, 4 Cox C.C. 84.

Where the accused with intent to murder gave poison to A. to administer as a medicine to B., but A. neglecting to give it to B., it was by chance given to B. by a child, this was held an administering by the accused. *R. v. Michael* (1840), 2 Mood. C.C. 120, 9 C. & P. 356.

*Sub-sec. (b)*—"Wounds"—To constitute a "wound" the continuity of the skin must be broken. *R. v. Wood* (1830), 1 Mood. C.C. 278. There must be a division not merely of the cuticle or upper skin but of the whole skin. *R. v. McLaughlin* (1838), 8 C. & P. 635; *R. v. Becket* (1836), 1 M. & Rob. 526; *R. v. Smith* (1837), 8 C. & P. 173; *R. v. Warman* (1846), 1 Den. 183; *R. v. Briggs* (1831), 1 Mood. C.C. 318; *R. v. Becket* (1836), 1 M. & Rob. 526.

*Sub-sec. (b)*—"Grievous bodily harm"—If the bodily injury be such as seriously to interfere with health or comfort that is sufficient, and it is not necessary that it should be either permanent or dangerous. *R. v. Cox* (1818), R. & B. 362; *R. v. Ashman* (1858), 1 F. & F. 88.

*Sub-sec. (c)*—"Shooting with intent"—Possession of burglar's tools at the time of the shooting may be evidence of intent. *R. v. Mooney*, 15 Que. K.B. 57. Where the accused was charged with wounding T. with intent to murder him, and it appeared in evidence that the defendant intended to murder M. and that he shot at and wounded T., supposing him to be M., and the jury found that he intended to murder the man at whom he shot, supposing him to be M., the conviction was upheld. *R. v. Smith* (1856), Dears. 559, 25 L.J.M.C. 29; *R. v. Stopford* (1870), 11 Cox C.C. 643; and see Code sec. 259; *R. v. Fretwell*, L. & C. 443, 9 Cox C.C. 471, 33 L.J.M.C. 128.

*Sub-sec. (c)*—"Attempts to discharge loaded arms"—If a person intending to shoot another puts his finger on the trigger of a loaded fire-arm, but is prevented from pulling the trigger, it is nevertheless an attempt to discharge loaded arms under this section. *R. v. Duckworth* [1892] 2 Q.B. 83, 17 Cox C.C. 495; *R. v. Brown* (1883), 10 Q.B.D. 381; (*R. v. St. George* (1840), 9 C. & P. 483, overruled.)

The expression "loaded arms" includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material. Sec. 2 (19).

*Sub-sec. (h)*—"By any other means attempts to commit murder"—Where a woman jumped out of a window to avoid the violence of her husband, it was held that to constitute this offence it must be proved that he intended by his conduct to make her jump out. *R. v. Donovan* (1850), 4 Cox C.C. 401.

The sending or placing of infernal machines with intent to murder is within this sub-section. *R. v. Mountford* (1835), Mood. C.C. 441, 3

Russ. Cr., 6th ed., 280 (n). Attempts to commit suicide are, however, not included. *R. v. Burgess* (1862), 9 Cox O.C. 302, L. & C. 258, 32 L.J.M.C. 55; but come under sec. 270 of the Code.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

*Wounding, or disabling with intent*—See secs. 273-282.

*Assaults generally*—See secs. 290-296.

*Wounding with intent to do grievous bodily harm*—See sec. 273.

*Wounding or inflicting grievous bodily harm*—See sec. 274.

*Wounding public officer on duty*—See sec. 275.

*Attempts generally*—Code sec. 72.

#### Letters threatening murder.

**265.** Every one is guilty of an indictable offence and liable to 'ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person.

*Origin*—Sec. 233, Code of 1892; R.S.C. 1886, ch. 173, sec. 7.

*Threats to kill*—The gravamen of the charge is not in meaning to carry out the threat contained in the letter, but in sending or uttering it with knowledge of the contents. Compare *R. v. Johnson* (1913), 9 Cr. App. R. 57, where the charge was one of maliciously sending a letter threatening to murder.

*"Writing"*—See definition in sec. 2, sub-sec. (42).

*Jurisdiction of sessions excluded*—Code sec. 583.

*Jurisdiction of summary trial excluded*—Code sec. 777.

*Postal offences generally*—See Code secs. 3, 207, 209, 364, 365, 366, 400, 407, 449, 451, 510D, 516, 538, 867, 869, and the Post Office Act R.S.C. 1906 ch. 66.

*Blackmail, threats and intimidation*—See secs. 216 (h) 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 478, 748.

#### Conspiring to murder.—Counselling murder.

**266.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who,—

- (a) conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of His Majesty or not, or is within His Majesty's dominions or not; or,

- (b) counsels or attempts to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement.

*Origin*—Sec. 234, Code of 1892; R.S.C. 1886, ch. 162, sec. 3.

*Counselling murder*—This offence may be committed by the publication of a newspaper article exulting in the assassination of a foreign monarch and commending it as an example to revolutionists throughout the world; and the counselling need not be directed to any particular person. *R. v. Most* (1881), 7 Q.B.D. 244; 14 Cox C.C. 583.

Where the indictment is for soliciting another to commit murder it is unnecessary to negative the commission of the murder which, if committed, would render the accused guilty of the principal offence as an accessory before the fact (sec. 69), for it cannot be intended that the principal offence has been committed where it is not charged. 1 Stark, Cr. Plead., 2nd ed., 148; *R. v. Higgins* (1801), 2 East 5, 6 R.R. 615.

*Counselling or inciting offences generally*—See sec. 69.

*Jurisdiction of sessions excluded*—Code sec. 583.

*Jurisdiction of summary trial excluded*—Code sec. 777.

#### Accessory after the fact to murder.

**267.** Every one is guilty of an indictable offence and liable to imprisonment for life, who is an accessory after the fact to murder.

*Origin*—Sec. 235, Code of 1892.

*Assisting a murderer after the crime*—The accused must be proved to have done some act to assist the murderer personally: *R. v. Chapple* (1840), 9 C. & P. 355; or by employing another person to harbour or relieve him. *R. v. Greenacre* (1837), 8 C. & P. 35; *R. v. Butterfield* (1843), 1 Cox C.C. 39; *R. v. Lee* (1834), 6 C. & P. 536; *R. v. Jarvis* (1837), 2 M. & Rob. 40; or some other act within the terms of Code sec. 71 in reference to the murder.

*Exception as to husband or wife of principal offender*—See sec. 71 (2); and as to evidence see Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4, as amended by 6 Edw. VII, Can., ch. 10, sec. 1.

*Indictment of accessory after the fact to murder*—An accessory before the fact is a party to the principal offence and may be charged therewith, but an accessory after the fact is not a party to it so as to be so chargeable, but is to be charged with the separate offence of



being such accessory. Sec. 856 precludes the joinder with a charge of murder of a count charging any offence other than murder, and it would seem that an accessory after the fact to murder should be charged by a separate indictment notwithstanding the general wording of sec. 849.

*Accessories after the fact*—See sec. 71 on this subject generally.

*Jurisdiction of sessions excluded*—Code sec. 583.

*Jurisdiction of summary trial excluded*—Code sec. 777.

### **Punishment for manslaughter.**

**268.** Every one who commits manslaughter is guilty of an indictable offence and liable to imprisonment for life.

*Origin*—Sec. 236, Code of 1892; R.S.C. 1886, ch. 162, sec. 5.

*Jurisdiction of sessions excluded*—See sec. 583.

### *Suicide.*

#### **Aiding or counselling suicide.**

**269.** Every one is guilty of an indictable offence and liable to imprisonment for life who counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or who aids or abets any person in the commission of suicide.

*Origin*—Sec. 237, Code of 1892.

*Common intention to prosecute an unlawful purpose*—See sec. 69 as to aiders and abettors in the commission of offences.

#### **Attempt to commit suicide.**

**270.** Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment.

*Origin*—Sec. 238, Code of 1892.

*Attempt to commit suicide*—An attempt to commit suicide is now viewed in England as an attempted "felony." *R. v. Mann* [1914] 2 K.B. 117, 10 Cr. App. R. 31, explaining *R. v. Burgess, L. & C.* 258; and see *R. v. Robinson* [1915] 2 K.B. 342. The Canadian Criminal Code, sec. 14, abolishes the distinction between felony and misdemeanour. Code sec. 1033 enacts that an inquest or judgment of *felo de se* shall not cause any attainder or forfeiture.

*Drunkenness as affecting intent*—Compare sec. 259 as to murder.

*Neglect in Childbirth and Concealing Dead Body.*

**Neglecting to obtain assistance in childbirth.**

**271.** Every woman is guilty of an indictable offence who, with either of the intents in this section mentioned, being with child and being about to be delivered, neglects to provide reasonable assistance in her delivery, if the child is permanently injured thereby, or dies, either just before, or during, or shortly after birth, unless she proves that such death or permanent injury was not caused by such neglect, or by any wrongful act to which she was a party, and is liable,—

- (a) if the intent of such neglect be that the child shall not live, to imprisonment for life;
- (b) if the intent of such neglect be to conceal the fact of her having had a child, to imprisonment for seven years.

*Origin*—Sec. 239, Code of 1892.

*Duty to provide necessities for child*—Code secs. 241, 242, 242A; and see sec. 256 as to acceleration of death; secs. 252, 257 and 262, as to causing death by omission of duty.

**Concealing dead body of child.**

**272.** Every one is guilty of an indictable offence and liable to two years' imprisonment, who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth.

*Origin*—Sec. 240, Code of 1892; R.S.C. 1886, ch. 162, sec. 49; 24-25 Vict., Imp., ch. 100, sec. 60; 32-33 Vict., Can., ch. 20, sec. 61.

*Verdict on acquittal on murder charge*—On an indictment for the murder of a child recently born and acquittal of that offence, the jury is empowered, if the facts warrant it, to bring in a conviction for concealment of birth. Sec. 952.

*Concealment of birth*—Although the mere denial of the birth will not support a conviction; *R. v. Turner* (1839), 8 C. & P. 755; it is a factor in proof of the offence. *R. v. Piché* (1879), 30 U.C.C.P. 409. What is a disposition with intent to conceal, must depend on the circumstances of each particular case. The most complete exposure of the body might be a concealment, *ex. gr.* if placed in a secluded place where the body would not be likely to be found. *R. v. Brown* (1870), L.R. 1

C.C.R. 244; R. v. George, 11 Cox C.C. 41; R. v. Rosenberg (1906), 70 J.P. 264.

"Child"]—See Code sec. 251.

*Intent to conceal*—Former statutes required that there should be a "secret disposition" of the dead body.

Under the former law it was held to be a "secret disposition" where the woman placed the dead body of the child of which she had been delivered between a trunk and the wall of a room in which she lived alone, and on being charged with having had a child she at first denied it, but being pressed she pointed out where the body was. R. v. Piché, 30 U.C.C.P. 409.

A final disposition of the body of the child is not essential, and it is an offence if it be hid in a place from which a further removal was contemplated. R. v. Goldthorpe (1841), 2 Moo. C.C. 244; R. v. Perry (1855), Dears. 471.

Where the only evidence was that the woman had been delivered of a child the body of which was taken away by two other persons, but the prisoner did not know where it was put, it was held insufficient. R. v. Bate (1871), 11 Cox C.C. 686.

There must be an identification of the body found as being that of the child of which she is alleged to have been delivered. R. v. Williams (1871), 11 Cox C.C. 684.

It must also be proved that the body concealed was that of a child dead at the time of the disposal or concealment. R. v. Bell (1874), Irish R. 8 C.L. 541; R. v. May (1867), 16 L.T. Rep. 362; 10 Cox C.C. 448.

The mere denial of the birth is not sufficient proof of intent to conceal. R. v. Turner (1839), 8 C. & P. 755. It must be shown that the accused did some act of disposal of the body after the child was dead. *Ibid.*

The fact that the mother had previously allowed the birth to be known to some persons is not conclusive evidence negating intent to conceal. R. v. Douglas (1836), 1 Mood. C.C. 480; R. v. Cornwall (1817), R. & R. 336; R. v. Morris, 2 Cox C.C. 489.

*Confession as evidence*—A. being questioned by a police constable about the concealment of a birth gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie"; and it was held that a further statement made by her to the officer was inadmissible in evidence, as not being free and voluntary. She was taken into custody on the same day, placed with two accomplices, and charged with the concealment of birth. All three then made statements. It was held that those made by the accomplices could not be deemed to be affected by the previous inducement to A. and were therefore admissible against themselves, although that made by A. was inadmissible. When before the magistrate for the preliminary inquiry the

three prisoners received the formal caution (sec. 591) from the magistrate as to anything they wished to say in regard to the charge, and A. then made a statement which was taken down in writing and attached to the deposition, and this latter statement was admissible in evidence against her. *R. v. Bate* (1871), 11 Cox C.C. 686.

*Neglect in childbirth occasioning death of or permanent injury to child*—See sec. 271.

*Neglect to register birth*—This subject is dealt with by provincial law and penalties provided for default. In Ontario, see the Vital Statistics Act, R.S.O. 1914, ch. 49.

*Homicide by injury to child before birth*—See secs. 251 (2), 271 and 306.

*Bodily Injuries and Acts and Omissions Causing Danger to the Person.*

**Wounding with Intent.**

**273.** Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully by any means wounds or causes any grievous bodily harm to any person, or shoots at any person, or by drawing a trigger, or in any other manner, attempts to discharge any kind of loaded arms at any person.

*Origin*—Sec. 241, Code of 1892; R.S.C. 1886, ch. 162, sec. 13.

*Shooting with intent*—Where intent is an ingredient of a crime it must be shown by the prosecution, and it is error to direct the jury that the onus of proof to satisfy them that a gun was discharged accidentally was upon the accused; the accused ought not to be found guilty if he satisfies them that it is reasonably possible that he did not intend to do it. Per Channell, J., in *R. v. Davies* (1913), 8 Cr. App. R. 211. The maxim that the law presumes a man to intend the natural consequences of his acts refers only to his conscious acts, not to his mistakes. *Ibid.*

*"With intent to maim, disfigure or disable"*—To maim is to injure any part of a man's body which may render him, in fighting, less able to defend himself or to annoy his enemy. 1 Hawk., ch. 44, sec. 1; *R. v. Sullivan* (1841), C. & Mar. 209. To disfigure is to do some external injury which may detract from his personal appearance. To disable is to do something which creates a permanent disability and not merely a temporary injury. Archbold Cr. Plead. (1900), 807; *R. v. Boyce* (1824), 1 Mood. C.C. 29.

*With intent "to do some other grievous bodily harm"*—The intent may be inferred from the act committed. *R. v. Le Dante*, 2 Geldert & Oxley (N.S.) 401.

A person who fires a loaded pistol into a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and who hits one of them, may be convicted on an indictment charging him with shooting at the person he has hit with intent to do grievous bodily harm to that person. *R. v. Fretwell* (1864), L. & C. 443, 9 Cox C.C. 471.

An indictment charging the accused with wounding A. with intent to do him grievous bodily injury will be supported by evidence that he intended to do grievous bodily harm to the man he wounded, and who, in fact was A., although the accused did not think that he was A., but somebody else. *R. v. Stopford* (1870), 11 Cox C.C. 643. It will also be sufficient under this section that the defendant wounded, etc., any person with intent to inflict grievous bodily harm on a third person. *R. v. Latimer* (1886), 17 Q.B.D. 359, 16 Cox 707.

*With intent to resist apprehension, etc.*—The apprehension or detainer which is the subject of the "intent to resist or prevent," must have been a lawful apprehension or detainer. See as to justification of arrest or other detention, sec. 23 *et seq.*

*Unlawfully wounds or causes any grievous bodily harm*—Compare with sec. 242 (b).

An injury seriously interfering with health or comfort, although neither permanent nor endangering life, is sufficient. *R. v. Ashman* (1858), 1 F. & F. 88; *R. v. Cox* (1818), R. & B. 362.

As to matters of justification and excuse, see secs. 16-68.

*Attempts to discharge loaded arm*—There may be such an "attempt" where a revolver was drawn but the other person seized the offender and successfully resisted his efforts to shoot. *R. v. Linneker* [1906], 2 K.B. 99.

*Verdict for any included lesser offence proved*—Code sec. 951.

*Unlawfully inflicting grievous bodily harm*—Code sec. 274.

*Unlawful wounding*—Code sec. 274.

*Wounding with intent to murder*—See sec. 264.

*Carrying offensive weapon without permit*—Code sec. 118.

*Possessing revolver, etc., with intent to injure*—Code sec. 121.

*Pointing revolver loaded or unloaded*—Code sec. 122.

*Ambiguous or defective verdict*—See Code sec. 1004 *et seq.* as to passing sentence; *R. v. Edmonstone* (1907), 15 O.L.R. 325, 13 Can. Cr. Cas. 125; *Slaughenwhite v. The King*, 35 S.C.R. 607, 9 Can. Cr. Cas. 173, reversing *R. v. Slaughenwhite* 37 N.S.R. 382, 9 Can. Cr. Cas. 53.

*Suspended sentence*—Code sec. 1081; *R. v. Pettipas* (No. 2), 18 Can. Cr. Cas. 74 (N.S.).

**Wounding.—Inflicting grievous bodily harm.**

**274.** Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument.

*Origin*—Sec. 242, Code of 1892; R.S.C. 1886, ch. 162, sec. 14; 24-25 Vict., Imp., ch. 100, sec. 20.

*"Unlawfully wounds"*—One reported decision would limit the application of the word "unlawfully" to the wounding and declare that if the charge be for inflicting grievous bodily harm it need not be stated as having been done "unlawfully." *R. v. Treadwell*, 5 Can. Cr. Cas. 461. Such does not appear to be the correct reading of the section. The English Act from which it is taken uses the phrase "unlawfully and maliciously wound or inflict any grievous bodily harm"; and under it the bodily harm must clearly have been unlawful and malicious.

*Grievous bodily harm*—If under a well-grounded apprehension of personal injury by the defendant, anyone in escaping therefrom is physically hurt, the defendant is guilty of inflicting grievous bodily harm. *R. v. Beech* (1912), 7 Cr. App. R. 197; *R. v. Halliday* (1889), 54 J.P. 312; 38 W.R. 256; *R. v. Donovan*, 4 Cox C.C. 399. The intention to do grievous bodily harm may be general without being directed particularly to the person injured. *R. v. Fretwell*, 33 L.J.M.C. 128.

The words "grievous bodily harm" have no technical meaning. In their natural sense, injuries which resulted in death would be included as well as those which did not result fatally. *R. v. Union Colliery Co.*, 7 B.C.R. 247, 3 Can. Cr. Cas. 523, same case in appeal, 31 S.C.R. 81; 4 Can. Cr. Cas. 400. It is injury of greater degree than that embraced in the phrase "actual bodily harm"; *R. v. Hostetter*, 5 Terr. L.R. 363, 7 Can. Cr. Cas. 221; but not necessarily of a permanent or dangerous character. *R. v. Archibald*, 4 Can. Cr. Cas. 159. It is an injury which seriously interferes with comfort or health. *R. v. Archibald*, 4 Can. Cr. Cas. 159; *R. v. Ashman*, 1 F. & F. 88; *R. v. Clarence*, 22 Q.B.D. 23; *R. v. Martin*, 8 Q.B.D. 54, 14 Cox C.C. 633.

*Wounding officer, or person assisting, in execution of duty*—Code sec. 275.

*Verdict for lesser offence proved*—Code sec. 951. A verdict for common assault may be received. *R. v. Canwell*, 11 Cox C.C. 263; *R. v. Oliver*, 30 L.J.M.C. 12; *R. v. Yeadon*, 9 Cox C.C. 91, L. & C. 81; *R. v. Taylor* L.R. 1 C.C.R. 194. But justices holding a preliminary enquiry for the greater offence without power of trial of same cannot without a fresh information assume to try the charge as one of common assault over which they had summary jurisdiction. *Miller v. Lee* 25 A.R. 428, 2 Can. Cr. Cas. 282; *R. v. Lee*, 2 Can. Cr. Cas. 233; *Goodwin v. Hoffman*, 15 Can. Cr. Cas. 270.

*Summary trial*—Code, sec. 773, . . . . .

*North-West Territories*—For special provisions as to trial, see N.W.T. Act, R.S.C. 1906, ch. 62, secs. 37-55.

*Yukon Territory*—In the Yukon this offence is triable summarily without a jury. The Yukon Act, R.S.C. ch. 63, sec. 65.

**Shooting at the King's vessels.—Wounding public officer engaged in execution of duty.**

**275.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully,—

(a) shoots at any vessel belonging to His Majesty or in the service of Canada; or,

(b) maims or wounds any public officer engaged in the execution of his duty or any person acting in aid of such officer.

*Origin*—Sec. 243, Code of 1892; R.S.C. 1886, ch. 32, sec. 213, ch. 34, sec. 99.

*"Maims"*—*Mayhem*, or the maiming of persons, was probably at one time an offence at common law of the degree of felony; as the judgment was *membrum pro membro*. But this judgment afterwards went out of use; partly because the law of retaliation is at best an inadequate rule of punishment; and partly because, upon a repetition of the offence, the punishment could not be repeated. The offence, therefore, appears to have been considered, in latter times, as in the nature of an aggravated trespass and a misdemeanour of the highest kind. Coke Lit. 127a, Russell Crimes, vol. 1, p. 971.

A bodily hurt whereby a man is rendered less able in fighting, to defend himself or to annoy his adversary, is properly a maim at common law. Therefore, the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eyes or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims; but the cutting off his ear, or nose, or the like, are not held to be maims at common law; because they do not weaken a man, but only disfigure him. In order to found an indictment of *mayhem* the act must be done maliciously, though it matters not how sudden the occasion. 1 East P.C., c. 7, s. 1.

It is laid down that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted; and, on conviction, fined and imprisoned. For as the life and members of every subject are under the safeguard and protection of the King; so they are said to be *in manu regis*, to the end that they may serve the King and country when occasion shall require. Co. Lit. 127a.

*Wounding officer in execution of duty*—Where the officer is not engaged in the execution of his duty at the time of the offence, the charge of wounding would come under sec. 274. *R. v. Dupont*, 3 Can. Cr. Cas. 566 (Que.); *R. v. Williams*, 21 O.L.R. 467. That section would also apply where the offence was the infliction of grievous bodily harm and not a wounding.

*"Public officer" defined*—Code sec. 2, sub-sec. (29).

**Strangling, etc., with intent.—Giving narcotic with intent.**

**276.** Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing, any indictable offence,—

- (a) by any means whatsoever, attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance; or,
- (b) unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter or thing.

*Origin*—Sec. 244, Code of 1892; R.S.C. 1886, ch. 162, secs. 15 and 16.

*Attempts to murder*—See sec. 264.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303, 306.

*Punishment by whipping*—See secs. 80, 204, 276, 292, 293, 301, 302, 446, 457, 1060.

**Administering poison to endanger life.**

**277.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully administers to, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.

*Origin*—Sec. 245, Code of 1892; R.S.C. 1886, ch. 162, sec. 17.

*"Administering"*—See note to sec. 264.



*Any poison or other destructive or noxious thing*—Some drugs are noxious only when taken in large quantities; and it is doubtful whether the administering of a drug in so small a quantity as to be incapable of doing harm although a larger quantity of the drug would be a poisonous dose, is administering a "poison." *R. v. Hennah* (1877), 13 Cox C.C. 547; *R. v. Cramp* (1880), 5 Q.B.D. 307, 14 Cox C.C. 401, 42 L.T. 442. In the latter case it is suggested that where the drug administered is a recognized "poison" it may be that the offence is complete although the quantity administered is too small to be noxious.

If any grievous bodily harm is in fact inflicted, the offence comes under sec. 277. *Tulley v. Corrie* (1867), 10 Cox C.C. 640, 17 L.T. 140.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

#### **Administering poison with intent to injure.**

**278.** Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully administers to, or causes to be administered to or taken by, any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person.

*Origin*—Sec. 246, Code of 1892; R.S.C. 1886, ch. 162, sec. 18.

*Intent to injure, aggrieve or annoy*—Where the defendant administered a drug to a woman and the jury found that it was administered with the intent to excite her sexual passion and desire, in order that the defendant might have connection with her, this was held to be an administering with intent to "injure, aggrieve and annoy" her. *R. v. Wilkins* (1861), L. & C. 89, 9 Cox C.C. 20, 31 L.J.M.C. 72; compare cases under secs. 303-305.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

#### **Causing bodily injuries by explosives.**

**279.** Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully and by the explosion of an explosive substance burns, maims, disfigures, disables or does any grievous bodily harm to any person.

*Origin*—Sec. 247, Code of 1892; R.S.C. 1886, ch. 162, sec. 21; Offences against the Person Act, 32-33 Vict., Can., ch. 20, sec. 27; 24-25 Vict., Imp., ch. 100, sec. 28.

*Explosive apparatus and materials*—See definition of "explosive substance" in sec. 2, sub-sec. (14).

*Search warrant*—Code secs. 628-631, 633, 635.

*Other offences relating to explosives*—See Code secs. 111-114, 280, 594, 633; and the Explosives Act, 4-5 Geo. V, Can., ch. 31.

*Offence of inflicting grievous bodily harm*—See sec. 274.

**Causing explosion with intent to harm.—Sending explosives.—  
Throwing explosive or destructive substance.**

**280.** Every one who unlawfully,—

- (a) with intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm is effected or not,
  - (i) causes any explosive substance to explode,
  - (ii) sends or delivers to, or causes to be taken or received by, any person, any explosive substance, or any other dangerous or noxious thing,
  - (iii) puts or lays at any place, or casts or throws at or upon, or otherwise applies to, any person any corrosive fluid, or any destructive or explosive substance; or,
- (b) places or throws in, into, upon, against or near any building, ship or vessel, an explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes place and whether or not any bodily injury is effected;

is guilty of an indictable offence and liable, in cases within paragraph (a) of this section, to imprisonment for life, and in cases within paragraph (b) of this section to fourteen years' imprisonment.

*Origin*—Sec. 248, Code of 1892; R.S.C. 1886, ch. 162, secs. 22 and 23; *Offences against the Person Act*, 32-33 Vict., Can., ch. 20, secs. 28 and 29; 24-25 Vict., Imp., ch. 100, secs. 29 and 30.

*Explosive apparatus and materials*—See definition of "explosive substance" in sec. 2, sub-sec. (14).

*Search warrant*—See Code secs. 628-631, 633, 635.

*Offences relating to explosives*—Code secs. 111-114, 279, 280, 633; the *Explosives Act*, 4-5 Geo. V, Can., ch. 31.

*Throwing corrosive fluid*—Unless the contrary be proved the intention will be evidenced by the act; *R. v. Rhenwick Williams* (1790), 1 Leach 533; and the question of intent is for the jury. *R. v. Saunders*, 14 Cox C.C. 180.

Throwing oil of vitriol in a person's face has been held not to be a "wounding," *R. v. Murrow* (1835), 1 Mood. C.C. 456.

*Throwing destructive or explosive substances*—In an English case in 1887, it was held that boiling water was not included in this phrase. *R. v. Martin*, 62 L.T.N. 372; but see *R. v. Crawford*, 2 C. & K. 129.

*Wilful damage to property*—Code sec. 509, *et seq.*

~~Setting spring guns and man-traps.—Permitting the same to be set.—Exception.~~

**281.** Every one is guilty of an indictable offence and liable to five years' imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy, or inflict grievous bodily harm upon, any trespasser or other person coming in contact therewith.

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is in, or afterwards comes into, his possession or occupation, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine with such intent as aforesaid.

3. This section does not extend to any gin or trap usually set or placed with the intent of destroying vermin or noxious animals.

*Origin*—Sec. 249, Code of 1892, R.S.C. 1886, ch. 162, sec. 24; 32-33 Vict., Can., ch. 20, sec. 30; 24-25 Vict., Imp., ch. 100, sec. 31.

*Intent to harm persons*—A similar provision in the English statute 7 and 8 Geo. IV, ch. 18, was held not to be applicable to the setting of dog-spears on a man's own land with no intention to harm human beings and without having brought about such a result. *Jordin v. Crump* (1841), 8 M. & W. 782; 11 L.J. Ex. 74.

If death is caused by unlawfully setting a spring-gun, the person setting it is guilty of manslaughter. *R. v. Heaton* (1896), 60 J.P. 508.

#### Endangering safety of railway traffic.

**282.** Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully,—

- (a) with intent to injure or to endanger the safety of any person travelling or being upon any railway,
  - (i) puts or throws upon or across such railway any wood, stone, or other matter or thing,
  - (ii) takes up, removes or displaces any rail, railway switch, sleeper or other matter or thing belonging to such railway, or injures or destroys any track, bridge or fence of such railway, or any portion thereof,

- (iii) turns, moves or diverts any point or other machinery belonging to such railway;
- (iv) makes or shows, hides or removes any signal or light upon or near to such railway,
- (v) does or causes to be done any other matter or thing with such intent; or,
- (b) throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used and in motion upon any railway, any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train of which such first mentioned engine, tender, carriage or truck forms part.

*Origin*—Sec. 250, Code of 1892; R. S. 1886, ch. 162, secs. 25 and 26; 32-33 Vict., Can., ch. 20, secs. 31 and 32; 24-25 Vict., Imp., ch. 100, secs. 32 and 33.

*Any railway*—The corresponding English Act, 24-25 Vict., ch. 97, secs. 35-57, has been held to apply to both public and private railways; *O'Gorman v. Sweet* (1890), 54 J.P. 663; and to railways not yet opened for regular traffic, but in use for the conveyance of workmen and materials. *R. v. Bradford* (1860), Bell C.C. 268, and see *R. v. Bowray*, 10 Jur. 211.

*Endangering persons on railways*—Sec. 282 deals with the offence where the danger is intentionally caused; and sec. 283 where there is an unlawful act or a wilful omission or neglect of duty, but the intent set out in sec. 282 is not charged.

An acquittal under this section will not bar an indictment under sec. 283, for wantonly endangering the safety of persons on railways. *R. v. Gilmore* (1882), 15 Cox C.C. 85.

*Cumulative charge*—Several acts of obstruction charged against the same accused and continuing for several weeks may be treated as one continuing offence at the option of the prosecution, and a conviction on an indictment so treated would be an answer to a fresh indictment for any of such acts of which evidence was given by the prosecution. *R. v. Michaud*, 17 Can. Cr. Cas. 86. If not treated as one offence, the court has a discretion to order a separate trial. *Ibid.*; Code sec. 857.

*Mischief to railway property*—See secs. 510 (A), 517-519.

*Extradition*—Under the Extradition Convention of 1901 with the U.S.A., "wilful and unlawful destruction or obstruction of railroads which endangers human life," is an extraditable crime.

**Wantonly endangering safety of persons on railways.**

**283.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein.

*Origin*—Sec. 251, Code of 1892; R.S.C. 1886, ch. 162, sec. 27.

*Charge laid under repealed clause of Railway Act*—In *R. v. Corrigan*, the defendant was prosecuted before a police magistrate for a breach of the provisions of s. 415 of the Railway Act of Canada, R.S.C. 1906, c. 37, and on the evidence was found guilty of the offence as charged. No amendment was asked for, and a conviction was recorded on the charge as laid. Subsequently the magistrate discovered that s. 415 had been repealed, and he thereupon reserved for the opinion of the Court of Appeal the question whether the conviction should be allowed to stand as for an offence under sec. 283 of the Criminal Code:—Held, that the conviction could not be sustained under a different statute. *R. v. Corrigan*, 20 O.L.R. 99, 15 Can. Cr. Cas. 310.

**Causing bodily injury by unlawful act or omission of duty.**

**284.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.

*Origin*—Sec. 252, Code of 1892; R.S.C. 1886, ch. 162, sec. 33.

*Neglect of duty resulting in bodily harm to another*—The duty may arise from contract or be imposed by statute or common law. Certain duties are imposed by the Code itself, for example see secs. 247 and 248. The latter imposes a legal duty as regards the criminal law to do an act which he undertakes to do, if omission to do it is or may be dangerous to life, and if the omission causes bodily injury he may be prosecuted under sec. 284 subject to any defence of lawful excuse which may arise under sec. 248, and see sec. 16 as to "justification and excuse."

An acquittal on a charge of manslaughter is not a bar to a charge of inflicting grievous bodily injury based upon the same circumstances. *R. v. Shea*, 14 Can. Cr. Cas. 319; Code sec. 274.

The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence. *R. v. Union Colliery Co.* (1900), 7 B.C.R. 247, 3 Can. Cr. Cas. 523;

affirmed *sub-nom.*, *Union Colliery v. The Queen* (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

*Liability of corporations*—By sec. 2, sub-sec. (13) the term “every one” includes corporations in relation to such things as they are capable of doing. Sec. 284 embraces such an offence. *Union Colliery v. The Queen*, 31 Can. S.C.R. 81.

*Punishment where corporation defendant*—It is said that sec. 284 does not extend the criminal responsibility of corporations beyond what it was at common law; *R. v. Great West Laundry Co.*, 3 Can. Cr. Cas. 514, 13 Man. L.R. 66. The common law punishment of a fine is to be imposed on a corporation convicted under sec. 284. See *Union Colliery Co. v. The Queen*, 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81; *R. v. Toronto Railway Co.*, 10 O.L.R. 26, 10 Can. Cr. Cas. 196; Code secs. 920 and 1029.

#### Injuring persons by furious driving.

**285.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or motor vehicle, automobile or other vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person.

*Origin*—Sec. 253, Code of 1892; R.S.C. 1886, ch. 162, sec. 28; *Offences against the Person Act 1861*, Imp., sec. 35.

*Furious driving*—A bicycle is a “vehicle” under this section. *R. v. Parker*, 59 J.P. 793. Furious riding on horseback seems to come under sec. 284 rather than 285, where injury is done to another person.

*Misconduct or neglect in motoring*—Driving at an excessive speed with knowledge of defects in the brakes or other mechanism of an automobile which would make it impossible to stop the car promptly, is in itself evidence that the act was wanton. *R. v. Seager*, 15 Can. Cr. Cas. 483.

An acquittal on a charge of manslaughter is not a bar to a charge of inflicting bodily harm based upon the same circumstances. *R. v. Shea*, 14 Can. Cr. Cas. 319.

Wilful misconduct means misconduct to which the will is a party; something opposed to accident or negligence; the “misconduct” not the conduct must be wilful. It occurs where the person guilty of it knows that mischief will result from it, and also where the act is done under the supposition that it might be mischievous and with an indifference to his duty to ascertain whether it was mischievous or not. *Lewis v. Great Western Ry. Co.*, 3 Q.B.D. 195, 47 L.J.Q.B. 131, at 206; *R. v. Monahan*, 11 Cox C.C. 608, 23 L.T. 168; *R. v. Holroyd*, 2 M. & R. 339;

Early v. Canadian Northern Ry., 8 Sask. L.R. 27, 8 W.W.R. 486; Anderson v. Canadian Northern Ry. [1917] 3 W.W.R. 143. Compare sec. 509 as to reckless mischief.

*Verdict for an attempt*—There may be a verdict for the lesser offence of an attempt to cause a grievous bodily injury if the evidence warrants it. Code sec. 949; R. v. McCarthy (1917), 41 O.L.R. 153, 29 Can. Cr. Cas. 448. An attempt implies an intent; Code sec. 72; but intending to commit an offence is not the same as attempting to commit it. R. v. McCarthy, *supra*; R. v. McPherson, Dears. & B. 197. It is open to the jury to believe any part of any evidence and disbelieve any other part; they may therefore find that there was an intent, and with that intent an act done looking to the commission of the offence, which act failed of effect. R. v. McCarthy, *supra*. So where the grievous bodily injury resulted from the second or third of three collisions closely following one another, the jury may find the attempt in respect of the first collision and at the same time conclude that the other collisions were unexpected and accidental. R. v. McCarthy, *supra*.

#### **Liability of driver of car for failure to stop after accident happens.**

**285A.** Whenever, owing to the presence of a motor car on the highway, an accident has occurred to any person or to any horse or vehicle in charge of any person, any person driving the motor car shall be liable on summary conviction to a fine not exceeding fifty dollars and costs or to imprisonment for a term not exceeding thirty days if he fails to stop his car and, with intent to escape liability either civil or criminal, drives on without tendering assistance and giving his name and address.

*Origin*—Can. Stat. 1910, ch. 13, sec. 2.

*Motor car and automobile offences*—The owner of a motor car who is sitting next to a driver who proceeds at a dangerous speed is taken to be aware of the dangerous speed and may be held to be guilty of abetting a violation of the law. DuCros v. Lambourne (1906), 22 T.L.R. 3. And under the Motor Car Act (Imp.) in Provincial Motor Cab Co. v. Dunning [1909], 2 K.B. 599, it was held that the vehicle owner could be convicted under that Act if the vehicle had been sent out by persons for whom he was responsible, in a condition which did not comply with the law.

For other offences relating to the operation of motor cars, see the various provincial statutes.

*Paying damages and costs to person aggrieved*—See sec. 729.

**Using motor car without owner's consent.**

**285B.** Every one who takes or causes to be taken from a garage, stable, stand, or other building or place, any automobile or motor car with intent to operate or drive or use or cause or permit the same to be operated or driven or used without the consent of the owner shall be liable, on summary conviction, to a fine not exceeding five hundred dollars and costs or to imprisonment for any term not exceeding twelve months, or to both fine and imprisonment.

*Origin*—1910 Can. Stat., ch. 11; 1918 Can. Stat., ch. 16.

*Unlawful use of motor car*—The marginal note to the official text of this section introduced into the Code by the amendment 9-10 Edw. VII, ch. 11, and since amended by increasing the penalty (Can. Stat., 1918, ch. 16), is erroneous in referring to this offence as "theft of motor car." *Hirschman v. Beal* (1916), 38 O.L.R. 40, 11 O.W.N. 83, 28 Can. Cr. Cas. 319, reversing 37 O.L.R. 529, 10 O.W.N. 411. The offence is not theft but a minor offence, and the marginal note cannot change the effect of the text of the enactment. *Hirschman v. Beal*, supra; *Attorney-General v. Great Eastern Ry.*, 11 Ch. D. 449, at 460, 461, 465. The Federal Parliament has made no special enactment as to the force, if any, to be given to marginal notes in the statutes, although it has made the preamble of every Act a part thereof "intended to assist in explaining the purport and object of the Act." R.S.C. 1906, ch. 1, sec. 14.

Sec. 285B is not an amendment of the larceny or theft part of the Code, but an addition to a section dealing with injury caused by negligent driving of carriages and motor vehicles; and there is nothing to indicate that Parliament intended the new offence to be "a theft." *Hirschman v. Beal*, supra, per Riddell, J.

*Paying damages and costs to person aggrieved*—See sec. 729.

**Impeding shipwrecked person.—Impeding person assisting.**

**286.** Every one is guilty of an indictable offence and liable to seven years' imprisonment,—

- (a) who prevents or impedes, or endeavours to prevent or impede, any shipwrecked person in his endeavour to save his life; or,
- (b) who without reasonable cause prevents or impedes, or endeavours to prevent or impede, any person in his endeavour to save the life of any shipwrecked person.

*Origin*—Sec. 254, Code of 1892; R.S.C. 1886, ch. 81, sec. 36.

*Shipwrecked person*—See sec. 2 (33).



**Leaving hole in ice unguarded.—Leaving unused mine unguarded.—Neglect to make inclosure after conviction.—Manslaughter by neglect to guard hole.**

**287.** Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour, or both, who,—

- (a) cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, uninclosed by bushes or trees or unguarded by a guard or fence, of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein; or,
- (b) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which there is any excavation of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein; or,
- (c) omits within five days after conviction of any such offence to so guard or inclose the same or to construct around or over such exposed opening or excavation a guard or fence of such height and strength.

2. Every one whose duty it is to guard such hole, opening, aperture, or place, is guilty of manslaughter if any person loses his life by accidentally falling therein while the same is so unguarded or uninclosed.

*Origin*—Sec. 255, Code of 1892; R.S.C. 1886, ch. 162, secs. 29, 30, 31, 32.

*Paying damages and costs to person aggrieved*—See sec. 729.

**Sending unseaworthy ships to sea.**

**288.** Every one is guilty of an indictable offence and liable to five years' imprisonment who sends, or attempts to send, or

is a party to sending, a ship registered in Canada to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place on the inland waters of the United States to any port or place on the inland waters of Canada in such an unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that he used all reasonable means to ensure her being sent to sea or on such voyage in a seaworthy state, or that her going to sea or on such voyage in such unseaworthy state, was, under the circumstances, reasonable and justifiable.

*Origin*—Sec. 256, Code of 1892; 52 Vict., Can., ch. 22, sec. 3, as amended by 56 Vict., ch. 32; and compare sec. 457 of the Merchant Shipping Act 1894 (Imp.).

*Preliminary*—No person shall be prosecuted for any offence under this section without the consent of the Minister of Marine and Fisheries; sec. 595; but a count is not to be quashed for omitting to state this consent. Code sec. 855, sub-sec. (h).

#### **Taking unseaworthy ship to sea.**

**289.** Every one is guilty of an indictable offence and liable to five years' imprisonment who, being the master of a ship registered in Canada, knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such an unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable.

*Origin*—Sec. 257, Code of 1892; 52 Vict., Can., ch. 22, sec. 3; compare sec. 457 of the Merchant Shipping Act 1894 (Imp.).

*Assaults.***Definition of assault.**

**290.** An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud.

*Origin*—Sec. 258, Code of 1892.

*What constitutes an assault*—“The first principle which runs through the whole law on this subject is that any interference whatever with the person of another, or with his personal liberty, requires special justification.” Stephen’s *Crim. Law*, 109; and see *Le Olere v. Marti*, 28 Can. Cr. Cas. 160 (Que.).

A party defendant to a civil action, was met in the street by the accused, who, acting on behalf of the solicitor to the plaintiff in the action, tendered to such defendant an order for discovery which had been made in the action. The defendant declined to accept the document, whereupon the accused thrust it into the inner fold of the defendant’s coat, which was unbuttoned at the time, and as the defendant opened his coat the document fell on the street, where he left it. An information was preferred by the defendant against the process server for assault in so touching him, and it was held in review of the justices’ conviction that the accused was entitled to serve the document on the defendant personally, and that as there was no evidence that the accused had touched the respondent further than was necessary to bring the document home to him, the justices were wrong in convicting the appellant. *Rose v. Kempthorne*. 27 Times L.R. 132.

Provocative words will not ordinarily justify an assault though they may mitigate the punishment. *Evans v. Bradburn* (1915), 9 W.W.R. 281, 32 W.L.R. 585 (Alta.); *Slater v. Watts*, 16 B.C.B. 36 (B.C.).

But as an assault may, under sec. 290, be based upon a threat, by “any act or gesture,” to apply force, the person unlawfully assaulted may be able to justify force used to repel the assault if he is under a reasonable apprehension of grievous bodily harm, and the force he uses is not meant to cause grievous bodily harm, nor is it more than is necessary for the purpose of self-defence. Code secs. 16 and 53.

So also if the assault by threat to apply force where there is a present ability to do so (Code sec. 290) is accompanied with insult (Code sec. 55), the person assaulted, or any one under whose protection he or she is, may justify force in defence, if no more force is used than is necessary to prevent such assault, or the repetition of it. Code sec. 55. But

the person repelling the insulting assault is to do no more hurt than is proportionate to the insult which the force he used was intended to prevent. Code secs. 16 and 55.

The threats which constitute an assault must be accompanied by acts positively evidencing an intent to carry them out; and be not mere expressions of an intention to do something upon the hypothesis of something happening which may never occur. *Pockett v. Pool* (1896), 11 Man. R. 275, 286, per Killam, J.

A blow struck in anger or which is likely or which is intended to do corporal hurt, is an assault, but a blow struck in sport and not likely, nor intended, to cause bodily harm, is not an assault. *R. v. Buchanan* (1898), 12 Man. R. 190, 1 Can. Cr. Cas. 442, citing *R. v. Coney*, 8 Q.B.D. 534.

An assault being a breach of the peace and unlawful, the consent of the person struck to engage in a fight entered into in a spirit of hostility and anger, does not excuse the other. *R. v. Buchanan* (1898), 12 Man. R. 190, 1 Can. Cr. Cas. 442.

Any person may interfere to prevent a breach of the peace, and he may proceed to any extremity which may be necessary to effect that object; commencing, of course, with a request to the offender to desist, then, if he refuses, gently laying hands on him to restrain him: and if he still resist, then with force compelling him to submit. *Ex parte Kane*, *R. v. Shaw*, 26 Can. Cr. Cas. 156 (N.B.). But in every case upon summary conviction, it is a question for the justice whether or no the degree of force actually used was necessary for the object which renders it legitimate; if there be any excess, it will be an assault. The slightest imposition of the hands, if not justified, is an assault; and the necessity for a greater or less degree of violence depends on the circumstances of the case, to be judged by the magistrate. *Ex parte Kane*, supra.

The pointing of a loaded rifle at a person within shooting distance is an assault; *R. v. Cronan*, 24 U.C.C.P. 106; *R. v. Chartrand* (1912), 2 W.W.R. 773; and a conviction for assault may be supported under a charge for the greater offence of shooting with intent. *R. v. Chartrand* (1912), 2 W.W.R. 773, 21 W.L.R. 850, 20 Can. Cr. Cas. 116 (Sask.).

*Interfering to prevent breach of the peace*—See secs. 46, 47, 648.

*Common assault*—Code secs. 291, 709, 732-740.

*When trespasser's resistance of removal deemed an assault*—See sec. 61.

*Assault provoked by entry on lands against person in peaceable possession*—See sec. 62.

*Assaulting and beating female*—Code sec. 292, 777, 778, 784.

*Aggravated assaults*—Code sec. 296, 732, 1048.

*Indecent assaults*—Code secs. 292-294, 773 (d), 781, 784.

*Assault with intent to rob*—Code secs. 446 and 448.

*Attempts to murder*—Code sec. 264.

*Assaulting officer engaged in execution of his duty*—Code secs. 296 (b), 773 (c), 781.

*Causing bodily harm by assault or otherwise*—Code secs. 264, 273, 274, 279, 280, 281, 284, 285, 295.

*Wounding*—Code secs. 264 (b), 273, 274, 275 (b), 773 (c).

*Assault with intent to commit indictable offence*—Code sec. 296, 777.

#### **Penalty for common assault.**

**291.** Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to one year's imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment, with or without hard labour.

*Origin*—Code of 1892, sec. 265; R.S.C. 1886, ch. 162, sec. 36.

*Assault defined*—Code sec. 290.

*Fine in lieu of imprisonment*—Code sec. 1035 makes a general provision for imposing a fine in lieu of imprisonment; but as to the offence of common assault it is to be construed as subject to the specific limitation in amount to \$100 as the alternative of the authorized term of imprisonment. *R. v. Johnson* (1913), 24 W.L.R. 468, 21 Can. Cr. Cas. 215.

"*On summary conviction . . . to two months' imprisonment.*"—If the month of February would come within the term of the sentence, care should be taken that the imprisonment imposed does not exceed the two months' limit, as might happen on a sentence for sixty days. *R. v. Brindley*, 12 Can. Cr. Cas. 170, 173 (N.S.); *R. v. Gavin*, 30 N.S.B. 162, 1 Can. Cr. Cas. 59; *Halifax v. Clusen*, 18 N.S.B. 521. If hard labour is to be included in the summary conviction it must have been regularly imposed and included in the minute of conviction, if any. *Ex parte Carmichael*, 8 Can. Cr. Cas. 19 (N.S.).

*Summary conviction proceedings excluded if title to land in question*—Code sec. 709.

"*Summary conviction*" and "*summary trial*" *jurisdiction in assault*—A justice proceeding under Part XV (summary conviction), may send the case up for trial instead of himself disposing of it, if he finds the assault complained of to have been more than a common assault triable under Part XV, Code sec. 732. So if the assault was accompanied by an attempt to commit some other indictable offence, or if the justice is of opinion that from any other circumstances the case should not be disposed of under Part XV, he shall abstain from dealing with it under that Part. Code sec. 732. If the justice is a magistrate having the power to summarily try under Part XVI, he may, of course, proceed to try the special classes of assault referred to in sec. 773, in

the manner applicable thereto (see Code secs. 776, 781). Other classes of assault within the jurisdiction in Ontario of the Court of General Sessions would be triable under secs. 777 and 778 by a magistrate having extended jurisdiction under sec. 777. But in any case under Part XVI, if it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstances, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, the magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case. Code sec. 784. A previous conviction of the accused is not, however a bar to the magistrate holding a summary trial for assault, if he sees fit to do so. Code sec. 784.

If the jurisdiction is exercised under Part XV (summary convictions), a fine may be imposed carrying with it the penalty of imprisonment for non-payment for which sec. 739 provides, although the term may be in excess of the limit of two months' imprisonment which might have been imposed as a punishment of first instance. *R. v. Hawes*, 6 Can. Cr. Cas. 238. If the proceedings are under the extended jurisdiction of magistrates under sec. 777 (summary trials), the like punishment may be imposed as upon indictment, Code sec. 777; *R. v. Hawes*, supra; *R. v. Coolen*, 36 N.S.B. 510, 7 Can. Cr. Cas. 522.

On the summary trial under sec. 777 of concurrent charges of assault and pointing a fire-arm, the magistrate, after hearing the assault case, reserved judgment to take up the second charge, but no further evidence then being adduced except the examination of the defendant, the magistrate dismissed the second charge and entered a conviction upon the charge of assault. There is no presumption under such circumstances that the intermixing of the trials has prejudiced the accused, and the conviction should be sustained unless such prejudice is clearly shown. *R. v. Reid*, 12 Can. Cr. Cas. 352.

A justice holding a preliminary enquiry on a charge of assault with intent cannot even with the consent of the prosecutor give himself jurisdiction to try the case as for a common assault and so transfer a preliminary enquiry into a summary proceeding upon the one information. *Goodwin v. Hoffman*, 15 Can. Cr. Cas. 270. A new information or complaint should be laid, and proceedings should be begun *de novo* in respect thereof and carried on in conformity with Part XV dealing with summary conviction procedure.

*When disposal under Part XV is a release from further proceedings, civil or criminal?*—Code sec. 734.

*Discretion to discharge from summary conviction on paying damages and costs to person aggrieved?*—See sec. 729.

*Costs on summary conviction under Part XV?*—See secs. 735, 737, 738.

*Recovery of costs on an indictment for assault?*—See secs. 1044, 1046, 1047.

*Recognizance to keep the peace*—In a summary hearing under Part XV, the justice on finding the accused guilty may require him to find sureties to keep the peace. Code sec. 748. This may be done in addition to or in lieu of any other sentence. Sec. 748. Similarly there is power, under secs. 1058 and 1059, to require recognizances in addition to any sentence imposed on a summary trial by a magistrate under Part XVI, or by a court of criminal jurisdiction. As to estreat, see sec. 1094; *R. v. Walker*, 23 Can. Cr. Cas. 179.

*Fresh information before another magistrate after prohibition of trial by first magistrate*—*Ex parte Peck* (No. 2), 39 N.B.R. 274, 16 Can. Cr. Cas. 49.

**Indecent assault on female.—Consent procured by fraud.—Assaults on females.**

**292.** Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who,—

- (a) indecently assaults any female; or,
- (b) does anything to any female by her consent which but for such consent would be an indecent assault, if such consent is obtained by false and fraudulent representations as to the nature and quality of the act.
- (c) assaults and beats his wife or any other female and thereby occasions her actual bodily harm.

*Origin*—Sec. 259, Code of 1892; 53 Vict., Can., ch. 37, sec. 12. .

*"Indecently assaults"*—The circumstances may make the assault an indecent one where accompanied by an immoral proposal; it is not essential that the act constituting the assault should be in its nature indecent. *R. v. Louie Chong* (1914), 32 O.L.R. 66, 23 Can. Cr. Cas. 250, 7 O.W.N. 84.

*Complaint of prosecutrix*—The complaint of a girl of tender years may be proved in evidence although made in answer to interrogations if the latter were not of a leading or suggestive character. *R. v. Pailleur*, 15 Can. Cr. Cas. 339, 20 O.L.R. 207.

Lapse of time in making a complaint might be very serious in the case of a person of more mature years, where the question of consent was involved, but in the case of a child of six years it must be regarded in a very different light. *R. v. McGivney* (1914), 5 W.W.R. 1181, 19 B.C.R. 22, 26 W.L.R. 602, 22 Can. Cr. Cas. 222.

In *Regina v. Guthridge*, 9 C. & P. 472, in which the prosecutrix did not go into the witness box, the evidence of complaints made by her recently after the outrage was rejected by Baron Parke, as such evidence is received as confirmatory evidence only. So also the complaint of a

child under five years of age who was not a witness, was rejected as direct proof. *R. v. McMillan* (1916), 9 W.W.R. 1181.

What is the first reasonable opportunity after the commission of a sexual offence for the prosecutrix to make a complaint so as to make the evidence of the person to whom the complaint is made admissible in proof of consistency of conduct on the part of the prosecutrix, must depend on the circumstances of each case; an early complaint is not necessarily excluded because there had been a previous complaint to another person. *R. v. Lee* (1911), 7 Cr. App. R. 31; *Hopkinson v. Perdue*, 8 O.L.R. 228, 8 Can. Cr. Cas. 286; *R. v. Smith*, 9 Can. Cr. Cas. 21 (N.S.); *R. v. Barron*, 9 Can. Cr. Cas. 196 (N.S.); *R. v. Lillyman* [1896] 2 Q.B. 167; *R. v. Christie* [1914] A.C. 545, 556, 567 (H.L.).

A statement, to a third party, although not in the presence of the accused, may be given in evidence, provided it is shown to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and that it has not been elicited by questions of a leading and inducing or intimidating nature. *R. v. Spuzzum*, 12 B.C.R. 291, 12 Can. Cr. Cas. 287; *R. v. McGivney* (1914), 5 W.W.R. 1181, 26 W.L.R. 602, 22 Can. Cr. Cas. 222, 19 B.C.R. 22. There should be no suggestion in the questions of the identity of the person to be blamed; it should be left for the complainant to say who the party was, or if the name was not known to give a description of the party. See *R. v. McGivney* (1914), 5 W.W.R. 1181, 19 B.C.R. 22; *R. v. Iman Din*, 15 B.C.R. 476, 18 Can. Cr. Cas. 82; *R. v. Bowes*, 15 Can. Cr. Cas. 326; *R. v. Osborne* [1905] 1 K.B. 551.

*Consent of child under fourteen no defence to indecent assault*—Code sec. 294; *R. v. McGavaran*, 6 Cox C.C. 64. The consent may, however, negative a charge of common assault unless the consent was obtained by fraud. Code sec. 290.

*Corroboration of child's testimony when not under oath*—Where the charge is indecent assault under sec. 292 and the girl in respect of whom the offence is charged to have been committed is under fourteen, she or any other child of tender years who is tendered as a witness may be allowed to give testimony not under oath if she does not understand the nature of an oath, Code sec. 1003. But the testimony so given without oath, must be corroborated "by some other material evidence in support thereof implicating the accused." Code sec. 1003, sub-sec. (2); compare sec. 16 of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 16.

In *Rex v. Burr* (1906), 13 O.L.R., at p. 486, 8 O.W.R. 703, Moss, C.J.O., in dealing with the question of corroborative evidence "implicating the accused," said:—"This does not necessarily make it incumbent on the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be to virtually render a conviction impossible in the majority of cases like the present. It is enough if



there be other testimony to facts from which the jury or other tribunal trying the case weighing them in connection with the testimony of the witness may reasonably conclude that the accused committed the act with which he is charged." *R. v. Burr*, *supra*; *R. v. Daun*, 12 O.L.R. 227, 11 Can. Cr. Cas. 244; *R. v. Pailleur* (1909), 20 O.L.R. 207, at p. 214, 15 Can. Cr. Cas. 339; *R. v. McGivney* (1914), 5 W.W.R. 1181, 19 B.C.R. 22, 22 Can. Cr. Cas. 222.

The condition of the child when she came home may fix the time of the offence and so implicate the accused where there is the child's direct evidence of identity and also corroborative proof that the offence was committed at a certain time and place where the accused was proved to have been under circumstances which afforded him, to the exclusion of anyone else, the opportunity for committing the offence. *R. v. Bowes* (1909), 20 O.L.R. 111, 14 O.W.R. 1214; and see *Beffell v. Morton* (1906), 70 J.P. 347; *R. v. McGivney* (1914), 5 W.W.R. 1181, 19 B.C.R. 22, 22 Can. Cr. Cas. 222.

*Evidence or presumption of age being under fourteen*—Code sec. 984. Subject to the provisions of the Code or other federal law, the provincial laws of evidence regulate the mode by which age is to be proved. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 35; compare *R. v. Garneau*, 4 Can. Cr. Cas. 69 (Que.), as to registers of civil status; and see notes to sec. 211 (seduction of girls between fourteen and sixteen) and secs. 242, 242A (parental neglect of child under sixteen).

*Female over fourteen; where question of consent is material*—When a sexual offence is alleged, if consent is a good defence, the Court will quash a conviction, if it is not satisfied that this defence has been rebutted. *Bex v. Hart*, 10 Cr. App. R. 176.

Mere submission is not always equivalent to consent. A person may submit to an act done from ignorance, or the consent may be obtained by fraud; and in neither case would it be such consent as the law contemplates. *R. v. Lock* (1872), L.R. 2 C.C.R. 10. Consent means an active will in the mind of the patient to permit the doing of the act complained of; and knowledge of what is to be done is essential to a consent. *Ibid*.

Where a school teacher was charged with indecent assault upon one of his scholars, and it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months, it was held that evidence of the conduct of the prisoner towards her subsequent to the assault was properly admissible as tending to show the indecent quality of the assault, and as being, in effect, a part or continuation of the same. *R. v. Chute*, 46 U.C.Q.B. 155.

Lord Alverstone, speaking for the Court of Criminal Appeal, said, in *R. v. May* (1912), 8 Cr. App. R. 63, at 68:—"The Court is of opinion that if the facts of a case proved in evidence are such that the jury might reasonably infer consent, there ought to be a direction to the jury

by the judge on that question. It is easy to point out where the onus of proof lies and what is the evidence on that point in any particular case; but if the facts proved in evidence are not such that the jury might reasonably infer consent, and particularly if the case has been conducted by counsel in such a way as to make the question of consent immaterial or an entirely secondary issue to the main defence, there is no necessity for such a direction. It is impossible to lay down a rule applicable to all cases, but this indication of the principle on which the judge should act will, we think, be sufficient as a general rule.<sup>1</sup>

*General denial by defence*—Where the judge summed up in a way that might lead the jury to think that they must convict the prisoner even though they thought that consent to the indecency was proved, there is a misdirection amounting to a miscarriage of justice, although the case for the defence was an entire denial of indecency with or without consent. *R. v. Horn* (1912), 7 Cr. App. R. 200. Where there is no question of age dispensing with consent (see Code sec. 294) it seems obligatory for the prosecution to negative consent; the defence may urge that if there was consent the accused could not be convicted although a distinct defence of consent was not raised, but a general denial relied upon. *Ibid.*; and see *R. v. Bradley* (1910), 4 Cr. App. R. 225.

*Punishment*—Under this section every one found guilty of an indecent assault on a female is liable to two years' imprisonment and to be whipped; but the court in many cases, acting under the discretion conferred by the special proviso contained in sec. 1028 of the Code, does not inflict the whipping, and imposes only an imprisonment. *R. v. Robidoux* (1898), 2 Can. Cr. Cas. 19.

*Previous chastity not an element of indecent assault*—It is said that where the charge is indecent assault or rape, the previous chastity of the person upon whom the offence was committed is not an element of the offence. *R. v. Pieco* [1917] 1 W.W.R. 892, 896 (Alta.). But a cross-examination of the prosecutrix may develop denials by her which may let in contradictory evidence in rebuttal. As to character evidence, see the Canada Evidence Act, R.S.C. 1906, ch. 145.

But where the charge is seduction of a girl between 14 and 16, of previously chaste character, evidence is admissible in defence that before the date of the alleged offence the girl had had illicit connection with another. *R. v. Pieco* [1917] 1 W.W.R. 892, 896 (Alta.).

*Assault with actual bodily harm to female*—Sub-sec. (c) of sec. 292 was added by the Code Amendment Act of 1909. Whipping may be imposed for this offence. For criminal neglect to provide a wife with necessaries, see Code secs. 242 (2) and 242A. As to other assaults occasioning actual bodily harm, see Code sec. 295.

*Exclusion of public from trial*—Code sec. 645.

*Assault with bodily harm*—As to this offence generally, see sec. 295.

*Punishment by whipping*—See secs. 80, 204, 276, 292, 293, 301, 302, 446, 457, 1060.

*North-West Territories*—For special provisions as to trial, see N.W.T. Act, R.S.C., ch. 62, secs. 37-55.

*Yukon Territory*—As to summary trial in the Yukon, see the Yukon Act, R.S.C., ch. 63, sec. 65.

#### Indecent assault on males.

**293.** Every one is guilty of an indictable offence and liable to ten years' imprisonment, and to be whipped, who assaults any person with intent to commit sodomy or who, being a male, indecently assaults any other male person.

*Origin*—Sec. 260, Code of 1892; R.S.C. 1886, ch. 157, sec. 2.

*Evidence generally*—Evidence of the finding of indecent photographs at the lodgings of the accused was held admissible to prove identity under special and peculiar circumstances. *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478 (H.L.), affirming *R. v. Thompson*, 86 L.J.K.B. 1321 [1917], 2 K.B. 630. Lord Sumner (1918), 87 L.J.K.B. 478, at 484, said: "That the boys should pick out as the guilty person some one who, unknown to them, possessed these objects, confirms their accuracy if such possession is one of the personal *indicia* of the guilty man, for it shows that they selected a man who, so far, corresponds to the man who is wanted." There must be something to connect the circumstance tendered in evidence not only with the accused but with his participation in the crime in order to make it evidence of identification in the particular case. *Thompson v. Director of Public Prosecutions*, *supra*. So where, as in the last-mentioned case, the actual criminal made an appointment to meet the same boys at the same time and place three days later presumably for the same purpose and the accused kept the criminal's appointment and was identified by the boys as the same man, the House of Lords held that on a defence of mistaken identity being raised, it was competent for the prosecution to prove the finding of the indecent photographs as it tended to attach to the accused an abnormal peculiarity of the specialized and extraordinary class of people who habitually commit these offences against nature. *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478, at 485. If, however, there had been nothing to show a propensity in the criminal to the practice of such acts, such as the making of the appointment, the photographs would have been merely objects going to the accused's bad character and not to his identity with the criminal in the particular case. *Ibid*, at 486.

On a charge under sec. 293 of indecent assault on a male, evidence of an attempt by the accused of a similar offence at another time with another male was rejected in *R. v. Iman Din*, 18 Can. Cr. Cas. 82, 15 B.C.R. 476.

*Accused under fourteen*].—A boy under fourteen may be convicted of indecent assault upon another boy, if shown to be competent to know the nature and consequences of his conduct and to appreciate that it was wrong. Code sec. 18; *R. v. Hartlen* (1898), 30 N.S.R. 217, 2 Can. Cr. Cas. 12.

*Consent of boy under fourteen immaterial*].—Code sec. 294. As to proof or inference that the age of a boy is under fourteen, see sec. 984.

*Complainant over fourteen; question of consent*].—A consent obtained by fraud will not prevent the act being an assault, Code sec. 290, and see note to that section.

*Conduct of accused on being identified before arrest*].—There is no rule of law that evidence of a statement made in the presence and hearing of the accused is not admissible as having a bearing on his conduct, unless he accepts the statement; *R. v. Christie* [1914], A.C. 545, 83 L.J.K.B. 1097, 10 Cr. App. R. 141; but where the accused denies the truth of the statement, the presiding judge, in the absence of special circumstances, should intimate to counsel for the prosecution that, inasmuch as the evidence, though admissible, would have little value and might unfairly prejudice the jury against the accused, it ought not to be admitted. *R. v. Christie*, supra. The majority opinion in that case favoured the view that evidence of the statement ought to be confined to the mere fact of identification and ought not to be allowed to contain a repetition of the details of the offence in amplification of the act of identification or otherwise; *R. v. Christie*, supra.

*Excluding public from trial*].—Code sec. 645.

*Punishment of whipping*].—See secs. 80, 204, 276, 292, 293, 301, 302, 446, 457, 1060.

*North-West Territories*].—For special provisions as to trial, see N.W.T. Act, R.S.C. 1906, ch. 62, secs. 37-55.

*Yukon Territory*].—As to summary trial in the Yukon, see the Yukon Act, R.S.C., ch. 63, sec. 65.

#### **Consent of child under fourteen no defence to indecent assault.**

**294.** It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency.

*Origin*].—Sec. 261, Code of 1892; 53 Vict., Can., ch. 37, sec. 7; Criminal Law Amendment Act, Imp., 1880, sec. 2, which superseded *R. v. Johnson* (1865), 10 Cox 114, L. & C. 632, 34 L.J. 192, and *R. v. Roadley* (1880), 14 Cox 463, 49 L.J. 88.

*Consent immaterial to indecent assault of child under fourteen*].—The language of this section is manifestly framed to apply to an indecent assault on a male (Code sec. 293) as well as to an indecent assault on a female (Code sec. 292).

Sec. 294 is similar to sec. 2 of the Criminal Law Amendment Act 1880 (Imp.) except that the age there is 13. It does not create a new offence but it deprives the defendant of what would have been a defence. *R. v. Stephenson* (1912), 8 Cr. App. R. 36. It does not make it essential that, on a charge to which it applies, the indictment should state the child's age or that she was under the specified age. *Ibid.*

*Proof or inference of age*—Code sec. 984.

#### Assault with bodily harm.

**295.** Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment.

*Origin*—Sec. 262, Code of 1892; R.S.C. 1886, ch. 162, sec. 35; 32-33 Vict., Can., ch. 20, sec. 47.

*Assault with actual bodily harm to a female*—By the Code amendment of 1909 it is made an indictable offence punishable with two years' imprisonment with the addition of whipping for one to assault and beat "his wife or any other female," and thereby occasion to her any actual bodily harm. Code sec. 292.

*"Actual bodily harm"*—This phrase embraces injuries of a less serious nature than those referred to in Code sec. 274, under the heading of "grievous bodily harm." *R. v. Hostetter* (1902), 5 Terr. L.R. 363, 7 Can. Cr. Cas. 221. But the power of summary trial exercisable by a 'magistrate' as defined by sec. 771, apart from the extended jurisdiction of city magistrates under sec. 777, does not enable such magistrate to entertain a charge under sec. 295, although he may, with the consent of accused, in Manitoba, New Brunswick, Nova Scotia, Ontario and Quebec (sec. 778) and without such consent, in Alberta, British Columbia, Saskatchewan, Prince Edward Island and the Territories (sec. 776), try a charge under sec. 274, of inflicting grievous bodily harm. Code sec. 773, sub-sec. (c). *R. v. Sharpe*, 18 Can. Cr. Cas. 135, 20 Man. R. 555; *R. v. Law* (1915), 7 W.W.R. 1101, 33 W.L.R. 569, 25 Can. Cr. Cas. 251, (*R. v. Hostetter* (1902), 5 Terr. L.R. 363, doubted on this point).

Sub-sec. (c) of sec. 773, in effect reproduces sec. 274 of the Code. The fact that the person charged may be convicted of a lesser offence pursuant to sec. 951 cannot give jurisdiction in the first instance. The jurisdiction given to the magistrates under 773 is a statutory one, and cannot be extended by implication. *Rex v. Sharpe*, 20 Man. R. 555, 18 Can. Cr. Cas. 132, at 138; *R. v. Law* (1915), 7 W.W.R. 1101; but see contra, *R. v. Prokopate* (1914), 7 Sask. L.R. 95, 6 W.W.R. 405, 29 W.L.R. 88, 23 Can. Cr. Cas. 189; *R. v. Zyla*, 17 W.L.R. 258; *R. v. Hostetter*, 5 Terr. L.R. 363.

*Effect of conviction for offence involving assault*—On a trial before a city magistrate having the extended powers of summary trial under

sec. 777, the magistrate may convict of a lesser offence included in the offence charged where that part only of the charge is proved. Code sec. 951. The magistrate may convict of common assault under sec. 291 notwithstanding that the information was for an indictable offence under sec. 295 for assault with bodily harm as the latter includes common assault. *R. v. Frank Coolen*, 36 N.S.R. 510, 8 Can. Cr. Cas. 157.

A conviction on summary trial has the same effect as a conviction upon indictment. Sec. 791.

When an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to such subsequent indictment. Sec. 909.

And if the person summarily convicted by a justice of common assault on the complaint of the person aggrieved, taken under Part XV, pays the fine or undergoes the punishment awarded, he is released from all further or other proceedings, civil or criminal, for the same cause. Code sec. 734; *Grantillo v. Caporicci*, 16 Que. S.C. 44. The person aggrieved has, by laying a charge of common assault and asking summary disposal of same by a justice, elected that method of disposal and the consequence which follows under sec. 734 so far as the matter of the complaint is under the control of the complainant; but a statutory duty is placed upon the justice by Code sec. 732 when he finds that a more serious offence has been brought before him under cover of a charge of common assault only, to stop the proceedings under Part XV, (sec. 732), and so prevent the operation of sec. 734. *Green v. Henneghan* [1918] 3 W.W.R. 658 (Alta.); *Larin v. Boyd*, 27 Que. S.C. 472, 11 Can. Cr. Cas. 74. (*Hardigan v. Graham*, 1 Can. Cr. Cas. 437 (Que.) explained).

If the proceedings were taken before a city magistrate having the extended powers referred to in sec. 777 to summarily try an indictable offence, and the defendant, on being put to his election under sec. 778, has chosen a summary trial for the indictable offence of assault occasioning actual bodily harm, or even for common assault, it would seem to follow that a conviction of common assault, in the one case as for the lesser offence and in the other for the offence charged, has the effect under Code sec. 792 of releasing the accused from "all further or other criminal proceedings for the same cause." *Green v. Henneghan* [1918] 3 W.W.R. 658 (Alta.); *Nevills v. Ballard*, 28 Ont. R. 588, 1 Can. Cr. Cas. 434; *R. v. Stanton*, 5 Cox C.C. 324; *R. v. Miles*, 59 L.J.M.C. 56, 17 Cox C.C. 9; *B. v. Morris*, L.R. 1 C.C.R. 90, 36 L.J.M.C. 84; *R. v. Elvington*, 1 B. & S. 688, 31 L.J.M.C. 14; *R. v. Walker*, 2 Moody & Rob, 446; *R. v. Marsham, ex parte Lawrence* [1912] 2 K.B. 362. If the magistrate is holding a summary trial under sec. 773 for unlawful

wounding or unlawfully inflicting grievous bodily harm, whether his jurisdiction is absolute as it is in some provinces (Code sec. 776) or upon election of summary trial as it is in other provinces (Code sec. 778), sec. 792 gives the like effect to a conviction, and it operates as a release from further or other criminal proceedings for the same cause. *Nevills v. Ballard*, 28 Ont. R. 588; *Green v. Henneghan* [1918] 3 W.W.R. 658 (Alta.).

A conviction under sec. 295 for assault occasioning bodily harm does not bar the bringing of a civil action for damages. *Grantillo v. Caporici* (1899), 16 Que. S.C. 44; *Nevills v. Ballard*, 28 Ont. R. 588; *Green v. Henneghan* [1918] 3 W.W.R. 658.

But a conviction for common assault or other offence not comprehending the death of the party assaulted is not a bar to an indictment for the homicide if death results. *R. v. Morris*, L.R. 1 C.C.R. 90, 36 L.J.M.C. 84, 10 Cox C.C. 480. A charge of manslaughter is not for the same "cause" (Code secs. 734, 792), whether the word "cause" is considered as applying to the charge or accusation or to the cause for the accusation. *R. v. Morris*, *supra*.

*Inflicting "grievous bodily harm"*—Code sec. 274.

*Evidence of admissions and confessions*—Code sec. 685.

*Appeal*—There is no appeal to the Sessions in Ontario from a conviction on summary trial held under secs. 777, 778, for an assault occasioning bodily harm. *R. v. Rapp*, 23 Can. Cr. Cas. 203 (Ont.). As to appeal by case reserved or by leave, on questions of law, see secs. 1013, 1014-1020. The limited appeal under sec. 797, from certain summary trials does not apply.

#### Aggravated assault.

**296.** Every one is guilty of an indictable offence and liable to two years' imprisonment who,—

- (a) assaults any person with intent to commit any indictable offence; or,
- (b) assaults any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or,
- (c) assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person, for any offence; or,
- (d) assaults any person in the lawful execution of any process against any lands or goods; or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure; or,

(c) on any day whereon any poll for an election, parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person.

*Origin*—Sec. 263, Code of 1892; R.S.C. 1886, ch. 162, sec. 34.

*Sub-sec. (b)*—"Public officer"—See definition in sec. 2, sub-sec. (29).

As to the more onerous offence of maiming or wounding any "public officer" engaged in the execution of his duty, see Code sec. 275, sub-sec. (b).

*Sub-sec. (b)*—"Peace officer"—See definition in sec. 2, sub-sec. 26.

*Sub-sec (b)*—*Assaulting an officer engaged in the execution of his duty*—An assault on a peace officer attempting to serve a summons issued by a magistrate under the Canada Temperance Act is an assault on the officer "in the execution of his duty," *McFarlane v. The Queen* 16 S.C.R. 393.

It is not material to the offence, but a consideration in mitigation of the punishment, that the accused did not know that the other was a peace officer, or did not know that he was engaged in the execution of his duty. *R. v. Forbes* (1865), 10 Cox C.C. 362.

The officer is "engaged in the execution of his duty" in enforcing a warrant valid on its face if the conditions are such as are referred to in Code sec. 26 as justifying the officer in executing it, notwithstanding the invalidity of the conviction in the particular case. Code sec. 26; *R. v. King* (1889), 18 Ont. R. 566. Secs. 27-29 deal with the protection of the officer from criminal responsibility because of some irregularity, or lack of jurisdiction in the particular case. An offence under sub-sec. (b) may be the subject of a summary trial under sec. 773 (c), 776, 781, and in that case the punishment imposed must be within the limit of sec. 781; *R. v. Burtress* (1900), 3 Can. Cr. Cas. 536 (N.S.); *R. v. Booth*, 31 O.L.R. 539; *R. v. Crawford* (1912), 2 W.W.R. 952 (Alta.); *R. v. Shing* (1910), 15 W.L.R. 714, 20 Man. R. 214.

*Sub-sec. (d)*—*Assaulting a person making lawful distress*—On a charge of assaulting a person making a lawful distress it would appear necessary to prove the distress warrant and, if signed by an agent, to prove also the authority of such agent. It will not be presumed that a solicitor is authorized to sign a warrant on behalf of his client for the seizure of goods, but his authority as an agent may be proved; *R. v. Pierce*, 3 Terr. L.R. 347; and if the principal is a corporation *quære* whether the authority of the agent ought not to be under the corporate seal. *R. v. Pierce*, supra. Code sec. 349 (sec. 306 of the Code of 1892) referred to in *R. v. Pierce*, supra, was repealed in 1909 by 8-9 Edw. VII, Can., ch. 9.



Assaulting a person making a lawful distress is not as such within the list of offences triable under sec. 773, but it may, on the election by the accused to be tried summarily, be tried by a city magistrate having the extended powers conferred by sec. 777.

*Sub-sec. (d)—Assaulting a person making lawful seizure*—Resistance or wilful obstruction is punishable under sec. 169 although there may have been no assault so as to bring the case within sec. 296. See note to sec. 169; *Johnston v. Hogg*, 52 L.J.Q.B. 343. As to summary trial, see secs. 777, 778.

*Conviction on previous charge involving same assault*—See note to sec. 295.

*Jurisdiction to award costs*—Code sec. 1044.

*Requiring recognisance to keep the peace*—Code sec. 1058.

*Jurisdiction to award compensation for loss of "property" occasioned*—Code sec. 1048.

#### **Kidnapping.—Forcible confinement.—Non-resistance.**

**297.** Every one is guilty of an indictable offence and liable to twenty-five years' imprisonment who, without lawful authority,—

(a) kidnaps any other person with intent

(i) to cause such other person to be secretly confined or imprisoned in Canada against his will, or

(ii) to cause such other person to be unlawfully sent or transported out of Canada against his will, or

(iii) to cause such other person to be sold or captured as a slave, or in any way held to service against his will; or,

(b) forcibly seizes or confines or imprisons any other person within Canada.

2. Upon the trial of any offence under this section the non-resistance of a person so unlawfully kidnapped or confined shall not be a defence unless it appears that it was not caused by threats, duress or force, or exhibition of force.

*Origin*—Sec. 264, Code of 1892; 63-64 Vict., Can., ch. 46, sec. 3; 8-9 Edw. VII, Can., ch. 9, sec. 2; R.S.C. 1886, ch. 162, sec. 46; 32-33 Vict., Can., ch. 20, secs. 69 and 70.

*Kidnapping and false imprisonment*—It will be noted that the word "kidnap" is applied in the text to sub-sec. (a) only. The offence under sub-sec. (b) is in strictness, the criminal offence of false imprisonment, a species of aggravated assault. *Bishop's Crim. Law*, 2nd ed., sec. 668; *Cornwall v. The Queen*, 33 U.C.Q.B. 106. Under the present form

of the statute, which differs from that in question in the Cornwall case, it is an offence without lawful authority to forcibly imprison any other person, and it is also an offence to kidnap another with intent to cause him to be secretly imprisoned against his will and without lawful authority.

The forcible seizure or imprisonment under sub-sec. (b) involves the idea of unlawful violence. *Bird v. Jones*, 7 Q.B. 744; *Hunter v. Johnson*, 13 Q.B.D. 225; *R. v. Linsberg*, 69 J.P. 107; *People v. Camp*, 139 N.Y. 83 (under N.Y. Penal Code, sec. 211.).

Kidnapping was an indictable offence at common law. *R. v. Lesley*, 29 L.J.M.C. 97.

Where it appears that a plea of guilty to a charge of kidnapping was entered by the accused without the advice of counsel and without due appreciation of the character of the charge as distinct from the offence of abduction, a conviction for kidnapping made on summary trial by a magistrate without taking any testimony may be quashed on *certiorari* by a Court of superior criminal jurisdiction on an admission by the Crown that the offence, if any, was not kidnapping but abduction, but with leave to institute fresh proceedings for the latter charge. *R. v. Steckley* (1914), 23 Can. Cr. Cas. 263, 7 O.W.N. 137.

An assault with intent to kidnap or to forcibly imprison without lawful authority is punishable under Code sec. 296 (a) as an aggravated assault. As to attempts and conspiracies, see secs. 570 and 573.

*Without lawful authority*—The authority to forcibly seize, confine or imprison another person may be under civil law or criminal law. As to the latter, see Code sec. 16 *et seq.* as to matters of justification or excuse, and as to arrest without warrant in certain cases, sec. 646 *et seq.*

A conviction by a magistrate having competent jurisdiction over the subject matter of it upon which the party has been arrested is, until reversed or quashed, conclusive evidence in favour even of the magistrate in a prosecution against him for false imprisonment; 7 Term. R. 633 n; or in a civil action of trespass. *Gates v. Devenish*, 6 U.C.Q.B. 260; *Townsend v. Beckwith*, 14 Can. Cr. Cas. 353, 42 N.S.R. 307. And where a justice's conviction is quashed for excess of jurisdiction in a matter to which Part XXII of the Cr. Code 1906, applies, the court may grant an order of protection to the justice by making it a condition of the order to quash that no action shall be brought against him or the officer acting under it. Cr. Code, sec. 1131. Similar legislation is to be found in the provincial statutes.

*Punishment*—The maximum punishment for this offence was raised by the Code Amendment of 1909 from seven years to twenty-five.

*Place of offence*—Where the commission of the offence includes the removal of the person kidnapped in a vehicle or in a vessel employed

in inland navigation, the person accused is to be considered as having committed the offence in any magisterial jurisdiction through which the vehicle or vessel passes in the journey. Cr. Code sec. 584 (a).

*Jurisdiction of general sessions*—See sec. 582.

### *Unlawful Carnal Knowledge.*

#### **Rape defined.—Age.**

**298.** Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence.

*Origin*—Sec. 266, Code of 1892.

"*Not his wife*"—The difference of surname appearing from the acknowledgments or testimony of the accused is some evidence that the woman was not his wife. *R. v. Walebek* (1913), 4 W.W.R. 501, 23 W.L.R. 931, 21 Can. Cr. Cas. 130; *R. v. Mullen*, 5 O.W.R. 451; 18 Can. Cr. Cas. 80.

Where the prosecutrix was not expressly asked whether she was the wife of the accused but was sworn as a witness and identified herself under a name different from that upon which the accused was arraigned and had pleaded, and further swore that she did not know the accused by name, this was held sufficient proof that she was not the wife of the accused. *R. v. Mullen* (No. 2) 18 Can. Cr. Cas. 80 (Ont.). It would seem that the difference of name would not alone be a cogent circumstance in the province of Quebec, because of local usages, as regards French-speaking people.

The refusal of the trial Judge to withdraw the case from the jury on the ground that the Crown had failed to prove that the girl was not the wife of the accused, was sustained in a case where there was evidence, if not in the Crown's case, then in that of the defence, on which the jury could find that she was not his wife; *R. v. Faulkner* (1911), 19 Can. Cr. Cas. 47 at 50, 16 B.C.R. 229; see *Rex v. Iman Din* (1910), 18 Can. Cr. Cas. 82, 15 B.C.R. 476.

*Penetration to be proved*—*R. v. Dunning* (1908), 1 Sask. L.R. 391, 14 Can. Cr. Cas. 461. Emission need not be proved. Code sec. 7.

"*Woman*"—When there has been no violence, and the girl is under fourteen and has consented or complied, the offence falls under sec. 301; but when there has been violence, and when the girl has not consented, then, notwithstanding the fact that the girl is under fourteen years of

age, the crime is rape, and falls under this section. *R. v. Riopel* (1898), 2 Can. Cr. Cas. 225, 228, (Que.); *R. v. Batcliffe*, 15 Cox C.C. 127; *R. v. Dicken*, 14 Cox C.C. 8.

The words "man" and "woman" in this section are to be taken in a general or generic sense as indicating all males and females of the human race, and not in a restricted sense as distinguished from boys and girls. *R. v. Riopel* (1898), 2 Can. Cr. Cas. 225 (Que.).

*Proof of complaint by prosecutrix*.—In *R. v. Lillyman*, [1896] 2 Q.B. 167, 65 L.J.M.C. 195, 60 J.P. 536, it was held by the court (Russell, C.J., Pollock, B., Hawkins, Cave and Wills, JJ.), upon a Crown case reserved, that in cases of indecent assault and rape, and similar charges, not only the fact that the prosecutrix made a complaint soon after the occurrence, but the details of the complaint itself, are admissible in evidence, not as proof of the facts complained of but to show that her conduct at the time was consistent with her story in the witness box and as negating consent. Hawkins, J., in delivering the judgment of the court, said: "The general usage has been to limit the evidence of the complaint to proof that the woman made a complaint of something done to her, and that she mentioned in connection with it the name of a particular person. . . . After very careful consideration, we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of a complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. . . . It has been sometimes urged that to admit the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury, they would naturally so treat it. But it never could be legally so left, and we think it is the duty of the judge to *impress upon the jury* that they are not entitled to use the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated. With such a direction, we think the interests of an innocent accused would be better protected than they are under the present usage; for, when the whole statement is laid before the jury, they are less likely to draw wrong inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint against the accused." And see *R. v. Christie*, [1914] A.C. 545.

In *R. v. Rush* (1896), 60 J.P. 777, the prisoner was indicted for carnally knowing a girl under the age of thirteen years. The day after the commission of the alleged offence the girl's mother questioned her, and the girl, in the absence of the prisoner, made a statement in answer. It was proposed to give the particulars of the statement in evidence on behalf of the prosecution on the authority of *R. v. Lillyman*, [1896] 2 Q.B. 167, 60 J.P. 536. Mr. Justice Wright, presiding at the Central Criminal Court, said that the lapse of time between the committing of

the offence and the making of the statement was important in these cases; that, when counsel proposed to open upon and put in evidence such statements, the judge's attention should first be called to the time that had elapsed between the occurrence and the making of the statement, in order that the judge might be enabled to say whether or not the lapse of time would be an objection to the admissibility of the statement. In *Rush's* case the statement had not been made immediately after the alleged offence was committed, and the trial judge therefore refused to allow evidence of the particulars of the statement to be given.

Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence, including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as confirmatory of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge. *R. v. Biendeau* (1900), 3 Can. Cr. Cas. 293 (Que.).

Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the court under the circumstances of the particular case; but if admitted, it is nevertheless the province of the jury to take into consideration the time which intervened, in weighing the probability of its truth. *R. v. Riendeau* (1901), 4 Can. Cr. Cas. 421, 10 Que. K.B. 584; *R. v. Cassidy*, 7 E.L.R. 216 (P.E.I.); *R. v. Spuzzum* (1906), 12 B.C.R. 291; *R. v. Dunning* (1908), 1 Sask. L.R. 391, 14 Can. Cr. Cas. 461; *R. v. Graham* (1899), 3 Can. Cr. Cas. 22, 131 Ont. R. 77; *R. v. Smith* (1905), 9 Can. Cr. Cas. 21 (N.S.); *R. v. Barron* (1905), 9 Can. Cr. Cas. 196 (N.S.); *Hopkinson v. Perdue*, 8 Can. Cr. Cas. 286 (Ont.); *R. v. Osborne*, [1905] 1 K.B. 351; *R. v. Merry* (1900), 19 Cox C.C. 142; *R. v. Ingey* (1900), 64 J.P. 106; *R. v. Bishop*, 11 Can. Cr. Cas. 30.

It is an exception to the ordinary rules of evidence that statements made in the absence of the prisoner should be received in evidence against him, but the principle is applied to the crime of rape as to which the question whether the woman was a consenting party is essential. The judge must have a discretion to say whether the complaint made is one which, having regard to the woman and to the safety of the prisoner, should be admitted in evidence. The length of time which has elapsed before the complaint was made, the omission to complain to the first person met by the woman, and to whom she might easily have complained, and the circumstances of the person who has been outraged, must be considered in deciding whether the complaint should be admitted. *R. v. Macnamara* (1897), 18 Austr. L.T. 263; *R. v. Christie* [1914] A.C. 545. The principle is to get the nearest picture of the mind of the woman to see whether the act of the prisoner was an outrage on her, or whether she was a consenting party. Of course the

longer the time which has elapsed before the complaint, the more probable it is that a woman who had consented should make a false or exaggerated charge against the man. On the other hand it would be wrong to exclude a complaint made at the earliest reasonable opportunity. The judge must consider in each case the class of person the woman is, the opportunities she has had for complaining, and on the whole he must exercise his discretion and decide whether it appears to him that the complaint was made at such a time as to render it probable that the complaint was spontaneous, and honestly represented her attitude to the prisoner, and to exclude the conclusion, which might otherwise be more reasonable, that she was making a charge to shield herself. *R. v. Macnamara*, *supra*.

*The question of consent*—The question whether the act of connection was consummated through fear, or merely through solicitation is a question of fact for the jury. *R. v. Day* (1841), 9 C. & P. 722; *R. v. Jones* (1861), 4 L.T.N.S. 154; *R. v. Cardo* (1889), 17 Ont. R. 11; *R. v. Fick*, 16 U.C.C.P. 379.

Proof on behalf of the defence that the injured party or her parents had instituted civil proceedings to recover damages arising from the commission of the alleged rape is properly excluded upon the criminal trial as irrelevant, unless other facts have been disclosed in evidence which tend to show an intent to thereby wrongfully extort money from the accused. *R. v. Riendeau* (1900), 3 Can. Cr. Cas. 293, 9 (Que.).

On a charge of rape, evidence is admissible on behalf of the defence to contradict a statement of the complainant, made on her cross-examination, denying that, on an occasion when she met the accused subsequent to the alleged rape, she had refused to put an end to the interview, as requested by her mother, and had struck her mother for the latter's interference. Such evidence is relevant to the charge not only as affecting the credibility of the complainant's testimony generally, but as showing conduct inconsistent with resistance to the alleged offence. *R. v. Riendeau* (No. 2), 4 Can. Cr. Cas. 421, 10 Que. K.B. 584.

The prisoner's statement made at a previous trial through his counsel may be given in evidence by the prosecution if it tends to anticipate a possible defence which might be offered by the prisoner. *R. v. Bedere* (1891), 21 O.R. 189. The practice is for the Crown not to object to questions put to the complainant tending to elicit the fact that she had previously had connection with other men; *R. v. Laliberté* (1877), 1 S.C.R. 117; but the witness may object, or the judge may, in his discretion, tell the witness she is not bound to answer the question. *R. v. Laliberté* (1877), 1 S.C.R. 117. If the answer given is a denial she cannot be contradicted by calling other witnesses, as the point is foreign to the issue. *Ibid.*; *R. v. Muma* (1910), 22 O.L.R. 227, 2 O.W.N. 176, 17 Can. Cr. Cas. 285; *R. v. Cockroft* (1870), 11 Cox C.C. 410; *R. v. Holmes*, L.R. 1 C.C.R. 234. But evidence is admissible by the defence

to show the general bad reputation of the complainant for unchastity. *R. v. Bishop*, 11 Can. Cr. Cas. 30.

The complainant may, however, be cross-examined as to alleged prior illicit connection had with her by the accused; *R. v. Riley* (1887), 16 Cox C.C. 191, 18 Q.B.D. 481, 56 L.J.M.C. 52; and so discredit her testimony. If she denies having previously had connection with the prisoner, the latter may give evidence in contradiction. *R. v. Finnessey* (1906), 11 O.L.R. 338, 10 Can. Cr. Cas. 347. The prosecutrix is bound to answer questions put as to her general reputation for chastity, and if she refuses to answer, the fact may be shown. *R. v. Finnessey* (1906), 11 O.L.R. 338, 10 Can. Cr. Cas. 347.

A charge may be laid for having carnal knowledge of a girl of fourteen under Code sec. 301 without involving the question of consent; but unless the girl is a witness in the case there could be no question of consistency and the evidence of her complaint would not be admissible unless her testimony was given. *R. v. McMillan* (1916), 9 W.W.R. 1181.

*Consent of an imbecile*—Even though the woman be an imbecile, she may still be capable of giving her consent. If she consents to the intercourse there is no offence in law, unless the man knows or has good reason to believe that she is an imbecile. (Sec. 219.) Three cases regarded as authorities on this point are *Reg. v. R. Fletcher*, 8 Cox 131; *Reg. v. Chas. Fletcher*, 10 Cox 248, and *Reg. v. Barratt*, 12 Cox 498. The effect of these authorities is that if the evidence establishes that the girl was in such a condition of imbecility that the jury might reasonably find that she was incapable of giving her consent, then there is a case to go to the jury, and a verdict of "guilty" on their part will not be disturbed. *R. v. Walebek* (1913), 21 Can. Cr. Cas. 130, at 133, 23 W.L.R. 931, 4 W.W.R. 501.

In the case of *Reg. v. Connelly*, 26 U.C.Q.B. 317, the jury expressly found that the woman, though insane, was a consenting party; and the Court held that on such a finding a verdict of guilty could not be supported.

*Evidence of child under fourteen*—Code sec. 1003; Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 16.

*Conviction for lesser offence of assault or indecent assault*—The distinction between felony and misdemeanour is abolished, and proceedings in respect of all offences, except so far as they are varied by the Code, shall be conducted in the same manner. Code sec. 14.

Sec. 951 of the Crim. Code provides that "every count shall be deemed divisible; and if the commission of the offence charged as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved."

An assault is included in every case of rape as a necessary ingredient. *R. v. Muma*, 22 O.L.R. 225, 17 Can. Cr. Cas. 285; *R. v. West*, [1898] 1 Q.B. 174; *R. v. Edwards* (1898), 2 Can. Cr. Cas. 96, 29 Ont. R. 451. The usual form of an indictment for rape is that "A. did assault B., a woman who was not his wife, and did then and there have carnal knowledge of her without her consent." See *Regina v. Edwards*, 29 O.R. 451, 2 Can. Cr. Cas. 96, and *Regina v. Guthrie*, L.R. 1 C.C.B. 241; *Wilkinson v. Dutton* (1863), 32 L.J.M.C. 152, and *re Thompson* (1860), 6 H. & N. 193, *R. v. Fick*, 16 U.C.C.P. 379 (Ont.).

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness, for the prosecution.

### Punishment for rape.

**299.** Every one who commits rape is guilty of an indictable offence and liable to suffer death or to imprisonment for life.

*Origin*—Sec. 267, Code of 1892; R.S.C. 1886, ch. 162, sec. 37.

*Verdict for a lesser offence proved, if included in the offence charged*—If the judge allows the indictment to go generally to the jury, it is not competent for him to withdraw from their consideration a verdict for any lesser offence which may be included in the indictment. Code sec. 951; *R. v. Scherf*, 13 B.C.R. 407, 13 Can. Cr. Cas. 382; 8 W.L.R. 219; *R. v. Edwards* (1898), 29 Ont. R. 451, 2 Can. Cr. Cas. 96; *R. v. West*, [1898] 1 Q.B. 174.

A verdict for an attempt may be returned if the evidence establishes an attempt to commit the offence and the jury negatives the complete offence. Sec. 949, and as to attempts generally, see Code sec. 72. An attempt to commit rape is punishable under sec. 300.

A new trial may be ordered on the ground that the charge of the trial judge was calculated to lead the jury to believe that if they failed to find the accused guilty of rape they would fall short of their plain duty. *R. v. Scherf*, 13 Can. Cr. Cas. 382, 13 B.C.R. 407. In that case, Clement, J., said, "I do not think a judge is entitled to press a jury that far. The evidence points strongly to an offence under sec. 211 of the Code [seduction of girl between fourteen and sixteen]. No intimation of this was given the jury and I believe that if they had known that a verdict of not guilty on the charge of rape would not necessarily mean that the accused would go unwhipt of justice, their action on this indictment might have been different."

The verdict may be for the lesser offence of assault with intent to commit rape; *John v. The Queen*, 15 S.C.R. 384; or of indecent assault; *R. v. Graham* (1899), 31 Ont. R. 77, 3 Can. Cr. Cas. 22.



*Jury not to separate on trial of capital charge*—The jury must be kept together on the trial of a charge of rape, as it is a capital offence; Code sec. 945 (4); and if they have been allowed to separate overnight another jury may be empanelled and the trial begun *de novo*. There is no duty cast upon the judge to exclude from the second jury the jurors who were on the first and who had already heard part of the evidence on the abortive trial. *R. v. Luparello* (1915), 8 W.W.R. 89, 25 Man. R. 233, 30 W.L.R. 777. On the calling of the second jury the accused has the unimpaired right of challenge. *R. v. Luparello*, *supra*.

*Excluding public from trial*—Code sec. 645.

*Evidence of child under fourteen*—Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 16. Code sec. 1003 makes somewhat similar provisions for offences under secs. 292, 301 and 302, but probably does not apply to offences under secs. 299 or 300.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness, for the prosecution.

*Evidence of similar acts*—In dealing with the question of the admissibility of evidence of similar acts, a great deal depends upon the nature of the crime alleged. A rule which may be applied to theft (*R. v. Collins*, 9 Cox C.C. 497, 33 L.J.M.C. 177), or arson will not necessarily apply to such a crime as rape. And even with respect to crimes of indecency one rule may very well apply to cases where consent is immaterial, such as *Rex v. Chitson*, [1909] 2 K.B. 945; and another to a case where absence of consent is essential. *R. v. Paul* (1912), 2 W.W.R. 605, 622. In *Rex v. Chitson*, [1909] 2 K.B. 945, it is apparent that the reason for the admission of the prisoner's statement to the complainant that he had done the same to another girl was as stated by Lawrence, J., that "if he has made that statement to the prosecutrix at the time alleged by her, that fact would strongly corroborate her evidence that the prisoner was the person who had had connection with her."

Compare as to evidence of identity, *Thompson v. Director of Public Prosecutions* [1918] A.C. 221, 13 Cr. App. R. 61, 87 L.J.K.B. 478; and see reference to *R. v. Chitson*, in *Brunet v. The King*, (1918), 57 S.C.R. 83, 30 Can. Cr. Cas. 16, at 40, per Anglin, J.

The case of incest which arose in *Rex v. Ball*, [1911] A.C. 47, 80 L.J.K.B. 691, rested upon special circumstances applicable to such a crime. The evidence of previous similar acts there admitted was considered relevant as tending to prove the existence of a guilty passion between the brother and sister, i.e., the existence of a guilty relationship between the two which would tend to prove the commission of the act of incest charged. This furnishes a ground for distinguishing

incest from rape in dealing with the point under consideration. *R. v. Paul* (1912), 2 W.W.R. 623, per Stuart, J.

*Bail*—Rape is a capital offence and the justices on committing for trial for that offence cannot grant bail. Code sec. 699; *re Hopfe's bail* (1913), 4 W.W.R. 1, 22 Can. Cr. Cas. 116, 23 W.L.R. 751, (Alta.). Bail may, however, be granted by a provincial superior court, Code sec. 699; *R. v. Pyburn*, 11 O.W.N. 61.

*Jurisdiction of sessions excluded*—See sec. 583.

*Aiding and abetting a rape*—The aider and abettor is punishable as a principal. Code sec. 69; *R. v. Finnessey*, 11 O.L.R. 338, 10 Can. Cr. Cas. 347; *R. v. Blais*, 11 O.L.R. 345, 10 Can. Cr. Cas. 354. He may be indicted jointly with the principal offender. *R. v. Blais*, *supra*; but may be granted an order for a separate trial. Code sec. 857. If a separate trial is ordered, the one is bound to testify against the other. Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4, and it would not be illegal for the prosecuting counsel or the judge to comment in their addresses to the jury upon the failure of the accused to call as his witness the person jointly charged but ordered to be separately tried. *R. v. Blais*, 11 O.L.R. 345, 10 Can. Cr. Cas. 354.

*Boy under fourteen*—A boy under fourteen years of age cannot be convicted of rape. Code sec. 298 (2). He is presumed by law to be unable to commit the offence and it would seem that he would not be liable to be convicted of carnally knowing a girl under fourteen in contravention of Code sec. 301. See Code 16 preserving excuses and defences under the common law where not inconsistent with the Code, and see *R. v. Waite* [1892] 2 Q.B. 600, 61 L.J.M.C. 187. But he may be found guilty of an indecent assault; *R. v. Williams* [1893] 1 Q.B. 320; or of a common assault. *R. v. Waite*, *supra*.

#### **Punishment for attempt to commit rape.**

**300.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape.

*Origin*—Sec. 268, Code of 1892.

*Attempts generally*—Code sec. 72.

*Question of consent*—See sec. 298 and note to same.

*Complaint by prosecutrix*—See note to sec. 298.

*Excluding public from trial*—Code sec. 645.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Verdict for lesser offence*—Code sec. 951; *R. v. Clarke*, 38 N.B.R. 11, 12 Can. Cr. Cas. 300.

*Verdict for attempt charged where full offence proved*—Code sec. 950.

*Jurisdiction of sessions excluded*—See sec. 583; *R. v. Wright*, 2 Can. Cr. Cas. 83 (N.B.); *R. v. Preston* (1905) 11 B.C.R. 159, 1 W.L.R. 17, 9 Can. Cr. Cas. 201.

*Assault with intent to commit indictable offence*—Code sec. 296, subsec. (a); *R. v. Preston* (1905) 11 B.C.R. 159, 1 W.L.R. 17, 9 Can. Cr. Cas. 201.

### **Carnally knowing girl under fourteen years.**

**301.** Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, whether he believes her to be of or above that age or not.

*Origin*—Sec. 269, Code of 1892; 53 Vict., Can., ch. 37, sec. 12.

*Carnal knowledge*—Code sec. 7 dispenses with proof of emission.

An indictment for rape under secs. 298 and 299 lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding this section. *R. v. Riopel* (1898), 2 Can. Cr. Cas. 225; *R. v. Batcliffe* (1882), 15 Cox C.C. 127; *R. v. Dicken* (1877), 14 Cox C.C. 8.

Carnal knowledge alone constitutes an offence under this section when the girl is under the age of fourteen and her consent to the act is not a defence. *R. v. Brice*, 7 Man. R. 627; *R. v. Chisholm*, 7 Man. R. 613; *R. v. Cameron* (1901), 4 Can. Cr. Cas. 385 (Ont.).

*Proof or inference of age*—Code sec. 984.

*Evidence of paternity by showing child's similarity to the accused*—A child, sworn to have been born of the criminal intercourse, may be exhibited to the jury, and its likeness to the accused pointed out in proof of the charge, but it is preferable that witnesses should be called to testify to the points of likeness relied upon. *R. v. Hughes*, 22 O.L.R. 344, 17 Can. Cr. Cas. 450; *Udy v. Stewart*, 10 Ont. R. 590.

*Cross-examination going to credit*—In *R. v. Cargill* [1913] 2 K.B. 271, 82 L.J.K.B. 655, 8 Cr. App. R. 224, defendant's counsel cross-examined the girl as to alleged previous acts of connection with other men which she denied. Evidence tendered to prove such previous acts was rejected, the question of seduction not being relevant to the issue although the girl had given evidence that defendant had seduced her, which evidence had not been objected to; neither could the rejected evidence be received to show that the girl was unworthy of belief as the rule is that her answers to questions in cross-examination going merely to credit cannot be contradicted.

Matters which go to credit only and are relevant only as going to credit cannot be contradicted by further evidence; so the evidence of the girl as to her chastity admitted, though irrelevant, on a charge of carnal knowledge of a girl under the statutory age, cannot be rebutted

by positive testimony where she has maintained her statement when cross-examined to credit. *R. v. Cargill*, supra, commenting on *Attorney-General v. Hitchcock* (1847) 1 Exch. R. 99, 16 L.J. Ex. 259, and *Thomas v. David*, 7 C. & P. 350.

*Verdict for a lesser offence proved*—Sec. 951 authorizes a verdict of indecent assault (sec. 292), the consent of a girl under fourteen not being material to that offence; sec. 294; *R. v. Cameron* (1901), 4 Can. Cr. Cas. 385 (Ont.); or if the complete commission of the offence under sec. 301 is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt (sec. 949) and punished accordingly. Sec. 302.

*Excluding public from trial*—Code sec. 645.

*Joinder of counts*—A charge of carnal knowledge of a girl under fourteen may be joined with a charge of criminal seduction of the same girl when between fourteen and sixteen. Code sec. 856; *R. v. Hughes*, 22 O.L.R. 344, 17 Can. Cr. Cas. 450. The court may order a separate trial of each count. Code sec. 857; *R. v. Hughes*, supra.

*Evidence of child of tender years taken without oath*—Code sec. 1003; Canada Evidence Act, R.S.C. 1906, ch. 146, sec. 16.

*Insufficiency of alleged admission or confession*—See *R. v. Blyth* (1917), 11 O.W.N. 406.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Punishment of whipping*—See secs. 80, 204, 276, 292, 293, 301, 302, 446, 457, 1060.

#### Attempt of that offence.

**302.** Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped.

*Origin*—Sec. 270, Code of 1892; 53 Vict., ch. 37, sec. 12.

*Child's evidence not under oath*—In a case where the trial judge received the child's statement, without oath, under sec. 1003 of the Code, and upon that and other evidence convicted the prisoner of the offence charged, he reserved for the opinion of the Court of Appeal the questions whether the child's statement was sufficiently corroborated to comply with the requirements of sub-sec. 2 of sec. 1003, and whether he was right in holding that there was sufficient evidence to justify his finding the prisoner guilty. It was held that the evidence of the child was sufficiently corroborated by: (a) evidence of the statement

made to her mother within an hour or two after the occurrence—a statement volunteered by her, and not extracted by interrogation or suggestion; (b) evidence of the condition of the child's clothing, as testified to by her mother and two other persons; (c) evidence of the fact of the child having been with the prisoner during the time testified to as that during which his improper conduct took place. *Rex v. Bowes*, 20 O.L.R. 111, 15 Can. Cr. Cas. 326.

Upon the trial of a charge of attempted carnal knowledge of a girl under fourteen who is too young to understand the nature of an oath, a conviction for that offence is not warranted unless her evidence not under oath is corroborated by some other material evidence implicating the accused (Code sec. 1003), but the accused may be convicted of common assault upon the charge so laid if there be corroboration merely by some other material evidence. *R. v. De Wolfe* (1904), 9 Can. Cr. Cas. 38; Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 16.

*Proof or inference of age*—Code sec. 984.

*Identity of accused*—On a question of identity it is misdirection to charge the jury that the accused must prove his defence of an alibi by a preponderance of testimony. *R. v. Myshrall*, 35 N.B.R. 507, 8 Can. Cr. Cas. 474;

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Excluding public from trial*—Code sec. 645.

*Punishment of whipping*—See secs. 80, 204, 216, 276, 292, 293, 301, 302, 446, 457, 1060.

### *Abortion.*

#### **Attempt to procure abortion.**

**303.** Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses on her any instrument or other means whatsoever with the like intent.

*Origin*—Sec. 272, Code of 1892; R.S.C. 1886, ch. 162, sec. 47; 32-33 Vict., Can., ch. 20, sec. 59.

*With intent*—Supplying a noxious thing with intent to procure abortion is an offence by the terms of this section, although it subsequently appears that the woman was not pregnant. See *R. v. Titley* (1880), 14 Cox C.C. 502; *R. v. Goodhall* (1846), 1 Den. 187.

Where the instrument alleged to have been used was a quill, which might possibly have been used for an innocent purpose, evidence was allowed to be given, in order to prove the intent, that the prisoner had at other times caused miscarriages by similar means. *R. v. Dale* (1889), 16 Cox C.C. 703, per Charles, J.

And see *Brunet v. The King* (1918), 30 Can. Cr. Cas. 16, 57 S.C.R. 83, and note *infra*, on Evidence of previous criminal acts.

*Causes to be taken*].—Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, it was held that he had "caused it to be taken" within the meaning of a similar English statute. *R. v. Wilson* (1856), Dears. & B. 127; *R. v. Farrow* (1857), Dears. & B. 164.

*Drug or other noxious thing*].—The statute 32-33 Vict., c. 20, s. 59 as well as the later Act, R.S.C. 1886, c. 162, s. 47, used the phrase, any poison or any other noxious thing. It was laid down under that statute that while poisons are not noxious things when taken as medicine in ordinary treatment, that if taken or administered in undue and immoderate quantities the excess of the article becomes noxious, and it was not essential to support a conviction that the article should be noxious in itself if it was a "poison." *R. v. Stitt* (1879), 30 U.C.C.P. 30, 33.

The thing administered must be either a "drug" or a "noxious thing," and it is not sufficient that the accused supposed it would have the desired effect. *R. v. Hollis* (1873), 12 Cox C.C. 463; *R. v. Isaacs* (1862), 9 Cox C.C. 228, 32 L.J.M.C. 52.

To the same effect is the decision in *R. v. Pettibone* [1918] 2 W.W.R. 806 (Alta.).

If the article administered is not a "drug" and the quantity administered is innoxious but would be noxious had it been taken in large quantities, there is no administration of a noxious thing within the section. *R. v. Hennah* (1877), 13 Cox C.C. 547.

If the drug administered produces miscarriage it is sufficient evidence that it is noxious although there is no other evidence of its nature. *R. v. Hollis* (1873), 12 Cox C.C. 463.

Evidence that quantities of oil of juniper considerably less than half an ounce are commonly taken medicinally without any bad results, but that half an ounce produces ill effects and is to a pregnant woman dangerous, was held sufficient from which a jury might infer that the latter quantity was a noxious thing. *R. v. Cramp* (1880), 5 Q.B.D. 307.

*Excluding public from trial*].—Code sec. 645.

*Aiding and abetting in the offence*].—See Code secs. 69, 305.

On a charge of abortion alleged to have been committed by a physician at the instigation of the accused, it is necessary to prove both that the physician's operation was unnecessary and unlawful, and that the accused procured or abetted such unlawful operation. *Re McCready* (1909), 2 Sask. L.R. 46, 14 Can. Cr. Cas. 481.

And see *Brunet v. The King*, 57 S.C.R. 83, *supra*.

There is no statutory requirement of corroboration in respect of an offence under sec. 303, and a conviction may be founded on the evidence of the woman on whom the operation was performed. *R. v. Sadick Bey* (1914), 25 Can. Cr. Cas. 259, 20 Rev. Leg. N.S. 140 (Que.).

Where the accused was tried on a charge of procuring abortion and the only evidence was that of the woman who swore that she went to the accused and asked him to perform the operation, she herself being a consenting party thereto, the trial judge directed the jury that they should not convict upon the uncorroborated evidence of the woman who was *particeps criminis*. The jury, notwithstanding, brought in a verdict of guilty, and it was held that the evidence of an accomplice, even though uncorroborated, is legal evidence and sufficient to support a conviction, but the trial judge should advise the jury not to convict upon such evidence. *R. v. Reynolds* (1908), 1 Sask. L.B. 480.

And see *R. v. Betchel*, (1912), 2 W.W.R. 624, 4 Alta. L.R. 402.

*Charging same offence in different manner*—In an indictment laid under sec. 303 of the Code, the first count charged that the accused, with the intent to procure a miscarriage, etc., did unlawfully use upon the person of the woman an instrument, etc.; the second count charged that with like intent the accused did unlawfully "operate" on the said woman. The evidence submitted by the Crown was directed solely to proof of the fact of the performance of an operation by the use of an instrument, substantially negating the use of the hand or finger alone for the alleged purpose. The jury, however, were charged—after they had intimated that they were not satisfied that the evidence established the use of an instrument—that the use of the hand or finger might be considered in dealing with the second count. The jury found the accused not guilty on the first count, but guilty on the second count. It was held that the second count might not unnaturally be regarded as a mere repetition in another form of the gravamen of the first count, and that by the finding of not guilty on that count the whole case against the accused failed, and the finding on the second count, therefore, could not be supported. *R. v. Cook* (1909), 19 O.L.R. 174, 15 Can. Cr. Cas. 40. And see Code sec. 892 (application to divide counts), and sec. 909 (plea of *autrefois*).

*Conspiracy to procure abortion*—In *R. v. Bachrack*, 21 Can. Cr. Cas. 257, 28 O.L.R. 32, the Ontario Court of Appeal held that acts and declarations of those charged with conspiracy to procure abortion, occurring immediately after the commission of the operation, and made while procuring care for the person upon whom the abortion was performed, were admissible in evidence. As to conspiracies generally, see Code sec. 573.

The form of the indictment in *R. v. Bachrack*, *supra*, was for that the accused did, at a named place and in a given month, conspire,

combine, confederate, and agree together to commit a certain indictable offence, to wit, the crime of abortion, by then and there conspiring, combining, confederating, and agreeing together to procure the miscarriage of a certain woman (naming her), thereby committing an indictable offence, contrary to the Criminal Code. It was held that the form of the indictment was sufficient. Code secs. 303, 852; *Regina v. Rowlands* (1851), 17 Q.B. 671. The finding of the jury that the prisoners conspired to procure the abortion in the Province of Ontario was warranted by the evidence, but, finding it difficult to do so there, they went to a foreign country. Evidence of what took place in the foreign country in furtherance of the conspiracy was properly admitted. *R. v. Bachrack*, *supra*.

*Particulars of conspiracy to procure abortion*—Particulars may be ordered whereby the prosecution is further to describe the means by which any offence was committed, etc.; Code sec. 859, sub-sec. (f); *R. v. Bachrack* (1913), 28 O.L.R. 32, and see form of demand for particulars and of particulars served in answer in the last-mentioned case (28 O.L.R. at 32), also form of demurrer (28 O.L.R. at 34).

*Evidence of accomplice*—A conviction will stand although the only incriminating evidence was that of the woman on whom the abortion was practised with her own consent, but the trial judge may properly instruct the jury in such a case that they ought not to convict on the evidence of the woman alone when she was an accomplice. *R. v. Reynolds*, 9 W.L.R. 299, 1 Sask. L.R. 80, 15 Can. Cr. Cas. 209. *R. v. Betchel*, 2 W.W.R. 624, 4 Alta. L.R. 402, 10 Can. Cr. Cas. 423, 21 W.L.R. 665.

*Attempt to have woman take noxious drug to procure abortion*—Attempts are punishable under sec. 570. As to what constitutes an attempt of an indictable offence generally, see Code sec. 72. An attempt may be complete whether under the circumstances it was possible to commit the attempted offence or not, and so a conviction may be made for an attempt where made with drugs believed by the accused to be of a kind suitable for the illegal purpose, although they were in fact not of that kind. *R. v. Pettibone* [1918] 2 W.W.R. 806. So also it is sufficient that he tried to cause the woman to take the drugs and believed she had done so, although she did not take any of them, but deceived him into thinking she had done so. *R. v. Pettibone*, *supra*. Where none of the drugs were actually taken or where no instrument is used, as the case may be, the charge should be for an attempt only. *R. v. Pettibone*, *supra*. If, on the other hand, the charge had been for the actual offence under sec. 303, it would have been necessary to prove that the substances referred to were in truth noxious drugs or other noxious things within the meaning of sec. 303. *R. v. Pettibone* [1918] 2 W.W.R. 806 (Alta.); *R. v. Isaacs*, L. & C. 220, 32 L.J.M.C. 52; *R. v. Hollis*, 12 Cox C.C. 463.



*Where death results*—Where the illegal operation by which an abortion is procured causes the woman's death and a charge of murder is laid, there is no rule that the cause of death must be proved by the post-mortem examination; the case may go to the jury notwithstanding the absence of a complete post-mortem. *R. v. Garrow*, 5 B.C.R. 61, 1 Can. Cr. Cas. 246. As to culpable homicide, see sec. 252; murder, secs. 259, 260; manslaughter, sec. 262. Where the woman's death results and charges are laid in one indictment both for the unlawful administering of drugs with intent and for manslaughter, the former charge must be withdrawn if the prosecution uses the woman's dying declaration which would be admissible only upon a homicide charge. *R. v. Inkster* (1915), 8 W.W.B. 1098, 8 Sask. L.R. 233, 24 Can. Cr. Cas. 294, 31 W.L.B. 782.

As to constructive murder from abortion practices, see *R. v. Whitmarsh* (1898), 62 J.P. 680, 711, 42 Sol. J. 847; Code sec. 259; and as to manslaughter, Code secs. 252, 262.

Where the woman had died from other causes, evidence of what she had said to a witness and not in the presence of the accused, as to her bodily condition, must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them or how they were caused. *R. v. Thomson* (1912), 7 Cr. App. R. 276, applying *R. v. Gloster* (1888), 16 Cox C.C. 471.

An acquittal on a homicide charge will not bar a prosecution for procuring the abortion. *R. v. Topham*, 28 L.J. (Eng.), 186; compare *R. v. Serné*, 16 Cox C.C. 311, 107 Cent. Cr. Court Sess. papers 418.

*Evidence of previous criminal acts*—In *Rex v. Pollard*, 19 O.L.R. 96, 15 Can. Cr. Cas. 74, there was an indictment of the defendants (P., a physician and surgeon, and T., a boarding-house keeper), for procuring an abortion. The case for the Crown was that the defendants had performed an unlawful operation upon a certain woman, for the purpose of procuring a miscarriage. Of this there was evidence to go to the jury. The defence was then entered upon, and the defendant, P., swore that the operation was performed for a lawful purpose, and without any criminal intent. He was cross-examined as to whether he had not, some few weeks previously, performed an operation upon a person then in court. He denied having done so, and all knowledge of having treated her at all. This person and the man whom she had subsequently married were, against objection, called in reply, and gave evidence that P. had been employed to operate, and had operated, upon her so as to procure a miscarriage. It was contended that this evidence was admissible, as tending to rebut the evidence of P., or, in other words, to prove the unlawful intent. It was held that the testimony of these witnesses was improperly admitted, there being no evidence of a system which would let in proof of a single prior criminal act as part of it. *R. v. Pollard* (1909), 19 O.L.R. 96.

But where the defence raised was that the instruments had been used for a lawful purpose and with no criminal intent, the prosecution was allowed to prove by another female witness that he had performed a like operation upon her to procure miscarriage, and had told her at the time that he had "put dozens of girls right." *R. v. Bond* [1906] 2 K.B. 389, 75 L.J.K.B. 693. That statement of the accused in *Bond's* case was evidence of system although in respect of a single prior act of nearly a year before. *R. v. Pollard*, 19 O.L.R. 96, 99; *Brunet v. The King* (1918), 30 Can. Cr. Cas. 16 (Can.).

That the means used was not for an innocent purpose may be shown by the use of the same means at other times, not too remote, for an illegal purpose, at least where it is not the customary means for effecting the innocent purpose. See *R. v. Dale*, (1889), 16 Cox C.C. 703.

Evidence will not be inadmissible on the ground only that it goes to prove only one other criminal act and not one of a number. There may be other circumstances showing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part. *R. v. Bond* [1906] 2 K.B. 389, 75 L.J.K.B. 693. A *nexus* must be shown between the act charged and the other acts given in evidence, and this must be such that the criminal intent appearing from such other acts is inferentially the same in the act charged. *R. v. Ollis* [1900] 2 K.B. 758, 69 L.J.Q.B. 918, 19 Cox C.C. 554; *R. v. Fisher* [1910] 1 K.B. 149, 79 L.J.K.B. 187, 22 Cox C.C. 270 (false pretences); *R. v. Rhodes* [1899] 1 Q.B. 77; *Makin v. Attorney-General of N.S.W.* [1894] A.C. 57, 63 L.J.P.C. 41, 17 Cox C.C. 704; *Perkins v. Jeffrey* [1915] 2 K.B. 702, 84 L.J.K.B. 1554, 25 Cox C.C. 59; *R. v. Boyle and Merchant* [1914] 3 K.B. 339; *R. v. Geering*, 18 L.J.M.C. 215; *R. v. Roden* 12 Cox C.C. 630; *R. v. Cotton* 12 Cox C.C. 400; *R. v. Welford* (1918) 41 O.L.R. 359 (under a liquor law).

Compare *R. v. Rose* [1918] 3 W.W.R. 950 (Alta.), in which evidence of numerous other liquor prescriptions were admitted on a charge against a physician for illegal prescription of liquor where not medicinally required.

The evidence may be given in various classes of cases in proof of guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear; *Thompson v. Director of Public Prosecutions*, [1918] A.C. 221, 87 L.J.K.B. 478, 484; and notwithstanding that the general character of such evidence is to show that "the accused had in him the makings of a criminal." *Thompson's case*, *supra*, 87 L.J.K.B. 478, 484, per Lord Sumner. In cases of procuring abortion such evidence is constantly and properly admitted. But, before an issue can be said to be raised which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been "raised in substance, if not in so many

words, and the issue so raised must be one to which the prejudicial evidence is relevant." *Thompson v. Director of Public Prosecutions* [1918] A.C. 221, 87 L.J.K.B. 478, 484 (H.L.); *Brunet v. The King* (1918), 30 Can. Cr. Cas. 16 (Can.). It has been said by high authority that such evidence may be relevant if it "tends to make more probable the criminal intent regarding which, in view of the defence set up, it was essential that the Crown should not leave room for reasonable doubt." *R. v. Ollis* [1900] 2 K.B. 758, per Lord Russell, C.J.; *Brunet v. The King* (1918), 30 Can. Cr. Cas. 16 at 39, per Anglin, J.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

*Counselling the offence*—If the woman were with child the administration of a poison or other noxious thing with the unlawful intent would be a felony. Stephen, *Crim. Law*, art. 236. And to incite a felony, when no felony was committed, was generally a common law misdemeanour. *Brousseau v. The King* (1917), 56 S.C.R. 22, 29 Can. Cr. Cas. 207, per Fitzpatrick, C.J.; *R. v. Gregory*, L.R. 1 C.C.R. 77; see also *R. v. Ransford*, 13 Cox C.C. 9. As regards the common law offence of counselling a felony, it may not be material where the place was at which the felony itself was committed or attempted, as the offence of counselling the other within the jurisdiction to commit the crime would be complete although the crime was not attempted. In this view it would seem that *R. v. Walkem* (1908), 14 B.C.R. 1, 14 Can. Cr. Cas. 122, may have to be reconsidered. In that case there was evidence that accused counselled the woman to submit to an operation within the jurisdiction, but she had in fact gone to the United States and submitted to an operation there in consequence of the counselling. The question reserved for the decision of the Supreme Court of British Columbia appears to have ignored the circumstance that the woman was counselled within the jurisdiction to submit to an illegal operation to be performed within the jurisdiction, and raised only the point whether counselling in Canada to submit to an abortion in the United States was an offence. That court held that it was not an offence against the criminal law of Canada. *R. v. Walkem*, *supra*. The criminal common law of England is still in force in Canada, except in so far as repealed either expressly or by implication. *Union Colliery Co. v. The Queen* 31 S.C.R. 81, 87; *Brousseau v. The King* (1917), 56 S.C.R. 22, in which the effect of sec. 69 (d) of the Code is discussed. That sub-section enacts that every one is a party to and guilty of an offence who counsels or procures any person to commit the offence. And it was pointed out in the *Brousseau* case that to incite the commission of a felony, although the felony was not committed, was generally a misdemeanour at common law, even if sec. 69 (d) does not apply to an incited offence not completed, many of the judges favouring the view that it does so apply.

**Woman attempting to procure her own miscarriage.**

**304.** Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, whether with child or not, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage.

*Origin*—Sec. 273, Code of 1892; R.S.C. 1886, ch. 162, sec. 47.

*"Drug or other noxious thing"*—Code secs. 303, 304, 305.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

*Excluding public from trial*—Code sec. 645.

**Supplying drug to procure miscarriage.**

**305.** Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child.

*Origin*—Sec. 274, Code of 1892; R.S.C. 1886, ch. 162, sec. 48.

*"Drug or other noxious thing"*—Code secs. 303, 304, 305

*Attempt to administer, etc.*—An attempt of the offence to which sec. 303 is directed is not identical with the offence declared by sec. 305, but analogous to it. There may be an offence under sec. 305, which would not be an attempt of the offence covered by sec. 303. As to the latter, see note to sec. 303.

*"Knowing that the same is intended," etc.*—The intention here referred to is not necessarily that of the woman whose miscarriage is sought to be procured. *R. v. Hillman* (1863), L. & C. 258, 33 L.J.M.C. 60, 9 Cox C.C. 386. It is enough that the person charged who supplied or procured the drug, as the case may be, should intend it to be used for the purpose of procuring the miscarriage. *R. v. Hillman*, supra.

*Excluding public from trial*—Code sec. 645.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

**Killing unborn child.—Saving mother's life.**

**306.** Every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born.

2. No one is guilty of any offence who, by means which he in good faith considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during its birth.

*Origin*—Code of 1892, sec. 271.

*When child becomes a "human being"*—Code sec. 251.

*Exclusion of public from trial*—Code sec. 645.

*Drugging with intent*—See secs. 216, 264, 276, 277, 278, 303-306.

*Concealment of birth*—See sec. 272.

### *Offences against Conjugal Rights.*

**Bigamy defined.—Incompetency no defence.—Excuses.—Bigamous marriages outside of Canada.—Form of marriage.**

**307.** Bigamy is,—

- (a) the act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or,
- (b) the act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or,
- (c) the act of a person who goes through a form of marriage with more than one person simultaneously, or on the same day.

2. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage,—

- (a) if he or she in good faith and on reasonable grounds believes his wife or her husband to be dead; or,
- (b) if his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or,
- (c) if he or she has been divorced from the bond of the first marriage; or,
- (d) if the former marriage has been declared void by a court of competent jurisdiction.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

5. Every form of marriage shall for the purpose of this section be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form.

*Origin*—Sec. 275, Code of 1892; R.S.C. 1886, ch. 37, sec. 10.

*Wife or husband of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife or husband of the accused is both a competent and compellable witness for the prosecution.

*No presumption of validity of marriage against person charged with bigamy*—Cases of bigamy and actions of crim. con. are exceptions to the rule applicable as to property interests by which there is a strong presumption in favour of the validity of a marriage proved to have been celebrated *de facto*. *Hedge v. Morrow*, 32 O.L.R. 218, 7 O.W.N. 279; *re Sheran*, 4 Terr. L.R. 83.

But where as in Nova Scotia the requirement of the provincial marriage law, R.S.N.S., ch. 3, sec. 3, was that, with certain exceptions, every marriage shall be solemnized by a minister or clergyman of a church or religious denomination, being a man and resident in Canada, "recognized as duly ordained according to the rites and ceremonies of the Church or denomination to which he belongs," it was held on a bigamy charge that it was enough to prove that the *de facto* officiating clergyman was recognized as duly ordained according to the rites and ceremonies of the denomination to which he belonged. *R. v. Cameron* (1917), 29 Can. Cr. Cas. 113 (N.S.).

And in *R. v. Debard*, (1918), 15 O.W.N. 250, the first wife's evidence was admitted to prove not only the form of marriage, but that the person officiating was a justice of the peace in the foreign state.

The fact that the provincial marriage law imposes penalties upon persons solemnizing marriages without certain formalities being complied with, where its provisions do not declare that a marriage performed without compliance with these requirements is null and void, will not necessarily imply nullity. *Beamish v. Beamish*, 9 H.L.C., at p. 331; *Harris v. Meyer*, 50 N.S.R. 117, 30 D.L.R. 26; *R. v. Cameron* (1917), 29 Can. Cr. Cas. 113, 115 (N.S.); *Londonderry v. Chester*, 9 Am. Dec. 61.

*Sub-sec. 1 (a)*—"Goes through a form of marriage"—The form of marriage illegally gone through by a person already married may be a form of marriage which would have been valid but for the prior

marriage or but for some act or default of the person charged; secs. 240 (a), 307, sub-sec. 5; or it may be a form of marriage which, although not recognized by the law of the place where it was gone through, was such that a marriage celebrated there in that form is recognized as binding by the law of the province or territory where the offender is tried. Code sec. 240 (a); *R. v. Hutchins*, 4 W.W.R. 1240, 25 W.L.R. 1, 22 Can. Cr. Cas. 27 (Sask.); *R. v. Allen*, 41 L.J.M.C. 97.

*British subject leaving Canada with intent*—The legislation in this regard has been held to be within the legislative power of the Canadian Parliament when the extra-territorial act contemplated by the first subsection as taking place “in any part of the world” follows upon the leaving with intent (sub-sec. 4) which is the gist of the offence although expressed in a limitative clause; *Re Bigamy sections* (1897), 27 S.C.R. 461, 1 Can. Cr. Cas. 172; *R. v. Brinkley* (1907), 14 O.L.B. 434, 12 Can. Cr. Cas. 454; and subject to the qualification expressed in sub-sec. (4) that only a British subject so leaving with intent shall be liable to prosecution. See also the Imperial statute 24-25 Vict., ch. 100, sec. 57; *R. v. Earl Russell* [1901] A.C. 446, 70 L.J.K.B. 998. The decision in *R. v. Plowman* (1894), 25 Ont. R. 656, was overruled by the decision in “*re Bigamy sections*,” *supra*, which distinguished the leading case of *Macleod v. New South Wales* [1891] A.C. 455, 60 L.J.P.C. 55.

The onus of proof of the unlawful intent in leaving Canada is upon the prosecution. *R. v. Pierce* (1887), 13 Ont. R. 226.

An absence of *mens rea* is not to be inferred where the man leaving Canada to re-marry relied on a foreign divorce which his first wife had obtained from a foreign court, although he had obtained legal advice that the divorce enabled him to re-marry, if, in fact, the foreign divorce was made by a court without jurisdiction over him and the decree was therefore not valid in Canada. *R. v. Brinkley* (1907), 14 O.L.B. 434, 12 Can. Cr. Cas. 454.

For an example of a colonial enactment making an offence of prohibited extra-territorial acts and the return into the jurisdiction within a limited period thereafter, see New Zealand Customs Act, 1913, sec. 206; *Peninsular and Oriental S.N. Co. v. Kingston* [1903] A.C. 471, 476.

*Proving the first marriage when celebrated within the jurisdiction*—The validity of a marriage is determined by the law of the domicile at the time of the marriage. *Gray v. National Trust Co.* (1915), 8 W.W.R. 1061, 31 W.L.R. 684.

Proof of the first marriage when celebrated within the jurisdiction may be made by calling, where possible, the officiating minister or other functionary authorized to perform marriage ceremonies by the law of the province where it was performed, and calling witnesses as to identity of the parties, as well as putting in any official record, or extract from the record, in which the marriage is entered in conformity with the

provincial law. See *R. v. Birtles*, 27 Times L.R. 402. If the prosecution is in a different province than that in which the first marriage was celebrated, the official record may be less effective as proof than it would have been in the province in which it was issued. *R. v. Lafrenière*, 12 Que. P.R. 83. The provincial laws of evidence are to govern, subject to the provisions of any federal law. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 35. As to giving notice to produce official certificates or extracts as evidence, see Can. Evidence Act, R.S.C. 1906, ch. 145, secs. 25 and 28.

*Professional or expert evidence of foreign marriage laws on proving a first marriage out of Canada*—The leading authority on the subject of proof of foreign marriage law is *The Sussex Peerage Case* (1844), 11 Cl. & F. 35, 134. It was there laid down that, although it was not necessary that one should be a professional lawyer to prove the foreign law, it must be one who was *peritus virtute officii*. A bishop who had held a quasi-judicial position at Rome, was held qualified to prove the canon law as to marriage which was in force in that city. In this case the House of Lords overruled the decision of Wightman, J., in *Regina v. Dent* (1843), 1 C. & K. 97, who accepted, in the case of a Scotch marriage, the testimony of a non-professional witness who had no special knowledge as to the law of Scotland.

The best evidence on such a point is that of a foreign judge, or of a barrister or solicitor practising in the Courts of his own country. *R. v. Naoum*, 19 Can. Cr. Cas. 102, at 108; 24 O.L.R. 306; *R. v. Naguis* [1916] W.N. 427; *R. v. Savage*, 13 Cox C.C. 178; *R. v. Lindsay* (1902), 66 J.P. 505. In addition, the following have been held to be competent: a colonial Attorney-General, who was not a lawyer, as to the law of the colony (*The Sussex Peerage Case*, supra, at p. 124); a Governor-General of Hong Kong, as to the marriage law there (*Cooper-King v. Cooper-King*, [1900] P. 65); an English barrister, who had been employed by the Colonial Office as to marriage questions in Malta, although he had never practised there, as to Maltese law (*Wilson v. Wilson*, [1903] P. 157); a Persian ambassador, as to the law of his country, which he is required officially to know (In the Goods of Dost Aly Khan (1880), 6 P.D. 6); a Chilean notary, as to the testamentary law of Chili (In the Goods of Whitelegg, [1899] P. 267); as to the marriage law of Michigan, a minister of 25 years' standing in that State, who had studied these laws and had communications with the Secretary of State regarding them, and had celebrated many marriages (*R. v. Brierly*, 14 O.E. 525), the officiating minister who performed the ceremony in the foreign jurisdiction under authority of the foreign law. *R. v. Bleiler* (1912), 2 W.W.R. 5, 21 W.L.R. 18, 4 Alta. L.R. 320, 19 Can. Cr. Cas. 249. The following have been held not to be competent: a juriseonsult, who studied the foreign law at a university in another country, and who had not practical knowledge of it (*Bristow v. Sequeville*



(1850), 5 Ex. 275; In *re* Turner, [1906] W.N. 27; In the Goods of Bonelli (1875), L.R. 1 P.D. 69; as to Canadian marriage law, an English barrister who frequently argued Canadian appeals in the Privy Council (*Cartwright v. Cartwright* (1878), 26 W.R. 684); as to Scotch marriage law, a priest of that country who had celebrated many marriages there. (*R. v. Savage*, 13 Cox C.C. 178).

There must be proof of a marriage in fact as distinguished from a mere acknowledgment by the accused of the so-called first wife as his wife or cohabitation and reputation as such. *Zdrahal v. Shatney* (1912), 3 W.W.R. 239, 22 W.L.R. 336, 20 Can. Cr. Cas. 206; *re* Sheran, 4 Terr. L.R. 83; *Marks v. Marks*, 40 S.C.R. 210, affirming 13 B.C.R. 161.

This may appear from the first wife's testimony apart from the marriage certificate and her correspondence with her husband. *R. v. Debard*, (1918), 15 O.W.N. 250. And she may prove the ceremony before a *de facto* justice, when this evidence is supplemented by competent testimony that a justice was authorized by state law to solemnize marriages. *R. v. Debard*, *supra*.

An admission of the first marriage, voluntarily made by the accused on his being charged with bigamy and being duly warned, confirmed by the testimony of other witnesses of such marriage ceremony having been celebrated in ecclesiastical form, and followed by cohabitation, may be accepted in lieu of professional evidence. *R. v. Naoum*, 24 O.L.R. 306; *Zdrahal v. Shatney* (1912), 3 W.W.R. 239, 22 W.L.R. 336, 20 Can. Cr. Cas. 206 (Man.); *R. v. Creamer* (1860), 10 L.C.R. 404 (Que.); *R. v. Newton*, 2 Moody & R. 503; *R. v. Simmonsto* 1 C. & K. 164, 1 Cox C.C. 30; *R. v. McQuiggan*, 2 L.C.R. 340 (Que.); but see *R. v. Ray*, 20 Ont. R. 212; *R. v. Lindsay* (1902), 18 Times L.R. 761; *R. v. Griffin*, 14 Cox C.C. 308.

But admission of the first marriage is to be received with caution on a prosecution for bigamy, because of the motives which might induce such a representation to be made whether true or not, and because it is an admission of a mixed question of law and fact. *R. v. Naoum* (1911), 19 Can. Cr. Cas. 102, 24 O.L.R. 306; *R. v. Duff*, 29 U.C.C.P. 255 (Ont.).

See Taylor on Evidence, 10th ed., sec. 865; 1 Wharton's Crim. Evid., 10th ed., secs. 171, 172.

In *R. v. Hutchins* (1913), 4 W.W.R. 1240, 22 Can. Cr. Cas. 27, the only evidence of the second ceremony was the statement of the accused that he "went through a form of marriage with Anna L. Seyfert." The first marriage to Irene Hutchins having been proved, it was further necessary to support the conviction, to prove that the accused afterwards went through a *valid* form of marriage with Anna L. Seyfert. A valid form of marriage for this purpose is a form of marriage known to, and recognized by the law as capable of producing a valid marriage

independently of the bigamous character of the marriage: *R. v. Allen*, 41 L.J.M.C. 97, 101, 12 Cox C.C. 193; *R. v. Hutchins*, *supra*.

A statutory certificate of marriage given by a marriage registration officer of the province in which it was celebrated, may not be sufficient proof in another province of the celebration of that marriage. *R. v. Lafranière*, 12 Que. P.R. 83.

As to foreign certificates of marriage and of the recording of the marriage, see *R. v. Debard*, (1918), 15 O.W.N. 250.

*Sub-sec. 3 (a)—Belief of death of consort*—*Sub-sec. 3 (a)* adopts the law as it had been laid down in *R. v. Tolson* (1889) 23 Q.B.D. 168; and see *R. v. Smith*, 14 U.C.Q.B. 565 (Ont.).

*Sub-sec. 3 (b)—Continual absence of consort for seven years and no proof that accused knew consort was alive*—The continual absence here referred to as an excuse for bigamy is absence from the person. *R. v. Penaul, alias Rafuse* (1915), 25 Can. Cr. Cas. 161 affirmed, 49 N.S.R. 391.

If the prisoner and his first wife had lived apart for more than seven years before he married again, mere proof that the first wife was alive at the time of the second marriage is not enough; there must be evidence that the accused was aware that she was alive at some time within the seven years preceding the second marriage. *R. v. Fontaine*, 15 L.C. Jur. 141; *R. v. Curgerwen* (1865), L.R. 1 C.C.R. 1, 10 Cox C.C. 152; *R. v. Heaton* (1863), 3 F. & F. 819.

When the prosecution have proved the two marriages and that the first wife was alive at the time of the second marriage the onus is on the accused to show that his first wife had been continually absent for seven years before the second marriage. *R. v. Willshire* (1880), 6 Q.B.D. 366, 14 Cox C.C. 541; *R. v. Lumley*, L.R. 1 C.C.R. 196; *R. v. Dwyer*, 27 L.C. Jur. 201. And the onus after such proof is then upon the prosecution to show that he knew that the first wife was alive at some time during those seven years.

The absence need not have been in another country or even in another province of Canada. *R. v. Penaul, supra*.

It is not enough to prove that the accused had the means of knowledge as to whether the consort was living during some part of the seven years, if the accused satisfies the onus of proving that his first wife had been continually absent. *R. v. Faulkes*, (1903) 19 Times L.R. 250; and see *R. v. Jones*, 11 Q.B.D. 118. The accused is, of course, subject to cross-examination if he goes in the witness-box to testify on his own behalf as he may do under the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

*Sub-sec. 3 (c)—“If he or she has been divorced,” etc.*—As to a prior divorce the exception of sec. 307 of the Code is “if he or she has been divorced from the bond of the first marriage.” To establish a defence under that part of the section it is necessary to show a valid

divorce; the provisions declaring an honest belief in the consort's death as one defence and a divorce as another are inconsistent with a defence of a mere belief in a divorce, no matter how honest or reasonable. As regards the offence of bigamy the doctrine of *mens rea* does not apply so as to absolve the accused because of an honest and reasonable belief in the validity of a divorce he had obtained. *R. v. Bleiler*, 2 W.W.R. 5, 21 W.L.R. 18, 4 Alta. L.R. 320, 19 Can. Cr. Cas. 249, 1 D.L.R. 878; *R. v. Sellers*, 9 Can. Cr. Cas. 153 (N.S.) criticized; *R. v. Brinkley*, 14 O.L.R. 434, approved; and see *Sherras v. De Rutzen* [1895] 1 Q.B. 918, at 921, where Wright, J., said that bigamy was a remarkable exception to the theory of *mens rea*.

An honest and reasonable belief by the supposed wife that the man had a wife living, on obtaining information of which she left him and afterwards married another man was held a good defence as negating any *mens rea*, where she failed to give strict proof of the man's former marriage. *R. v. Sellers*, 9 Can. Cr. Cas. 153 (N.S.).

*Canadian divorces*].—The Canadian Parliament exercises a divorce jurisdiction by passing special Acts in dissolution of marriages of the persons respectively named in such Acts. It has, under the B.N.A. Act, constitutional authority over the subject of "marriage and divorce," leaving, however, to the provinces the legislative power over the solemnization of marriages. *Re Marriage Laws*, Canadian Reports [1912] 126, 11 E.L.R. 225, [1912] A.C. 880. The Federal Parliament has not yet established a federal divorce court, nor has it interfered with such divorce jurisdiction as the courts of some of the provinces, such as British Columbia and Nova Scotia had acquired prior to confederation of the provinces in 1867.

The Divorce and Matrimonial Causes Act, 20 and 21 Vict. (1857), ch. 85 (Imp.), is in force in Manitoba. It was introduced by 51 Vict. (1888), ch. 33 (Dom.), sec. 1 (now sec. 6, ch. 99, R.S.C. 1906), which provides that "Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said province, or of the Parliament of Canada." *Walker v. Walker* [1918] 2 W.W.R. 1 (Man.), reversing [1917] 2 W.W.R. 1029.

The Court of King's Bench of Manitoba possesses the jurisdiction and the machinery requisite to carry out the powers contained in the Divorce and Matrimonial Causes Act and such jurisdiction may be exercised by a single judge. *Walker v. Walker*, supra.

The Supreme Court of British Columbia has divorce jurisdiction in

respect of matrimonial offences committed in that province where the parties are there domiciled. *Watt v. Watt* [1908] A.C. 573, 77 L.J.P.C. 121, reversing 13 B.C.R. 281; *S. v. S.*, 1 B.C.R., pt. 1, p. 25; *Sheppard v. Sheppard*, 12 B.C.R. 486. The courts of Ontario and Québec exercise no divorce jurisdiction.

*Domicile as affecting recognition of foreign divorce*—It is well settled law that it is the courts of the domicile of the parties that have jurisdiction on the subject of divorce: *R. v. Wood*, 19 Can. Cr. Cas. 15, 20 O.W.R. 576; *Casavallo v. Casavallo* (1911), 1 W.W.R. 213 (Alta.); *Le Mesurier v. Le Mesurier* [1895] A.C. 517, 540; *Cox v. Cox* [1918] 2 W.W.R. 422. *R. v. Woods*, 6 O.L.R. 41; *R. v. Brinkley* (1907), 14 O.L.R. 434; *R. v. Hamilton*, 22 O.L.R. 484; *Bater v. Bater* [1906] P. 209, followed in *Cromarty v. Cromarty* (1917), 38 O.L.R. 481.

The question of domicile is to be decided by the circumstances and evidence of intention. *Irwin v. Gagnon* (1916), 23 R.L.N.S. 47, 17 Que. P.R. 402.

Residence in a country is *prima facie* evidence of an intention to reside there permanently and is, therefore, some evidence of domicile. *Re Seilo Estate* [1918] 1 W.W.R. 441 (Sask.). One may acquire a domicile from choice without renouncing allegiance to his domicile or origin. *Re Seilo Estate*, *supra*.

In the absence of evidence of a contrary intention, the acquirement of a domicile of choice may be inferred from the circumstances under which a person left his domicile of origin and the length of his residence in the jurisdiction where the domicile of choice is alleged to have been acquired. *Re Seilo Estate*, *supra*.

The domicile of a person is that place in which he has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his permanent home. *Wadsworth v. McCord*, 14 A.C. 631, affirming 12 S.C.R. 466; *Bonbright v. Bonbright*, 2 O.L.R. 249; *Stevens v. Fisk* (1885), 1 Cameron's S.C. Cas. 392, and 8 Legal News, 42, 53 (Que.); *King v. Foxwell*, L.R. 3 Ch. D. 318; *Wanzer Lamp Co. v. Woods*, 13 P.R. (Ont.) 511; *Edwards v. Edwards* 20 Gr. 392 (Ont.); *Harvey v. Farnie*, 8 A.C. 43; *Magurn v. Magurn* (1885), 11 A.R. 178 (Ont.) (leave to appeal refused by Privy Council); *R. v. Woods*, 6 O.L.R. 41, 7 Can. Cr. Cas. 226; *C. v. D.*, 8 O.L.R. 308; *Le Mesurier v. Le Mesurier* [1895] A.C. 517; *Watts v. Watts* [1908] A.C. 573, reversing 13 B.C.R. 281; *McNamara v. Constantineau*, 3 R. de J. 482 (Que.); *Jones v. City of St. John*, 30 S.C.R. 122.

The Privy Council in the case of *Le Mesurier v. Le Mesurier*, [1895] A.C. 517, decided that, according to the rules of international law, the domicile of the married pair affords the only true test of jurisdiction to dissolve their marriage, and that a divorce will be recognized only when it has been pronounced by a court within whose forum the parties have their domicil. This is declared to mean the domicil of succession

or true domicil. Mere residence will not suffice; nor will what has been called by some courts a matrimonial domicil be considered sufficient. *R. v. Woods* (1903), 7 Can. Cr. Cas. 226, 6 O.L.R. 41; *Cox v. Cox* [1918] 2 W.W.R. 422.

Lord Penzance in *Wilson v. Wilson* (1872) L.R. 2 P. & D., 435, said: "It is both just and reasonable that the differences of married people should be adjusted in accordance with the laws of the community to which they belong." This is quoted with approval and is in fact accepted as the basis of the judgment of the Privy Council in *Le Mesurier v. Le Mesurier* [1895] A.C. 517, 64 L.J.P.C. 97, where it was stated that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." There may be exceptional circumstances which will create an exception to that rule. *Ogden v. Ogden* (1908) P. 46; *Stathatos v. Stathatos* [1913] P. 46, and *De Montaigne v. De Montaigne* [1913] P. 154; *Cutler v. Cutler* (1914), 6 W.W.R. 1231, explaining *Adams v. Adams* (1909), 14 B.C.R. 301.

An English court will grant a decree of dissolution in favour of a wife deserted by her husband or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time that she was deserted, or began so to be, was domiciled with her husband in England, in which case he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in England. *Armstrong v. Armstrong* [1898] P. at 185.

In *Armitage v. The Attorney-General, Gillig v. Gillig*, [1906] P. 135, it was held that English courts would recognize the binding effect of a decree of divorce obtained in a State where the husband was not domiciled, if the courts of the country or State of his domicile would recognize it. There, an American domiciled in New York, had married an Englishwoman in England. She went to the State of South Dakota, U.S., where she took proceedings for divorce, which were served upon the husband personally and to which he put in an answer and cross-claim. A decree of divorce was pronounced on her petition, and she afterwards married in the State of Colorado an Englishman always domiciled in England. Then she petitioned the English Court for a declaration of validity of that marriage, and the Court being satisfied by the evidence that the Courts of her first husband's domicile (New York) would recognize the validity of the decree of the South Dakota Court (on the ground that that husband had submitted himself to its jurisdiction), pronounced for the validity of the second marriage. *Osler, J.A.*, in *R. v. Brinkley*, 12 Can. Cr. Cas. 454 at 459, said: "There is nothing in that case inconsistent with the decision in the *Le Mesurier* Case, but the contrary. The Court regarded the law of the State of the domicile—the State of New York—as that which affected and determined the status of the husband, and as that law recognized the validity

of the South Dakota decree, the wife who obtained it was free to marry again. The defendant is thus still left to demonstrate, if he can, that the law of his Canadian domicile will recognize the validity of the Michigan decree. This, however, for the reason already given, is, according to that law, denied. And see *Armitage v. Armitage*, [1898] P. 178, where Barnes, J., refers to the 'American doctrine' that the wife may acquire a domicile of her own in the country of the matrimonial home. Here the wife had not acquired even such a domicile, as the State of Michigan had never become the matrimonial home of the parties. *Bater v. Bater*, [1906] P. 209, follows and applies *Le Mesurier v. Le Mesurier*, holding that the domicile for the time being of the married pair when the question of divorce arises affords the only true test of jurisdiction to dissolve the marriage, and that the Court of the *bona fide* existing domicile has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country. See also *Guest v. Guest*, 3 O.R. 344; *Magurn v. Magurn*, 11 A.R. 178; *The Trial of Earl Russell*, [1901] A.C. 446. We need not consider the recent case of *Haddock v. Haddock*, 201 U.S. 562. It has been severely criticised both in the United States and in England, but it is not necessary to invoke it to show the invalidity of the Michigan decree. Cases like *Ogden v. Ogden* (1906), 23 Times L.R. 158, show that the Courts of the husband's domicile cannot undo a marriage solemnized in England between, *e.g.*, a domiciled Frenchman and an Englishwoman, in accordance with the requirements of English law, merely because it would be irregular in the country of the domicile by reason of the omission of some condition—such as the consent of parents in the case of a minor—required by the laws of that country."

It appears to be doubtful whether even a judicial separation would give the wife a right to acquire a separate domicile for herself. See the remarks of Lord Kingsdown in *Dolphin v. Robins*, 7 H.L.C. 390, at p. 420; and of Maclaren, J.A., in *R. v. Brinkley*, 12 Can. Cr. Cas. 454, at 466. In the latter case, Maclaren, J.A., said: "Even if the husband had been served with notice and had submitted to the jurisdiction, the decree would still have been a nullity on account of his being legally domiciled in this country when the (foreign) proceedings were taken. See *Armitage v. The Attorney-General*, [1906] P. 135 at 140."

As to domicil in an ex-territorial community subject to the jurisdiction of a British consular court, reference may be made to *Casdagli v. Casdagli*, (1918), 87 L.J. P. 73, 79, and cases there cited.

**Matrimonial domicile**—The doctrine of matrimonial domicile as ground for a foreign divorce when the facts on which such matrimonial domicile would not establish a domicile of succession, is generally rejected in Canada. *R. v. Woods* (1903), 6 O.L.R. 41; *R. v. Brinkley* (1907), 14 O.L.R. 434, 12 Can. Cr. Cas. 454; *R. v. Hamilton*, 17 Can. Cr. Cas. 410 (Ont.); *Swaizie v. Swaizie*, 31 Ont. R. 330.

A decree of divorce *a vinculo* pronounced by a Court whose jurisdiction is derived solely from some rule of municipal law peculiar to its forum cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority. *Le Mesurier v. Le Mesurier* [1895] A.C. 517.

No case appears to have arisen upon the effect, if any, of the Naturalization Act, 1914, *Can.*, in adoption of the British Nationality Act, 1914, in certain contingencies. By that Act if a man ceases to be a British subject it is lawful for his wife to make a declaration under the Act that she desires to retain British nationality and thereupon she is deemed to remain a British subject. 4-5 Geo. V, *Can.*, ch. 44, sec. 10, as amended, 5 Geo. V, *Can.*, 2nd sess., ch. 7, sec. 2, and see *Can. Statutes* 1915, p. cccxxi.

*Annulment decrees where marriage void ab initio*—The act of declaring a certain form or ceremony of marriage null and void is an entirely different thing from a judgment dissolving a marriage. An application to dissolve a marriage is necessarily made on the assumption that a valid marriage had taken place which is quite different from the case of a void marriage. *Cox v. Cox* [1918] 2 W.W.R. 422, 42 (*Alta.*); *Hardie v. Hardie*, 7 Terr. L.R. 13.

The Supreme Court of Alberta has jurisdiction to pronounce a declaratory judgment that an alleged marriage in Alberta is null and void, where it is found that before such marriage the defendant had been married to another person, that such person was alive at the time of the second marriage and that the parties to the first marriage had not been divorced by a decree which our Courts recognize as effectual; *Hardie v. Hardie*, 7 Terr. L.R. 13; *Cox v. Cox* [1918] 2 W.W.R. 422 (*Alta.*).

A degree of nullity on the ground of impotence has been granted in British Columbia. *P. v. P.*, 11 B.C.R. 369.

Ontario courts have, it seems, only the limited jurisdiction in annulment actions conferred by the Marriage Act, R.S.O. 1914, ch. 148, sec. 36; *Prowd v. Spence*, 24 O.W.R. 329; *McIntyre v. Gentsl*, 13 O.W.N. 309; *Malot v. Malot*, 4 O.W.N. 1405, 1577; *Reid v. Aull*, 32 O.L.R. 68, 6 O.W.N. 372; *Peppiatt v. Peppiatt*, 34 O.L.R. 121, 8 O.W.N. 447; *T. v. B.*, 15 O.L.R. 224; *May v. May*, 22 O.L.R. 559; *Menzies v. Farnon*, 18 O.L.R. 174.

Jurisdiction to annul on the ground of gross fraud inducing the consent, is denied in Ontario. *Hallman v. Hallman* (1914), 26 O.W.R. 1, 5 O.W.N. 976.

Quebec courts exercise jurisdiction for annulment of invalid marriages. Civil Code, *Que.*, article 127; *Smith v. Cook*, 24 *Que. S.C.* 469; *Durocher v. Degré*, 20 *Que. S.C.* 456; *Delpit v. Coté*, 20 *Que. S.C.* 338; *Agnew v. Gober*, 17 *Que. K.B.* 508; *Guttman v. Goodman*, 26 *Que. K.B.* 270; *Hébert v. Clouâtre*, 45 *Que. S.C.* 239, reversing 41 *Que. S.C.* 241.

**Punishment of bigamy.—Second offences.**

**308.** Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every one who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment.

*Origin*—Sec. 276, Code of 1892; R.S.C. 1886, ch. 161, sec. 4.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Summary trial by police magistrate*—See sec. 777.

**Feigned marriages.**

**309.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage.

*Origin*—Sec. 277, Code of 1892; R.S.C. 1886, ch. 161, sec. 2.

*Corroboration*—Code sec. 1002.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

**Practising or contracting polygamy.—Conjugal union with more than one consort.—Spiritual marriages.—Cohabitation in conjugal union.—Celebrating rite.—Assisting in compliance.—Procuring contract.**

**310.** Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars,—

- (a) who practises, or, by the rites, ceremonies, forms, rules, or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into



- (i) any form of polygamy,
- (ii) any kind of conjugal union with more than one person at the same time, or
- (iii) what among the persons commonly called Mormons is known as spiritual or plural marriage; or,
- (b) who lives, cohabits, or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married to another or with a person who lives or cohabits with another or others in any kind of conjugal union; or,
- (c) celebrates, is a party to, or assists in any rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (a) of this section; or,
- (d) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any form, rule or custom which so purports; or,
- (e) procures, enforces, enables, is a party to, or assists in the execution of, any form of contract which so purports, or the giving of any consent which so purports.

*Origin*—Sec. 278, Code of 1892; Code Amendment Act, 1900; 53 Vict., Can., ch. 37, sec. 11.

*"Form of marriage"*—Code sec. 240 (a).

*Polygamous marriages and illegal conjugal unions*—

An Indian who according to the customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under this section. *R. v. "Bear's Shin Bone"* (1899), 3 Can. Cr. Cas. 329, 4 Terr. L.R. 173.

The mere fact of cohabitation between a man and a woman, each of whom is married to another, will not sustain a conviction under this section (formerly 53 Vict., Can., ch. 37, sec. 11), to come within the terms of which there must be "some form of contract between the parties which they might suppose to be binding on them, but which the law was intended to prohibit," and the term "conjugal union" in the statute has reference to a form of ceremony joining the parties, a marriage of some sort before cohabiting with one another. The Queen

v. Labrie (1891), Montreal Law Reports, 7 Q.B. 211, per Dorion, C.J., Cross, J., Baby, J., Bossé, J. and Doherty, J.

In the Queen v. Liston (noted 34 C.L.J. 546) tried at the Toronto Assizes in 1893, Chief Justice Armour held that the corresponding section, 278 of the 1892 Code, was intended to apply only to Mormons.

In R. v. Harris (1906), 11 Can. Cr. Cas. 254 (Que.), tried by district magistrate Mulvena, of Sherbrooke, the accused man pretended that a divorce had been obtained in the U.S.A. by the woman, and that he had married her there and had produced to a witness what he called the certificate of marriage in proof that he was not living in concubinage with the woman. This was for the purpose of getting employment with the witness, but the latter refused either to employ the accused or to read the document. The alleged certificate of marriage was not produced nor was any strict proof made of the alleged marriage. As it was manifest from the circumstances that there could have been no valid foreign divorce nor the acquirement by the woman of any foreign domicile to found a divorce, the magistrate held that the defendant's claim that he was living with the woman as her husband under the pretended marriage certificate, was proof of some "form of conjugal union" in the nature of a marriage in contravention of this section of the Code. He further held that the accused, by claiming the relationship of man and wife and living with the woman in open continuous adultery, was guilty under this section; and that if there had been a bigamous marriage, the prosecution could be brought for the lesser offence under sec. 310.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Special provisions as to indictment and evidence under sub-secs. (b), (c) and (d)*—Code sec. 948.

*Adultery indictable in New Brunswick*—Adultery is an indictable offence in the Province of New Brunswick under the pre-confederation statute of that province, R.S.N.B. 1854, ch. 145, sec. 3, which has not yet (1918) been repealed by the Dominion Parliament. R. v. Strong (1915), 24 Can. Cr. Cas. 430, 26 D.L.R. 122, 43 N.B.R. 190; R. v. Akerley, (1918) unreported (N.B.).

The repeal in 1886 by the Dominion Parliament of parts of certain pre-confederation statutes of New Brunswick, which regulated procedure in prosecutions for adultery under R.S.N.B., 1854, ch. 145, leaves that offence punishable in New Brunswick under the procedure applicable to indictable offences generally under the Criminal Code. R. v. Strong, *supra*.

*Unlawful Solemnization of Marriage.*

**Without authority solemnizing a marriage.—Aiding or abetting such ceremony.**

**311.** Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who,—

- (a) without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage; or,
- (b) procures any person to solemnize any marriage knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony.

*Origin*—Sec. 279, Code of 1892, R.S.C. 1886, ch. 161, sec. 1.

*"Without lawful authority"*—The authority is derived from provincial law. *Re Marriage Laws*, [1912] A.C. 8-80, C.R., [1912] 1 Can. Appeal Cases 126, 11 E.L.R. 255, affirming 46 S.C.R. 132; *R. v. Brown* (1908), 14 Can. Cr. Cas. 87 (Ont.); *R. v. Dickout* (1893), 24 Ont. B. 250.

*Time limitation*—Code sec. 1140 (b).

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

**Authorized person solemnizing a marriage which contravenes provincial law.**

**312.** Every one is guilty of an indictable offence and liable to a fine, or to one year's imprisonment, who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized.

*Origin*—Code of 1892, sec. 280; R.S.C. 1886, ch. 161, sec. 3; 26 Geo. II, Imp., ch. 33 (repealed in England by 4 Geo. IV, ch. 76).

*Solemnization of marriage in contravention of law*—Sec. 312 is directed to the punishment of a clergyman or other functionary having authority to conduct a marriage ceremony for proceeding with such ceremony in contravention of the provincial law governing in such matters, *ex. gr.* without a marriage license or the publication of banns. The provinces have exclusive power to make laws in relation to the "solemnization of marriage in the province," but otherwise the subjects of

"marriage" and "divorce" are exclusively within the federal powers. *Re the Marriage Law of Canada* [1912] A.C. 880, 11 E.L.R. 255, 7 D.L.R. 629, affirming 46 Can. S.C.R. 132. Sec. 172 of the Code would apply to prosecutions for making a false declaration or affidavit under a provincial marriage law, and see also secs. 173-176.

*Marriage illegally solemnized by authorized person, but without license, etc.*—It has been doubted whether in view of the *Duchess of Kingston's* case, 20 State Trials, 355, a marriage without banns and without license in Ontario might not still be valid if solemnized by a person having a general authority to solemnize marriages, as the Ontario Marriage Act, R.S.O. 1914, ch. 148, does not expressly declare to be invalid the marriages solemnized without either of those preliminaries. See also the English statute, 26 Geo. II, ch. 33, enacted several years after the *Duchess of Kingston's* case, and which probably became a part of the law of Ontario in 1792. *Article on 53 G.L.J. 406.*

And see *Beamish v. Beamish*, 9 H.L.C. 531; *Harris v. Meyer*, 50 N.S.R. 117; *R. v. Cameron* (1917), 29 Can. Cr. Cas. 113 (N.S.).

*Time limitation*—The time limitation applicable under sec. 1140 (b) to an offence under sec. 311 appears not to extend to sec. 312.

### *Abduction.*

#### **Abduction of a woman.**

**313.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who, against her will, takes away or detains any woman of any age and whether married or not, with intent to marry or carnally know such woman or to cause her to be married or carnally known by any other person.

*Origin*—Sec. 281, Code of 1892; 8-9 Edw. VII, Can., ch. 9, sec. 2; R.S.C. 1886, ch. 162, sec. 48; 32-33 Vict., Can., ch. 20, sec. 55; 24-25 Vict., Imp., ch. 100, sec. 54.

*Abduction of woman with intent*—This section as enacted 1909, applies to women generally, while sec. 314 with a heavier penalty applies only to heiresses, so-called.

If the woman be taken away in the first instance with her own consent, but afterwards refuses to continue with the offender and be forcibly detained by him, the offence is within this section. So also if, having been forcibly taken away, she be afterwards married or defiled with her own consent, for the offender is not to escape from the provisions of the statute by having prevailed over the weakness of a woman whom he originally got into his power by such base means. *Fulwood's case*, Cro. Car. 482; *R. v. Swendsen*, 14 St. Tr. 595; *R. v. Wakefield*, 2 Lewin, 279; Archbold's Cr. Evid., 22nd ed., 855.

*Any woman of any age*—Compare sec. 266 as to the offence of rape, and see *E. v. Biopel* (1898), 2 Can. Cr. Cas. 225, decided under that section in which the word “woman” was construed in a general sense and as including a child under 14.

*Excluding public from trial*—Code sec. 645.

*Attempts*—See sec. 72.

*Procuring*—Code sec. 216.

*Abduction of young girls*—See also secs. 315, 316, 984.

*Wife of accused a compellable witness*—Sections 313-316 inclusive are included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, B.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

**Abduction of heiress, so called.—Alluring away against will of parent.—Effect of conviction on property.**

**314.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who, with intent to marry or carnally know any woman, or with intent to cause any woman to be married or carnally known by any other person, such woman having any interest, legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or being a presumptive heiress or co-heiress, or presumptive next of kin, to any one having such an interest,—

(a) from motives of lucre takes away or detains such woman against her will, whatever the age of such woman,

(b) fraudulently allures, takes away or detains such woman out of the possession and against the will of her father or mother or other person having the lawful care or charge of her, such woman being under the age of twenty-one years.

2. Every one convicted of any offence defined in this section is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place such property shall, upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information at the instance of the Attorney General, appoints.

*Origin*—Sec. 282, Code of 1892 as amended 8-9 Edw. VII, Can., ch. 9; R.S.C. 1886, ch. 162, sec. 42; 32-33 Vict., Can., ch. 20, sec. 54; 24-25 Vict., Imp., ch. 100, sec. 53; 9 Geo. IV, Imp., ch. 31.

*Abduction of heiresses with intent*—The amendment made to this section in 1909 was intended to remove doubts as to the interpretation of the former section and particularly to make it clear that sec. 314 (b) is applicable only to heiresses, so-called, and not to women generally.

It is unnecessary in a prosecution under this section to prove that the accused knew that the girl was an heiress or had such an interest in real or personal estate as is specified in sec. 314. *R. v. Kaylor*, 1 Dorion K.B. (Que.) 364. The property interests of the girl must be proved in order to bring the case within the section, and such property interest must be alleged in the indictment. *R. v. Fielding* (1909), 14 Can. Cr. Cas. 486 (N.S.).

*Excluding public from trial*—Code sec. 645.

*Wife a compellable witness*—Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

*Deprivation of civil rights accruing from criminal Act*—Compare secs. 641, 1048-1050; *O'Neil v. Attorney-General*, 26 Can. S.C.R. 122, 1 Can. Cr. Cas. 303; *Standard Life Assurance Co. v. Trudeau*, 9 Que. Q.B. 499, affirmed 31 Can. S.C.R. 376; *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; *Lundy v. Lundy*, 24 Can. S.C.R. 650; *Re Sanderson and Saville* (1912), 26 O.L.R. 616, 3 O.W.N. 1560, 22 O.W.R. 672.

**Abduction of girl under sixteen.—Consent immaterial.—Belief of offender as to age.**

**315.** Every one is guilty of an indictable offence and liable to five years' imprisonment who unlawfully takes or causes to be taken any unmarried girl, who is under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

2. It is immaterial whether the girl is taken with her own consent or at her own suggestion or not.

3. It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen.

*Origin*—Sec. 283, Code of 1892, R.S.C. 1886, ch. 162, sec. 44; 32-33 Vict., Can., sec. 56; 24-25 Vict., Imp., ch. 100, sec. 55.

*Takes or causes to be taken*—The language of the next following section (316) is in some respects more comprehensive as to abduction of a child under fourteen. Sec. 316 includes as a distinct offence not

only the taking but the enticing away or detaining and the subsequent harbouring. Under sec. 315 there must be a "taking" but it is immaterial whether the girl is taken at her own suggestion or not, or that she consented to being taken. Whether a persuasive inducement from the accused, such as was held to be essential under the law prior to the Code is still a requisite to the offence has been questioned. Judge Wallace, of Halifax, in *R. v. Meyers* (1915), 24 Can. Cr. Cas. 120, held that it was not, and distinguished *R. v. Jarvis*, 20 Cox C.C. 249; but *R. v. Blythe*, 4 B.C.R. 276, is opposed to this view. There must, however, be a taking out of the possession and against the will of the parent or other custodian. *R. v. Blythe*, 4 B.C.R. 276, 1 Can. Cr. Cas. 263; *R. v. Booth*, 12 Cox C.C. 231; *R. v. Mankletow*, 1 Dears. C.C. 159, 22 L.J.M.C. 115; *R. v. Timmins*, Bell C.C. 276, 30 L.J.M.C. 45; *R. v. Robins*, 1 C. & K. 456; *R. v. Holmes*, 16 Can. Cr. Cas. 7, 14 O.W.R. 419.

The offence may be complete although the object in taking the girl away may have been a philanthropic one. *R. v. Booth*, 12 Cox C.C. 231; *R. v. Yorkema*, 21 O.L.R. 193, 16 Can. Cr. Cas. 189; *R. v. Holmes*, 16 Can. Cr. Cas. 7, 14 O.W.R. 419.

*Out of the possession of the parent or guardian*—The girl may be in the constructive possession of the parent while visiting elsewhere with the parent's permission. *R. v. Mondelet*, 21 L.C. Jur. 154; but not when employed at a considerable distance from home without being under the care of anyone. *R. v. Henkers*, 16 Cox C.C. 257. So also where the accused had no reason to know that the girl lived at home, a conviction was quashed. *R. v. Hibbert*, L.R. 1 C.C.R. 184, 38 L.J.M.C. 61; *R. v. Green*, 3 F. & F. 274.

So where a girl had left her home without any inducement from the accused and having got fairly away went to him, his failure to restore her to the parents does not come within sec. 315, and it was held that in such case there was no "taking out of the parent's possession." *R. v. Olifer*, 10 Cox C.C. 402; *R. v. Miller*, 13 Cox C.C. 179; *R. v. Kauffmann* (1904), 68 J.P., 189.

The possession of the parent must be an actual or constructive possession *de facto*. *R. v. Blythe*, 4 B.C.R. 276, 1 Can. Cr. Cas. 263; *R. v. Mankletow*, 22 L.J.M.C. 115, 6 Cox C.C. 143. If the girl had renounced her father's protection in a foreign country, his following her into Canada will not re-establish a *de facto* possession. *R. v. Blythe*, 4 B.C.R. 276, 1 Can. Cr. Cas. 263; *Re Gertie Johnson*, 8 Can. Cr. Cas. 243. Where the parents are living apart and the girl is attending school under her father's direction, he has presumptive control as against the mother, and it is an offence to bring the child to the mother against the father's will unless there is lawful authority for so doing. *R. v. Holmes*, 16 Can. Cr. Cas. 7, 14 O.W.R. 419.

The taking "out of the possession" of the parent requires that there should be evidence of some active part taken by the accused as

a result of which the girl left her home. *R. v. Weinstein*, 26 Can. Cr. Cas. 50 (Que.); *re Johnson*, 8 Can. Cr. Cas. 243.

*Against the will of the parent*—The laxity of the course of life which the girl is permitted to lead may show that the taking was not against the parent's will. *R. v. Primelt*, 1 F. & F. 50.

*Knowledge of age*—In *Reg. v. Prince*, L.R. 2 C.C.R. 154, Brett, J., said, (at 170):—"Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind, or *mens rea*. . . . It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind and which he has a reasonable ground to believe and does believe to be the facts, would, if true, make his acts no criminal offence at all."

The conviction in that case was upon the charge of having unlawfully taken an unmarried girl under the age of sixteen out of the possession and against the will of her father. It was sustained upon the ground that the taking of the girl out of the possession of her father under the circumstances was a wrongful act, even if she were, as the prisoner supposed, over the age of eighteen years, and that, therefore, there was present a sufficient *mens rea* to make the offence a crime under the statute. Denman, J., in his judgment, says:—"He, the prisoner, had wrongfully done the very thing contemplated by the Legislature. He had wrongfully and knowingly violated the father's rights against the father's will, and he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which, in fact, he was committing."

Sub-sec. (3) appears to embody in statute form that part of the decision in *R. v. Prince*, L.R. 2 C.C.R. 154, quoted above.

*Wife of accused a compellable witness*—This section is included amongst those specified in sub-sec. 2 of sec. 4 of the Canada Evidence Act, R.S.C. 1906, ch. 145, and under it the wife of the accused is both a competent and compellable witness for the prosecution.

*Kidnapping*—The offence of kidnapping is a more serious one, involving the imprisonment of the person abducted. This is dealt with in sec. 297; and see *R. v. Steckley*, 7 O.W.N. 137, 23 Can. Cr. Cas. 263.

*Seduction*—This offence is distinct from the offence of seduction and a conviction under this section does not preclude a conviction for seduction. *R. v. Smith* (1890), 19 O.R. 714; following *R. v. Handley* (1833), 5 C. & P. 565, and *R. v. Vandercombe and Abbott* (1796), 2 Leach C.C. 708; and see Code secs. 210-220.

*Proof or inference of age*—Code sec. 984.



**Abduction of child.—Harbouring abducted child.—Possession in good faith.**

**316.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully,—

(a) takes or entices away or detains any child; or.

(b) receives or harbours any such child, knowing it to have been unlawfully taken, enticed away or detained with intent aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.

*Origin*—Sec. 284, Code of 1892, as amended by Can. Stat. 1900; R.S.C. 1886, ch. 162, sec. 45; 32-33 Vict., Can., ch. 20, sec. 57; 24-25 Vict., Imp., ch. 100, sec. 56; 48-49 Vict., Imp., ch. 69, sec. 56; 54 Geo. III, Imp., ch. 101.

*Guardian*—The term "guardian" here includes any person who has in law or in fact the custody or control of the child. Code sec. 240 (b).

*Proof or inference of age*—See sec. 984.

*Child-stealing*—Sec. 316 deals with the offence commonly known as child-stealing. For the more aggravated offence of kidnapping, reference should be made to Code sec. 297.

To constitute this offence it is not necessary that the accused should intend to deprive the parent permanently of the possession of the child. *Rex. v. Powell*, 24 Cox C.C. 229.

The English statute, 24-25 Vict., ch. 100, sec. 56, was more limited in its terms than is sec. 316. By it, in order to constitute the offence the accused must have "either by force or fraud" led or taken away or decoyed or enticed away or detained any child under the age of fourteen years with intent, etc. *R. v. Bellis* (1893), 62 L.J.M.C. 155, 57 J.P. 441, 17 Cox C.C. 660, 69 L.T. 26; *R. v. Barrett* (1885), 15 Cox C.C. 658.

Where a woman was indicted for that she did unlawfully detain a child under the age of fourteen with intent to deprive the mother of the possession of her, it was held that she was rightly convicted upon evidence that the child had been in the service of the prisoner and was missing and could not be found, and that she gave different accounts of what had become of the child, but implying that she had given her up to some third person although there was no evidence that the child

was still in her actual custody, nor indeed any evidence as to where she was. *R. v. Johnson* (1884), 15 Cox C.C. 481, 50 L.T. 759.

*Bona fide claim to possession of the child*—Prior to the enactment of the Criminal Code in 1892 the exception was: "No person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of getting possession of such child or taking such child out of the possession of any person having the lawful charge thereof."

The exception now is: "Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child." So that the enactment would seem to apply to any one doing any of the things against which it is aimed, unless "claiming in good faith a right to the possession of the child"; and the amendment would seem to have enlarged the character as well as the scope of the legislation. *R. v. Hamilton*, 22 O.L.R. 484, 17 Can. Cr. Cas. 410, at 416, per R. M. Meredith, J.A.

A foreign divorce granted in the country of the domicile of the parties whereby the wife was given the custody of the child is effective in Canada on the status of the parties so as to support a conviction of the father under Code sec. 316, for enticing the child while under the age of fourteen years from the custody of the mother. *R. v. Hamilton*, 17 Can. Cr. Cas. 410, 22 O.L.R. 484; *R. v. Watts*, 3 O.L.R. Similarly the mother may be convicted for taking the child from the custody of the father when awarded to him by the divorce decree. *Re Lorenz*, 7 Que. P.R. 101, 9 Can. Cr. Cas. 158.

If the child's father really believed that the decree of the foreign court granting a divorce to the mother and awarding her the custody of the child was invalid, such would constitute a defence under subsection (2). *R. v. Hamilton* (Ont.), 17 Can. Cr. Cas. 410, 22 O.L.R. 484. But belief in the regularity of a foreign divorce might not avail him in defence of a bigamy charge. *B. v. Brinkley*, (1907) 14 O.L.R. 434.

A person who might claim, in good faith, a right to the possession of the child, has the benefit of the exemption only when the possession is going to himself or herself, and may be convicted of conspiring with another having no such *bona fide* claim for unlawfully taking or enticing away the child for the purpose of that other person obtaining the possession of the child. *R. v. Duguid*, 21 Cox C.C. 200.

The courts of Canada will recognize a divorce decree dealing with the custody of the children granted in the state where the husband and wife and the children were then legally domiciled; and this although the divorce was granted for causes not recognized in English law. *R. v. Hamilton*, 22 O.L.R. 484, 17 Can. Cr. Cas. 410. See also note to sec. 807, dealing with the offence of bigamy.

Where the parents had become separated and the child left in the mother's care had been placed by her in charge of a third party without any objection on the father's part, the custody of such third party does not immediately become illegal on the death of the mother so as to justify the father prosecuting the third party for failing to deliver up the child to him on demand. *Cummings v. The King* (1915), 26 Can. Cr. Cas. 304 (Que.). It may be that the best interests of the child require that the father should not have its custody, but if otherwise, it is for the father first to take civil proceedings, as by habeas corpus, to obtain the custody. *Cummings v. The King*, *supra*. To establish that the third party could be convicted upon the criminal charge of unlawfully detaining the child, where it appeared that the custody of it in the past had been quite lawful, the prosecutor had to prove something more than mere inaction or passivity on the part of such third party, and not only that, but something more than mere default or refusal to comply with the father's demand for delivery of the child, because criminal process is designed to secure the trial and punishment of criminal offences, but not to procuring specific performance of legal or natural obligations. Different considerations would have to be weighed, if there had been evidence to show that the third party had, acting in a positive or affirmative way, formed a plan or done some act in the way of secreting the child or removing her from the jurisdiction. *Cummings v. The King*, *supra*.

*Wife of accused a compellable witness*—Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4.

*Attempts and conspiracy*—See secs. 72, 571, 573.

### *Defamatory Libel.*

**Definition of defamatory libel.—Manner of expressing.**

**317.** A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it is published.

2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

*Origin*—Sec. 285, Code of 1892.

*Intent*—Under Code sections 317 and 334 the motive by which a person is induced to publish or to form an intention to publish a

defamatory libel is now immaterial. *R. v. Law* (1909), 19 Man. R. 259, 275, 15 Can. Cr. Cas. 382.

*Defamatory libel*—Sending an indecent letter designed to insult the person to whom it was addressed would be punishable as a defamatory libel; *R. v. Goyer* [1917] 1 W.W.R. 590, 27 Can. Cr. Cas. 10 (Sask.); and if the indecent matter were on the envelope of the letter it would be punishable also under sec. 209. *R. v. Goyer*, supra.

It is not permissible to give evidence that the accused bore the complainant ill-will in proof that the accused was the person who wrote the libel. *R. v. Law* (1909), 19 Man. R. 259.

Extrinsic circumstances may be given in evidence to prove the innuendo of ironical statements. *R. v. Molleur*, 14 Que. K.B. 556, 12 Can. Cr. Cas. 8.

*"Published"*—Code secs. 318, 326-329.

*Presumption as to newspaper proprietor*—Code sec. 329.

*Venue in newspaper libel*—Code sec. 888.

*Jurisdiction of Sessions excluded*—See sec. 583.

*Form of stating the offence*—Code secs. 852-858, 861; Code form 64 (h); *R. v. Cameron*, 7 Que. Q.B. 162, 2 Can. Cr. Cas. 173; *R. v. MacDougall* (1909), 39 N.B.R. 388.

*Order for particulars*—Code secs. 859, 860.

*Matters of justification or excuse*—Code secs. 319-331.

*Plea in libel cases*—Code secs. 910-913.

*Extracts from parliamentary papers*—Code secs. 321, 947.

*Liability for costs in libel cases*—Code sec. 1045.

*Punishment*—Code secs. 333, 334.

*Extortion by defamatory libel*—Code sec. 332.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045.

*Injunction against defamation*—An injunction was granted until the trial to restrain the defendants, who professed to be mind-readers, and who had as such given, and who intended to repeat, public entertainments, pretending to give information as to the cause of the death of the plaintiff's husband, intimating that he met with his death at the hands of a supposed friend, and thereby suggesting the idea that a late partner of the deceased and the plaintiff were concerned in the matter. (*Monson v. Tussaud* [1894] 1 Q.B. 671, specially referred to.) *Quirk v. Dudley*, 4 O.L.R. 532.

#### What is publishing a libel.

**318.** Publishing a libel is exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it

to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person.

*Origin*—Sec. 286, Code of 1892.

*Publishing defamatory libel*—If the accused knew it to be false he may be charged under sec. 333; otherwise under sec. 334.

**Publishing upon invitation.**

**319.** No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish such defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge or required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

*Origin*—Sec. 287, Code of 1892.

**Publishing proceedings of courts of justice.**

**320.** No one commits an offence by publishing any defamatory matter, in any proceeding held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute or by order of His Majesty, or of any of the departments of government, Dominion or provincial.

*Origin*—Sec. 288, Code of 1892.

*Publishing any defamatory matter in any court proceeding*—As to reports of proceedings of courts or legislative bodies, see sec. 322.

**Parliamentary papers.—Good faith.**

**321.** No one commits an offence by publishing to either the Senate, or House of Commons, or to any Legislative Council, Legislative Assembly or House of Assembly, defamatory matter contained in a petition to the Senate, or House of Commons, or to any such Council or Assembly, or by publishing by order or under the authority of the Senate, or House of Commons, or of any such Council or Assembly, any paper containing defamatory

matter or by publishing, in good faith and without ill-will to the person defamed, any extract from or abstract of any such paper.

*Origin*—Sec. 289, Code of 1892.

*Evidence*—Code sec. 947.

**Fair reports of proceedings of parliament and courts.**

**322.** No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any Council or Assembly aforesaid, or any committee thereof, or of the public proceedings preliminary or final heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings.

*Origin*—Sec. 290, Code of 1892.

*Fair report of judicial or parliamentary proceedings*—This section is in accordance with the law declared in *Wason v. Walter* (1869), L.R. 4 Q.B. 73, where it was held that the publication in a public newspaper of a faithful report of a debate in either House of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate and reproduced in such faithful report. In the same case, Cockburn, C.J., said: "It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible: the general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of the proceedings."

This section applies even if the judicial proceedings were heard *ex parte*. *Kimber v. Press Association* [1893] 1 Q.B. 65; *R. v. Gray* (1865), 10 Cox C.C. 184.

The true criterion of the privilege is not whether the report was or was not of an *ex parte* proceeding, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public and innocent of all intention to do injury to the reputation of the party affected. *Wason v. Walter* (1869), L.R. 4 Q.B. 73; *Usill v. Hales* (1878), 3 C.P.D. 319; *Macdougall v. Knight*, 14 A.C. 194.

In a civil action it has been held that the publication of the statements contained in a pleading filed in the course of a civil action, merely because such statements form part of such a pleading, is not a

privileged publication within the rule which throws the protection of privilege about fair reports of judicial proceedings. The judgment appealed from, *Shallow v. Gazette*, Q.R. 17 K.B. 309, reversing the judgment of the Superior Court, Q.B. 31 S.C. 338, was affirmed. *Gazette Printing Co. v. Shallow*, 41 S.C.R. 339; *Kimber v. Press Association* [1893] 1 Q.B. 65; *R. v. Wright*, 8 T.R. 293.

The publicity of proceedings involving the conduct of a judicial authority serves the important purposes of impressing those concerned in the administration of justice with a sense of public responsibility, and of affording every member of the community an opportunity of observing for himself the mode in which the business of the public tribunals is carried on; but no such object would appear to be generally served by applying the privilege to the publication of preliminary statements of claim and defence relating only to private transactions; formulated by the parties themselves; in respect of which no judicial action has been taken, and upon which judicial action may never be invoked. *Gazette Printing Co. v. Shallow*, 41 S.C.R. 339, 360, per Duff, J. It is only when such preliminary statements or the claims or defences embodied in them form the basis or the subject of some hearing before, or some action by, a court or a judicial officer, that their contents can become the object of any real public concern as touching the public administration of justice. *Gazette Printing Co. v. Shallow*, *supra*.

A magistrate holding a preliminary inquiry on a criminal charge in open court may be said to be holding public proceedings within sec. 322; but *aliter* if an order has been made by him excluding the public under sec. 679 (d). See *Lewis v. Levy*, E. B. & E., 537, 558; *Stockdale v. Hansard*, 9 A. & E. 1; *Furniss v. Cambridge*, 23 Times L.R. 705.

#### **Fair reports of public meetings.**

**323.** No one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in a conspicuous place in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor.

*Origin*—Sec. 291, Code of 1892.

*Subjects of public interest*—Code sec. 324.

*"Newspaper" defined*—Code sec. 2, sub-sec. (22).

**Matter of public interest published for the public benefit.**

**324.** No one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit.

*Origin*—Sec. 292, Code of 1892.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045.

"*Subject of public interest*"—The complainant may himself have made the subject one of public interest by obtaining press notices commendatory of himself in reference thereto and thereby inviting public criticism. *R. v. Brasen* (1899), 3 Can. Cr. Cas. 89 (Que.).

"Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of courts of justice, and fairly commenting on them if there is anything that calls for observation; but they should be careful, in discharging that function, that they do not wantonly assail the character of others, or impute criminality to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences." Per Cockburn, C.J., in *Reg. v. Tanfield*, 42 J.P. at p. 424.

**Fair comments on public person.—Fair comments on literary or art productions.**

**325.** No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.

2. No one commits an offence by publishing fair comments on any published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if such comments are confined to criticism on such book or literary production, composition, work of art, performance or communication.

*Origin*—Sec. 293, Code of 1892.

**Publication in good faith seeking redress.**

**326.** No one commits an offence by publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance from a person



who has, or is reasonably believed by the person publishing to have, the right or to be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by the person publishing the same to be true, and is relevant to the remedy or redress sought, and such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

*Origin*—Sec. 294, Code of 1892.

**Answer to inquiries.—Intent.—Condition.**

**327.** No one commits an offence by publishing, in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is relevant to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

*Origin*—Sec. 295, Code of 1892.

**Giving information.—Intent.—Condition.**

**328.** No one commits an offence by publishing to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to which he has, or is, on reasonable grounds, believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances, if such defamatory matter is relevant to such subject, and is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true.

*Origin*—Sec. 296, Code of 1892.

**Proprietor of newspaper presumed responsible.—General authority to managers not negligence unless with intent.—Selling newspapers.**

**329.** Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof

that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

2. General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper.

3. No one is guilty of an offence by selling any number or part of such a newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper:

*Origin*—Sec. 297, Code of 1892.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045.

*"Newspaper" defined*—Code sec. 2, sub-sec. (22).

*Venue in newspaper libel*—Code sec. 888.

*"Defamatory matter"*—Code secs. 317, §18.

*Authority exercised by inserting defamatory matter*—The prosecution may give evidence under this head against the proprietor of his knowledge that the editor having general supervision of the newspaper had exercised his authority as such by inserting prior defamatory matter of a similar character. *R. v. Molléur*, 14 Que. K.B. 556, 12 Can. Cr. Cas. 8.

*Presumption against "proprietor"*—In order to take advantage of this statutory presumption, there must be proof that the accused was the "proprietor" of the newspaper. *R. v. Sellars*, 6 L.N. 197 (Que.).

**Selling books containing defamatory libel.—Sale by servant.—Master exempt unless authorizing.**

**330.** No one commits an offence by selling any book, magazine, pamphlet or other thing, whether forming part of any periodical or not, although the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet or other thing.

2. The sale by a servant of any book, magazine, pamphlet or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter contained therein unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet or other thing contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical.

*Origin*—Sec. 298, Code of 1892.

**Defamatory libel.—When truth a defence.**

**331.** It shall be a defence to an indictment or information for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published, and that the matter itself was true.

*Origin*—Sec. 299, Code of 1892; R.S.C. 1886, ch. 163, sec. 4; 37 Vict., Can., ch. 38, secs. 5 and 6; Libel Act 1843, Imp.

*Plea that true and publication for public benefit*—

To take advantage of this section, it must be pleaded. *R. v. Moylan*, 19 U.C.Q.B. 521; *R. v. Hickson*, 3 Montreal Legal News 139; *R. v. Laurier*, 11 Rev. Legale 184; *R. v. Creighton*, 19 Ont. B. 339.

*Pleas of justification either apart from innuendo or in the sense specified or both*—See Code secs. 910 and 911. The plea must be in writing and must set forth the particular facts by reason of which it was for the public good that such matters should be so published. Code sec. 910, sub-sec. (3). A plea of not guilty may be joined with it. Code sec. 911 (2). Without the plea of justification the truth of the matters is not to be inquired into upon a charge under sec. 334; but if the charge is under sec. 333 for publishing a defamatory libel "knowing the same to be false," evidence that it is true may be given in order to negative the allegation that the accused knew the alleged libel to be false. Sec. 911.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045.

**Extortion by libel.**

**332.** Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding six

hundred dollars, or to both, who publishes or threatens to publish, or offers to abstain from publishing, or offers to prevent the publishing of, a defamatory libel with intent to extort any money, or to induce any person to confer upon or procure for any person any appointment or office of profit or trust, or in consequence of any person having been refused any such money, appointment or office.

*Origin*—Sec. 300, Code of 1892; R.S.C. 1886, ch. 163, sec. 1.

*Blackmail*—Blackmail by obtaining money to refrain from or prevent a libel is covered by this section. If the threat is to bring a false criminal charge and the threat is made with intent to extort or gain, the case will come under sec. 453 or 454, according to the enormity of the suggested crime. A demand either of money or goods, if made with menaces and with intent to steal, is indictable under sec. 452; and, if made in writing, under sec. 451 it is an offence if made without reasonable or probable cause.

*Formalities of indictment*—See secs. 859 and 881, secs. 852, 855.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 478, 748.

*Threats to burn*—See sec. 516, 748.

*Threats of personal injury*—See sec. 748.

#### **Punishment of defamatory libel known to be false.**

**333.** Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding four hundred dollars, or to both, who publishes any defamatory libel knowing the same to be false.

*Origin*—Sec. 301, Code of 1892; R.S.C. 1886, ch. 163, sec. 2.

*"Publishing" defined*—Code sec. 318.

*"Defamatory libel" defined*—Code sec. 317.

*"Knowing the same to be false"*—These words distinguish the offence under sec. 333 from that under sec. 334; and a heavier penalty is made applicable, where the libel was known by the accused to be false at the time he published it.

When the indictment is under sec. 333, evidence of the truth of the matter alleged as libellous is admissible to negative the allegation of knowledge of its falsity, although justification is not pleaded. Code sec. 911.

*Formalities of indictment*—See secs. 859 and 861, secs. 852, 855.

*Finding sureties for good behaviour*—Code sec. 1058 and 1059.

*Venue*—Code secs. 884, 885, 888; R. v. Nicol (1900), 7 B.C.R. 278, 4 Can. Cr. Cas. 1.

*Costs in libel cases*—Code sec. 1045.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045.

*Nolle prosequi by Crown*—See sec. 962.

**Punishment of defamatory libel generally.**

**334.** Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel.

*Origin*—Sec. 302, Code of 1892; R.S.C. 1886, ch. 163, sec. 3.

*Jurisdiction of sessions excluded*—See sec. 583.

*Preliminary enquiry*—It has been held in England that a preliminary enquiry may be proceeded with although the complainant had taken civil action against defendant to restrain similar libels and had already obtained an interim injunction or an undertaking in lieu thereof in the civil action. *Ex parte Edgar*, 77 J.P. 283, 29 Times L.B. 279.

*Formalities of indictment*—See secs. 859, 861 and 852, 855; Code form 64 (h).

An indictment for defamatory libel is good which purports to set out only the tenor and effect of the alleged libel, but in fact sets out the exact words. Such an indictment following the statutory form (Criminal Code, form 64 (h)) need not state that the words were likely to injure the reputations of the persons alleged to be defamed by exposing them to hatred, contempt or ridicule, or that they were designed to insult such persons. *R. v. MacDougall*, 39 N.B.R. 388, 15 Can. Cr. Cas. 466.

If the aggravated offence under sec. 333 is charged, the Code form 64 (h) should be supplemented by including words to charge that the accused knew of the falsity, *ex. gr.* "he, the said A. B. then well knowing the said defamatory libel to be false."

*Plea of justification and of not guilty*—The following form of a plea of justification added to a plea of not guilty is adapted from form 81 of the English Crown Office Rules, 1886:—

"And now, that is to say on the — day of — 190—, before our said Lord the King in the — (court) at — comes the said A. B. (the defendant) by — his solicitor [or in his own proper person], and having heard the said indictment read he says that he is not guilty thereof, and hereupon he puts himself upon the country.

"And for a further plea the said A. B. pursuant to the Criminal Code says that our said Lord the King ought not further to prosecute the said indictment against him because he says that it is true that [here allege the truth of every part of the publication charged as a libel set out in the indictment].

"And the said A. B. further says that before and at the time of the publication in the said indictment mentioned [*here state facts which rendered the publication of benefit to the public*], by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published, and this he the said A. B. is ready to verify.

"Wherefore he prays judgment; and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified."

*Demurrer to indictment*].—The following form of demurrer is adapted from the English Crown Office Rules, 1886, form No. 80:—

"And the said A. B. in his own proper person cometh into court here, and having heard the said indictment read, saith that the said indictment and the matters therein contained, in manner and form as the same above are stated and set forth, are not sufficient in law, and that he the said A. B. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment, in this behalf the said A. B. prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictment specified."

*Joinder in demurrer*].—The following form may be used:—

"And ——— who prosecutes for our said Lord the King in this behalf, saith that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are sufficient in law to compel the said A. B. to answer the same; and the said ——— who prosecutes as aforesaid is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch as the said A. B. hath not answered to the said indictment nor hitherto in any manner denied the same, the said ——— for our said Lord the King prays judgment; and that the said A. B. may be convicted of the premises in the said indictment specified."

[NOTE: If the demurrer is overruled, leave to plead over is granted almost as of course.]

*Verdict*].—On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or

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judge to the jury on the matter in issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do. Code sec. 956. The defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of the Code. Code sec. 956 (2).

*Costs in libel prosecutions*—In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the court, or by action or suit as for an ordinary debt. Sec. 1045. An action for the costs and disbursements will lie though the plaintiff (defendant on the criminal charge) had not asked for a condemnation against defendant (complainant in the criminal charge) therefor at the time of the verdict. The judge who presided at the criminal trial could, even after proceedings in such action, tax such costs and disbursements. *Maekay v. Hughes* (1901), 19 Que. S.C. 367 (Sup. Ct.).

*Change of venue*—Code secs. 884, 885, 888; *R. v. Nicol* (1900), 7 B.C.R. 278, 4 Can. Cr. Cas. 1.

*Comparison of handwriting*—A comparison of style and common forms of expression in the libellous and admitted writings should be by experts or skilled witnesses and, without such evidence, the trial judge should not invite the jury to draw any inference from similarity in style or expressions. *Scott v. Greer* (1886), 14 A.E. 152; *Rex v. Law*, 19 Man. R. 259, 15 Can. Cr. Cas. 382.

When the only evidence of the handwriting of the accused is that of experts, and where the experts called by the prosecutor are contradicted by an equal number of experts called by the defence, and the accused denied the authorship on oath without her credibility being successfully impeached, the jury should be told that the prosecutor had failed to establish that the letters had been written by her. *R. v. Law*, 19 Man. R. 259, 15 Can. Cr. Cas. 382, per Perdue, J.A.; and see to the same effect, *Desroches v. Langlois*, 15 Que. K.B. 388; *R. v. Ranger* (1917), 30 Can. Cr. Cas. 65 (Que.).

As to comparison of handwriting by expert witnesses, see secs. 7 and 8 of the Canada Evidence Act. R.S.C. 1906, ch. 145; *Re Gammell* (1886), 19 N.S.R. 265; Osborn on Questioned Documents; Snowden-Bell on Expert Testimony.

*Proof of animus*—At a trial for criminal libel where the matter complained of was libellous *per se*, the prosecution should not be allowed to give evidence of acts of hostility on the part of the accused towards the prosecutor or his relatives, unconnected with the alleged libel, or that the accused cherished feelings of ill-will towards the prosecutor and was therefore likely to have been the person who published the libel; and, if such evidence has been admitted, although without

objection, the jury, if not discharged, should at least be told that they should give no weight to it. *R. v. Law*, 19 Man. R. 259, 15 Can. Cr. Cas. 382.

*Evidence under commission*—A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. *R. v. Nicol* (1898), 5 Can. Cr. Cas. 31, 8 B.C.R. 276; Code sec. 997.

An order for a commission to take such evidence should not be made before plea. *R. v. Nicol*, *supra*.

*Finding sureties for good behaviour*—The person convicted may be bound over to keep the peace and be of good behaviour (this latter ensuring that the offence will not be repeated) for any term not exceeding two years. Code sec. 1058. A direction to find sureties could be added to the substantive punishment at common law, but the time was not expressly limited as it now is by sec. 1058. At common law any "reasonable time" might be fixed for the recognizance to remain operative; *R. v. Edgar* (1913), 9 Cr. App. R. 13; and the time of imprisonment in default of finding sureties was limited only to the period for which the sureties were to be found. This by sec. 1058 is now fixed at one year or less. The Code will in this respect prevail over the common law. See *Brousseau v. The King*, 56 S.C.R. 22; *R. v. Cole* (1902), 5 Can. Cr. Cas. 330; compare *R. v. Trueman* (1913), 9 Cr. App. R. 45, 82 L.J.K.B. 916, [1913] 3 K.B. 164, 100 L.T. 413, and *R. v. Edgar* (1913) 9 Cr. App. R. 13.

Any alleged breach of the recognizance is to be inquired into upon oath and an opportunity given the accused to show cause against any proposed order to be made on the basis of the recognizance having been broken. See *R. v. Young*, 4 Can. Cr. Cas. 580, 2 O.L.R. 228; *R. v. Siteman*, 6 Can. Cr. Cas. 224.

In Ontario it has been held that the Crown, and not the private prosecutor, has the right to bring up the defendant released upon suspended sentence after conviction for criminal libel. *R. v. Young*, *supra*.

*Fine on conviction of corporation*—Code sec. 1035.

*Suspended sentence*—Code sec. 1081; *R. v. Young*, 2 O.L.R. 228, 4 Can. Cr. Cas. 580.

*Libel of wife by husband, or vice versa*—The principle of the common law is that husband and wife are one person. Lush on Husband and Wife, 3rd ed., p. 3. To that rule there were exceptions in cases of high treason, personal physical injuries by one to the other, and forcible abduction followed by marriage. The unity of husband and wife as regards a criminal prosecution is broken if by statute the one is made a competent and compellable witness against the other; *R. v. Lord Mayor of London*, 55 L.J.M.C. 118, but the libel sections are not included amongst those specified by sec. 4 of the Canada Evidence Act



(sub-sec. 2) in enumerating the cases in which the one shall be competent and compellable against the other.

If there were a statute making the wife a competent but not compellable witness against her husband, it would seem that she might elect to bring a charge, but that no criminal charge could be brought by another for libelling her unless she consented to its being brought. The status of the parties as to a civil action is, of course, controlled by provincial, not federal, laws.

*Abortive trial*.—In a criminal libel action, defendant, in support of his plea of justification, obtained a commission and had the evidence of certain witnesses, out of the jurisdiction, taken, for use at the trial. The evidence was used at the first trial and the jury disagreed. At the second trial the jury again disagreed. At the third trial defendant was acquitted, but the evidence was not used owing to the private prosecutors giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner. It was held, that as the commission evidence was not put in by defendant as part of his case, defendant should be deprived of the costs of it. Held, also, that defendant was not entitled to the costs of the abortive trials. *Rex v. Nichol*, 8 B.C.R. 276, 6 Can. Cr. Cas. 8.

*Defamatory libel*.—See secs. 317-334; 861, 871, 888, 905-934, 947, 956, 1045.

*Criminal information for libel*.—A party seeking a criminal information against another must himself be free from blame, or he will not be granted leave to take that method of procedure, and will be left to his recourse by indictment or action. *R. v. Whelan* (1863), 1 P.E.I. Rep. 223; *R. v. Lawson*, 1 Q.B. 486; *R. v. Biggs*, 2 Man. R. 18.

A party who wants a criminal information must place himself entirely in the hands of the court. If it appear that the party has put himself into communication with the publisher of the libel, for the purpose of retorting; or with the view of obtaining redress, or has in any way himself attempted to procure redress, or take the law into his hands, the remedy by criminal information will be refused. *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 25 (citing *ex parte Beaucherk*, 7 Jur. 373); *R. v. Heustia*, 1 James 101 (N.S.).

A person alive to the vindication of his character when assailed and entitled to the remedy of criminal information must apply with reasonable promptitude. The general rule is stated by Lord Mansfield in *R. v. Robinson* (1765), 1 W.Bl. 542, where he said: "There is no precise number of weeks, months or years; but, if delayed, the delay must be reasonably accounted for. The party complaining must come to the court either during the term; next after the cause of complaint arose, or at so early a period in the second term thereafter as to enable the accused, unless prevented by the accumulation of business in the court, to show cause within the second term; and this, regardless of the fact

whether an assize intervened or not." *R. v. Kelly* (1877), 28 U.C.C.P. 35; *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 24.

It is of the highest importance that the relator should in all cases lay before the court all the circumstances fully and candidly, in order that the court may deal with the matter. *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 25 (citing *R. v. Aunger*, 28 L.T.N.S. 634, 12 Cox C.C. 407).

The granting of a criminal information is discretionary with the court under all circumstances; the application is not to be entertained on light or trivial grounds. In dealing with such an application, the court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the court in granting the rule for a criminal information. *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 29.

There are two things principally to be considered in dealing with such an application: 1. To see whether the person who applies to conduct the prosecution, the relator or the informer, has been himself free from blame, even though it would not justify the defendant in making the accusation; 2. To see whether the offence is of such magnitude that it would be proper for the court to interfere and grant the criminal information. Both these things have to be considered, and the court would not make its process of any value unless they considered them and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, in judging whether there is reason for a criminal information or not. *R. v. Wilkinson* (1877), 41 U.C.Q.B. 1, 29.

"The court always considers an application for a criminal information as a summary extraordinary remedy depending entirely on their discretion, and therefore not only must the evidence itself be of a serious nature, but the prosecutor must apply promptly or must satisfactorily account for any apparent delay. He must also come into court with clean hands, and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the court such legal evidence of the offence having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendants." *R. v. Kelly* (1877), 28 U.C.C.P. 35.

The court confines the granting of criminal informations for libel to the case of persons occupying official or judicial positions, and filling some offices which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature. *Ex parte Freeman-Mitford*, 30 Times L.R. 698; *R. v. Wilson*, 43 U.C.Q.B. 583 (Ont.).

Leave was refused to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come

within the description of persons referred to. Per Armour, J., "I think the practice of granting leave to file criminal informations in this country, having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued and, if necessary, abolished by legislative enactment. The very rule adopted in England, that it will only be granted to what I may call 'a superior person' is the strongest reason, to my mind, why in this country it should never be granted at all. Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior." *R. v. Wilson* (1878), 43 U.C.Q.B. 583. Per Cameron, J.: "There is no real necessity, so far as I am aware, for any one seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging any one who may have libelled him with the offence, and may then by his oath deny the truth of the slanderous charges or imputations." *Ibid.* Hagarty, C.J., added that it was not to be understood that the court laid down any absolute rule as to future applications for criminal informations, or that they meant to fetter their discretion in dealing therewith. *R. v. Wilson* (1878), 43 U.C.Q.B. 583.

Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit on which he moves for a criminal information is bound to answer such charge, otherwise the affidavit will be held insufficient. *R. v. Whelan* (1862), 1 P.E.I. R&P. 220, per Peters, J.

Delay in not applying to the court promptly will, if not satisfactorily accounted for, be ground for refusing the application. *R. v. Kelly* (1877), 28 U.C.C.P. 35.

In answer to an application for a criminal information for libel the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they trusted to be reliable and trustworthy; that the *Globe* newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true, and without malice. This was held to be no ground for the court refusing to the applicant leave to file a criminal information for the reiterated publication in a newspaper of matter not pretended either to be not libellous, or to be true in fact. *B. v. Thompson* (1874), 24 U.C.C.P. 252.

Where there is foundation for a libel, though it falls far short of justification, an information will not be granted. *R. v. Biggs*, 2 Man. R. 18.

Leave to file a criminal information for libel can only be granted by the full court in Nova Scotia, i.e., the provincial Supreme Court, sitting *en banc*; a single judge, although presiding over a court for the disposal of criminal business in a county, has no jurisdiction to grant the leave. *R. v. Burgess*, 23 Can. Cr. Cas. 424, 48 N.S.R. 241, and see *R. v. Beale*, 1 Can. Cr. Cas. 235, 11 Man. R. 448, and *R. v. Labouchere*, 12 Q.B.D. 320, 15 Cox C.C. 415.

*Proceedings for contempt of court in libel concerning pending litigation*—Great care is to be exercised in applying the summary jurisdiction of the court in proceedings for contempt. *Re Whiteside*, *R. v. McInroy* (1915), 9 W.W.R. 846, 32 W.L.R. 764; 25 Can. Cr. Cas. 49; *Guest v. Knowles*, 17 O.L.R. 416; *re North Benfrew Election*, 9 O.L.R. 79; *re Lewis*, 84 O.L.R. 518, 24 Can. Cr. Cas. 364; *re Finance Union*, 11 Times L.R. 165; *R. v. Charlier*, 6 Can. Cr. Cas. 486 (Que.).

In cases of prosecutions for crimes against the king's subjects, the person charged has many rights and safeguards provided by the law, such as the right, in many cases, to a trial by jury, the right, in certain circumstances, to have the place of trial changed, the right to be tried where the act charged or the arrest took place, *R. v. O'Gorman*, 15 Can. Cr. Cas. 175, 18 O.L.R. 427, and, generally speaking, the right to what is understood by "full defence," and it is the court which sees that these rights are accorded. But when the process of summary punishment for contempt, is considered, the position is different. Here the power to award punishment is inherent in the court, not in the judge and jury, but in the court itself, and, being so inherent, it has to be adequate to meet the conditions which call for its exercise. *Fournier v. Attorney-General*, 19 Que. K.B. 431, 17 Can. Cr. Cas. 108, 113.

The person charged not only does not have the right to put forward the testimony of witnesses on his behalf, but is even exposed to have to answer interrogatories. Neither has he the right to a trial by jury. The absolute and far-reaching nature of this power has often been commented upon: *Ex parte Fernandez*, 10 C.B.N.S. 6; *The King v. Davies* [1906] 1 K.B. 32. This inherent power to summarily punish for contempt does not exist for the protection or vindication of the judge who may have been the object of the affront, but it exists to prevent interference with the due course of justice, and to prevent suitors from having their confidence in the court shaken or destroyed. *Folkard*, 7th ed., p. 389. *Stoddart v. Prentice*, 6 B.C.R. 308; *Fournier v. Attorney-General*, 19 Que. K.B. 431.

For a newspaper to insinuate that the Crown prosecutor at a preliminary enquiry before a justice is engaged in persecution and in seeking notoriety, and is taking action in order to earn money, is something which tends to interfere with a fair trial of the criminal charge and is punishable as a contempt of court on motion to the Supreme Court of the province. *Re Whiteside*, *R. v. McInroy* (1916), 9 W.W.R. 846

(Alta.). In that case a fine of \$25 was imposed along with an order for payment of the costs of the application.

The power has been exercised in respect of a scurrilous attack upon the presiding judge, published during the assize. *R. v. Gray* [1900] 2 Q.B. 36; but mere abuse of a judge does not amount to a contempt of court. In *re Bahamas Islands Reference*, [1893] A.C. 138.

The power to punish for contempt is a discretionary power; *McDermott v. The Judges of British Guiana*, 38 L.J.P.C. 1; *Ramsay v. The Queen*, 11 L.C.J., 164; *Fournier v. Attorney-General (Que.)*, 17 Can. Cr. Cas. 108, 19 Que. K.B. 431; *Wallace's case*, L.R. 1 P.C. 283; *re O'Brien (R. v. Howland)*, 16 S.C.R. 216.

A private litigant may apply to the Superior Court for the issue of contempt process to repress some act which, besides being an offence to the court, is an invasion of some private right. In such a case, the proceeding would be civil. *Godfrey v. George* [1896] 1 Q.B. 48; *Fournier v. Attorney-General (Que.)*, 17 Can. Cr. Cas. 108, 19 Que. K.B. 431. In the *Fournier* case, the action of the Superior Court was asked for by the Attorney-General, on the ground that an attack had been made on the court. In such circumstances, the case is to be regarded as being a criminal matter, notwithstanding that the court resorted to is a court of civil jurisdiction. *Fournier v. Attorney-General (Que.)*, 17 Can. Cr. Cas. 108, 19 Que. K.B. 431. *O'Shea v. O'Shea*, 15 P.D. 59; *Lewis v. Owen* [1894] 1 Q.B. 102.

In a criminal matter regard is to be had to the provisions of the criminal law, in determining whether a right of appeal exists or not, and whether, if it exists, it has been regularly exercised or not. *Fournier v. Attorney-General*, *supra*; *Ellis v. The Queen*, 22 S.C.R. 7; *O'Shea v. O'Shea*, L.R. 15 P.D. 59.

The charge should be proved with particularity where criminal proceedings are taken for contempt. *Re Scaife*, 5 B.C.R. 153; and see *re Houston, R. v. Wilkinson*, 41 U.C.Q.B. 42.

A corporation guilty of contempt in publishing comments calculated to prejudice the fair trial may be punished by fine, although the form of the application is for an attachment against the company and its directors. *R. v. Hammond* [1914] 2 K.B. 866.

A writ of attachment for contempt is to be moved for by counsel and not by an applicant appearing in person; *ex parte Liebrand* (1914), W.N. 310, applying *ex parte Fenn* (1833), 2 D.P.C. 527; unless provision has been made to the contrary by rule of court or otherwise. The Crown rules in the particular province will regulate the procedure in applying for a writ of attachment. *R. v. Cook*, 22 Can. Cr. Cas. 211, 14 E.L.R. 123, 15 D.L.R. 501; N.S. Crown Rules, order 25, rule 163; *Austin v. Bertram*, 23 N.S.R. 379. As to a variation of the formal order from the written decision, see *Grant v. Grant*, 36 N.S.R. 547.

## PART VII.

### OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS, AND OFFENCES CONNECTED WITH TRADE.

#### *Interpretation.*

#### **Definitions.**

**335.** In this Part, unless the context otherwise requires.—

- (a) 'act,' for the purposes of the sections relating to offences connected with trade and breaches of contract, includes a default, breach or omission;

*Origin*—Code of 1892, secs. 383, 392, 407, 419, 420, 421, 433, 443, 444, 519; 4 and 5 Edw. VII, ch. 9, sec. 1; 7 and 8 Edw. VII, ch. 18, sec. 5.

- (b) 'Admiralty' means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral;

- (c) 'break' means to break any part, internal or external, of a building, or to open by any means whatever (including lifting, in the case of things kept in their places by their own weight), any door, window, shutter, cellar-flap or other thing intended to cover openings to a building, or to give passage from one part of it to another;

*"Breaking and entering"*—As to burglary and shopbreaking, see Code secs. 460 and 461 (amendment of 1913), housebreaking, secs. 457, 458, 459, 462-464. Entrance obtained by threat, artifice or collusion may be a breaking. Sec. 340, sub-sec. 2.

Further lifting a partly open window has been held not to be a "breaking" within sec. 335 (c). *B. v. Burns*, 7 Can. Cr. Cas. 95, 36 N.S.R. 257. As to entrance by an aperture permanently and necessarily left open in a building, see sec. 340.

- (d) 'covering' includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper; and 'label' includes any band or ticket;

- (e) 'dwelling-house' means a permanent building, the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family or servants, or any of them, although it may at intervals be unoccupied;
- (f) 'document' means any paper, parchment or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material;
- (g) 'every one,' 'vendor,' 'purchaser,' 'merchant,' 'agent,' or 'person,' for the purposes of the sections relating to trading stamps, includes any partnership, or company, or body corporate;
- (h) 'exchequer bill' includes exchequer bonds, notes, debentures and other securities issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province so became a part of Canada;
- (i) 'exchequer bill paper' means any paper provided by the proper authority for the purpose of being used as exchequer bills, exchequer bonds, notes, debentures or other securities issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province became a part of Canada;
- (j) 'false document' means
  - (i) a document, the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the person who purports to make it, is falsely dated as to time or place of making, where either is material, or
  - (ii) a document, the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist, or

- (iii) a document which is made in the name of an existing person, either by that person or by his authority, with the fraudulent intention that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it;

"False document"—See sec. 338 as to external evidence of fraudulent intent, and sec. 466 (2) as to material alteration of a genuine document. Sub-sec. (f) of sec. 335 is declaratory of the common law. *Re Murphy*, 26 Ont. R. 163, 2 Can. Cr. Cas. 562 and 578. As to the offence of forgery, see secs. 466-471.

Signing a deed of land as the wife of the grantor for the purpose of barring dower is forgery, if the woman signing knew that the grantor had a wife living although she did not assume the real wife's Christian name in so doing. The gist of the offence is the signing with the knowledge that it was false and the intent that it should be accepted as genuine. The offence is then complete and it was not necessary to show that any person had actually been prejudiced by it. *United States v. Ford*, 34 W.L.R. 912, (*re Ford*), 26 Can. Cr. Cas. 430, 436; *re Lazier*, 26 A.R. (Ont.) 260.

- (k) 'false name or initials' means, as applied to any goods, any name or initials of a person which
  - (i) are not a trade mark, or part of a trade mark,
  - (ii) are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials,
  - (iii) are either those of a fictitious person or of some person not *bona fide* carrying on business in connection with such goods;
- (l) 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description false in a material respect; and the fact that a trade description is a trade mark,



or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Part;

*Forgery of trade marks and fraudulent marking of merchandise*—  
See secs. 335-337, 341, 342, 486-495, 635, 1039, 1040.

- (m) 'goods,' for the purposes of the sections relating to forgery of trade marks and fraudulent marking of merchandise, means anything which is merchandise or the subject of trade or manufacture;
- (n) 'name' includes any abbreviation of a name;
- (o) 'person,' 'manufacturer,' 'dealer' or 'trader' and 'proprietor,' for the purposes of the sections relating to forgery of trade marks and fraudulent marking of merchandise, include any body of persons, corporate or not corporate;
- (p) 'revenue paper' means any paper provided by the proper authority for the purpose of being used for stamps, licenses or permits, or for any other purpose connected with the public revenue;
- (q) 'seaman' means every person, not being a commissioned, warrant or subordinate officer, who is in or belongs to His Majesty's navy, and is borne on the books of any one of His Majesty's ships in commission, and every person, not being an officer as aforesaid, who, being borne on the books of any hired vessels in His Majesty's service, is by virtue of any Act of Parliament of the United Kingdom for the time being in force for the discipline of the navy, subject to the provisions of such Act;
- (r) 'seaman's property' means any clothes, slops, medals, necessaries or articles usually deemed to be necessaries for sailors on board ship, which belong to any seaman;
- (s) 'trade mark' means a trade mark or industrial design registered in accordance with the Trade Mark and Design Act, and the registration whereof is in force under the provisions of the said Act, and includes

any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of section 103 of the Act of the United Kingdom, known as the Patents, Designs and Trade Marks Act, 1883, are, in accordance with the provisions of the said Act, for the time being applicable;

*"The Patents, Designs and Trade Marks Act," 1883 Imp.]—As to British trade marks see also the Trade Marks Acts of 1888 and 1905, Imp. Registrar v. Du Cros [1913] A.C. 624, 83 L.J. Ch. 1; Sharpe v. Solomon, 84 L.J. Ch. 290; re Imperial Tobacco Co. [1915] 2 Ch. 27, 84 L.J. Ch. 643; re National Cash Register Co., 34 R.P.C. 273 and 354; Imperial Tobacco Co. v. De Pasquali (1918), 87 L.J. Ch. 293.*

- (t) 'trade description' means any description, statement or other indication, direct or indirect,
  - (i) as to the number, quantity, measure, gauge or weight of any goods,
  - (ii) as to the place or country in which any goods are made or produced,
  - (iii) as to the mode of manufacturing or producing any goods,
  - (iv) as to the material of which any goods are composed,
  - (v) as to any goods being the subject of an existing patent, privilege or copyright;
- (u) 'trading stamps' includes, besides trading stamps commonly so-called, any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods or a premium to the purchaser thereof, which is redeemable either
  - (i) by any person other than the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, or
  - (ii) by the vendor, or the person from whom he purchased the goods, or the manufacturer of the

goods, in cash or goods not his property, or not his exclusive property, or

(iii) by the vendor elsewhere than in the premises where such goods are purchased;

or which does not show upon its face the place of its delivery and the merchantable value thereof, or is not redeemable at any time;

*Trading stamp offences*].—See secs. 505-506.

(v) 'watch,' for the purposes of the next succeeding section, means all that portion of a watch which is not the watch case.

2. An offer, printed or marked by the manufacturer upon any wrapper, box or receptacle, in which goods are sold, of a premium or reward for the return of such wrapper, box or receptacle to the manufacturer, is not a trading stamp within the meaning of this Part.

#### Words or marks on watch cases.

**336.** Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no such description, those words or marks shall *prima facie* be deemed to be a description of that country within the meaning of this Part, and the provisions of this Part with respect to goods to which a false description has been applied, and with respect to selling or exposing, or having in possession, for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly.

*Origin*].—Code of 1892, sec. 444; 51 Vict., ch. 41, sec. 11.

*Watch*].—A watch for the purposes of this section means all that portion of a watch which is not the watch-case. Sec. 335 (v).

*Gold and Silver Marking Act*].—For offences indictable under this Act, see R.S.C. 1906, ch. 90, as amended 1907, ch. 17, 1908, ch. 29, 1915, ch. 15; R. v. Avstin (1911), 25 O.L.R. 69, 19 Can. Cr. Cas. 70.

#### What included as a "trade description."

**337.** The use of any figure, word or mark which, according to the custom of the trade, is commonly taken to be an indication

of any of the matters hereinbefore referred to in the interpretation of the expression 'trade description,' is a trade description within the meaning of this Part.

*Origin*—Code of 1892, sec. 443; 51 Vict., ch. 41, sec. 2.

"*Trade description*"—See sec. 335 (t).

**False document.**

**338.** To constitute a false document it is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence.

*Origin*—Code of 1892, sec. 421.

"*False document*"—See definitions in sec. 335, sub-sec. (j) and sub-sec. (f), and sec. 466 (2). As to the offence of forgery, see secs. 466-471.

**Outbuilding, when to be part of dwelling-house.**

**339.** A building occupied with, and within the same curtilage with, any dwelling-house shall be deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication, either immediate or by means of a covered and inclosed passage, leading from the one to the other, but not otherwise.

*Origin*—Code of 1892, sec. 407; R.S.C. 1886, ch. 164, sec. 2.

**Entrance to building defined.—Entering by artifice or breaking.**

**340.** An entrance into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building.

2. Every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, shall be deemed to have broken and entered that building.

*Origin*—Code of 1892, sec. 407; R.S.C. 1886, ch. 164, sec. 2.

*Breaking and entering*—See secs. 335, 339, 340, 455-465.

*Pretended collusion of servant*—The appellant suggested to a servant of the prosecutrix a plan for the commission of a robbery by the appellant at the shop of the prosecutrix. The servant, pretending to

agree to the appellant's suggestion, lent the keys of the shop to the appellant, who made duplicate keys, with one of which, on a day arranged with the servant, the appellant unlocked a padlock attached to the outer door and entered the shop, where he was arrested. The prosecutrix had been informed by the servant of the appellant's plan and knew that he intended to enter the shop on the day in question. The appellant was convicted on an indictment which charged him with having broken and entered the shop with intent to steal therein:—Held, that the conviction was right, notwithstanding that the prosecutrix knew that the appellant had been supplied with the means of breaking and entering by her servant. (*R. v. Johnson* (1841), *Car. & M.* 218, distinguished.) *R. v. Chandler* [1913] 1 K.B. 125, 82 L.J.K.B. 106, 8 Cr. App. R. 82, 23 Cox C.C. 330.

### *Application of Part.*

**As to provisions relating to false trade descriptions.**

**341.** The provisions of this Part respecting the application of a false trade description to goods extend to the application to goods of any such figures, words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

2. The provisions of this Part respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description.

*Origin*—Code of 1892, sec. 443; 51 Vict., Can., ch. 41, sec. 2; 50-51 Vict., Imp., ch. 28.

*Fraudulent marking of merchandise with false trade description*—See Code secs. 335-337, 341, 342, 486-495, 635, 1039, 1040, 1140 (a).

“*False name or initials*” defined—Code sec. 335, sub-sec (k).

**False trade descriptions.—Exceptions.**

**342.** The provisions of this Part with respect to false trade descriptions do not apply to any trade description which, on the twenty-second day of May, in the year one thousand eight hundred and eighty-eight, was lawfully and generally applied to

goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, such provisions shall apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

*Origin*—Code of 1892, sec. 455; 51 Vict., ch. 41, sec. 9; R.S.C. 1886, ch. 166; 50-51 Vict., Imp., ch. 28, sec. 2, sub-sec. (2).

*Trade descriptions "lawfully and generally applied" prior to 1888*—

A trade description is not "lawfully" applied to goods if its use, although not involving the commission of a criminal offence, tended to mislead the public; and a trade description is not "generally" applied, unless it was a conventional term in general use, not only by the persons engaged in the particular trade, but by the public at large. *Lemy v. Watson* [1915] 3 K.B. 731; 84 L.J.K.B. 1999; 13 L.G.R. 1323; 32 R.P.C. 508.

#### **Trading stamps.—Exceptions.**

**343.** The provision of this Part with respect to trading stamps shall not apply to any trading stamp issued by a manufacturer or vendor before the first day of November, one thousand nine hundred and five.

*Origin*—4 and 5 Edw. VII, ch. 9, sec. 2.

*Trading stamp offences*—See secs. 336, sub-sec. (u), 336 (2), 343, 505-508.

#### *Theft Defined.*

#### **Things capable of being stolen.**

**344.** Every inanimate thing whatever which is the property of any person, and which either is or may be made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it: Provided that nothing

growing out of the earth of a value not exceeding twenty-five cents shall, except in cases hereinafter provided, be deemed capable of being stolen.

*Origin*—Sec. 303, Code of 1892.

*"Anything capable of being stolen"*—See secs. 347, 356, 397.

*Offences resembling theft*—See secs. 389-398.

*Stealing water from water works*—Water conveyed in pipes may be the subject of larceny at common law, and where it was deliberately taken from the pipes through which an adjoining property owner got his water supply from the city municipality at a flat rate, after the refusal of permission from such owner and without any permission from the city, the person wrongfully appropriating the water is properly convicted on a charge alleging the theft thereof from the city. *R. v. Hutton* (1911), 24 Can. Cr. Cas. 212, 19 W.L.R. 907 (Alta.); *Ferens v. O'Brien*, 11 Q.B.D. 21, 52 L.J.M.C. 70; *R. v. White*, 1 Dears. C.C. 203, 22 L.J.M.C. 123.

**Living creatures capable of being stolen.—Living creatures wild by nature.**

**345.** All tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen: Provided that tame pigeons shall be capable of being stolen so long only as they are in a dovecot or on their owner's land.

2. All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in Canada, shall, if kept in a state of confinement, be capable of being stolen, not only while they are so confined but after they have escaped from confinement.

3. All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom, but no longer.

4. A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small inclosure, sty or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure.

5. Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen, nor shall the taking of their dead bodies by, or by the orders of, the person who killed them

before they are reduced into actual possession by the owner of the land on which they died, be deemed to be theft.

6. Everything produced by or forming part of any living creature capable of being stolen, shall be capable of being stolen.

*Origin*—Sec. 304, Code of 1892. Compare 63-64 Vict., Imp., ch. 33.

*Theft of animals*—Code sec. 350, as to animals generally; Code secs. 369, 392, 953, as to theft of cattle; Code sec. 370, as to dogs and domestic animals and birds.

*Tame pigeons*—Under the common law, see *B. v. Cheafor* (1851), 2 Den. 361. As to unlawfully killing or injuring tame pigeons where there is no theft, see Code sec. 393.

*Wild animals in captivity*—Under the common law, see *Aplin v. Porritt* [1893] 2 Q.B. 57, and *Harper v. Marcks* [1894] 2 Q.B. 319,

*Breaking into cage with intent to steal animal*—Code sec. 460.

**Oysters in oyster beds or fisheries.**

**346.** Oysters and oyster brood shall be capable of being stolen when in oyster beds, layings, or fisheries which are the property of any person, and sufficiently marked out or known as such property.

*Origin*—Sec. 304, Code of 1892.

*Theft of oysters*—Code sec. 371.

**Theft defined.—Asportation.—Although no attempt to conceal taking.  
—Purpose of taking.**

**347.** Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent,—

- (a) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest; or,
- (b) to pledge the same or deposit it as security; or,
- (c) to part with it under a condition as to its return which the person parting with it may be unable to perform; or,
- (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion.



2. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

4. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting.

*Origin*—Sec. 305, Code of 1892; R.S.C. 1886, ch. 164, sec. 63.

*Statutory theft including larceny and embezzlement*—The commissioners appointed by the English Government in 1884 to draft a Criminal Code proposed to do away with the term larceny and our definition of theft is taken from their draft. Indeed, our Criminal Code is, with some modifications, founded on the English draft Code which was not enacted by their Parliament. It will be seen that while the English idea of theft was particularly associated with the idea of "violent dispossession of the owner's property" the statutory enactments from time to time have been in the direction of accentuating and extending the idea of intention to fraudulently convert to one's use that which rightfully belongs to another. *R. v. Thompson* (1911), 1 W.W.R. 277, 21 Can. Cr. Cas. 80, per Simmons, J.

The Code definition of "theft" (sec. 347) provides that certain acts interfering with the rights of "owners" of property shall be punishable as crimes; but it is the provincial legislatures that have to do with fixing the relationship between individuals that constitute "ownership," at least where the federal Parliament has not assumed to define that term. *R. v. Hassell* [1917] 2 W.W.R. 48, at 50, 17 Can. Cr. Cas. 322 (Man.). The statute 1915 Man. ch. 13 giving a statutory "right" in the crop to the landlord on a crop-sharing lease held not to give the landlord the "ownership" of any specific portion of the crop while it is still undivided. *Ibid*, per Cumberland, County Judge. And see *R. v. Tessier*, 5 Can. Cr. Cas. 73, as to the phrase "special property or interest."

For the purposes of larceny, that man is the owner of goods who, as against the taker, is entitled to the possession of the goods taken. The taker cannot set up *jus tertii* against such an owner, unless the taking was effected with or in the belief that he had the authority of the third person: *Ency. of English Law*, 2nd ed., vol. 8, p. 51. It is quite immaterial for purposes of theft whether the possessor of goods seized larcenously has or has not any real right to them. One thief can steal stolen goods from another: *ibid.*; *Roscoe, Criminal Evidence*, 13th ed., 1908, p. 527.

So where all of the elements of theft exist, the prosecution may be for that offence, although the same facts show an offence under another

Dominion statute, *ex. gr.*, the Indian Act, *R. v. Beboning*, 17 O.L.R. 23, 13 Can. Cr. Cas. 405; Cr. Code sec. 15.

Where hay was taken with intent to steal it, by a person acting as caretaker of an Indian on lands part of an Indian reserve, it was held that a charge of theft was sustainable whether the Indian had a right to possession without a location title under ss. 21, 22 of the Indian Act, R.S.C. 1906, c. 81, or not, or whether the superintendent of Indian Affairs might have prevented the removal of the hay or not. *R. v. Beboning*, 17 O.L.R. 23, 13 Can. Cr. Cas. 405.

*Fraudulently taking or converting with intent*—*Prima facie* a person is supposed to have the mental capacities usual to a person of his years and appearance. If a man found a baby with a roll of bills in its hands and he took them and applied them to his own use, there can be little doubt that he should be deemed guilty of theft. *Dictum per Harvey, C.J.*; in *R. v. Wallace* (1915), 8 W.W.R. 671, 673, 8 Alta. L.R. 472. Similarly, if he took from one whom he knew to be an imbecile and who consequently could have no will to give it to him; but if he thought the person was capable of and had the intention to let him have the money, the criminal intention, or *mens rea*, would be absent and there would be no theft. *R. v. Wallace*, *supra*.

On a charge of theft, when the facts are compatible with an honest mistake on the defendant's part, there must be a direction on intent to steal. *R. v. Sturgess*, 9 Cr. App. R. 120.

Where defendant has sold some of the goods alleged to be stolen by him, it may be necessary to direct the jury on the question whether he intended to account to the owners for the proceeds. *R. v. Sturgess*, 9 Cr. App. R. 120.

The circumstances may negative any intent to steal. *R. v. Ford*, 13 B.C.R. 109, 12 Can. Cr. Cas. 555 (*re* taking money lost at cards under belief that the loser had been cheated); *R. v. Wade*, 11 Cox C.C. 549; *R. v. Lyon*, 29 Ont. B. 497, 2 Can. Cr. Cas. 242; *R. v. Clark*, 3 O.L.R. 176, 5 Can. Cr. Cas. 235.

*Evidence of prior or subsequent acts of accused in proof of intent or guilty knowledge*—There is an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction, the subject-matter of the charge being then investigated, which evidence is admissible where that issue is raised. *Minchin v. The King* [1914] 6 W.W.R. 800, 23 Can. Cr. Cas. 414 (Can.). It has been laid down that to make such evidence admissible there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence. *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478. See *The Queen v. Rhodes* [1899] 1 Q.B. 77, per Lord Russell, C. J., and *R. v. Ellis* [1910] 2 K.B. 746; *R. v. Boyle* [1914] 3 K.B. 339, 10 Cr. App.

R. 180; R. v. West, 12 Cr. App. R. 145; R. v. Mason (1914), 10 Cr. App. R. 160; R. v. Rodley, 9 Cr. App. R. 69; R. v. Wilks (1914), 10 Cr. App. 20; R. v. Mailloux, 3 Pugsley (N.B.), 493; R. v. Hendershott, 26 Ont. R. 678.

Where evidence of "similar acts" is admissible to show intent, the judge should direct the jury on the limits of the use which they may make of such evidence. R. v. Smith (1915), 11 Cr. App. R. 230.

Before an issue can be said to be raised which would permit the introduction of evidence by the prosecution of other criminal acts in proof of intent or guilty knowledge, it must have been raised in substance, if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. Thompson v. Director of Public Prosecutions (1918), 87 L.J.K.B. 478, 484 (H.L.).

"Without colour of right"—The taking must be without colour of right. R. v. Wade, 11 Cox C.C. 549; R. v. Farnborough [1895] 2 Q.B. 484, 64 L.J.M.C. 270. Whether the goods were or were not taken *bona fide* under a claim of right is a question for the consideration of the jury upon a proper instruction upon the law applicable to the particular case. R. v. Farnborough, *supra*; and see R. v. Mallison, 20 Cox C.C. 204; R. v. Thurborn, 1 Den. C.C. 388, 18 L.J.M.C. 140; R. v. Lyon, 2 Can. Cr. Cas. 242; R. v. Johnson, 8 Can. Cr. Cas. 123, 7 O.L.R. 525; R. v. Ripplinger, 14 Can. Cr. Cas. 111; R. v. Comeau (1914), 43 N.B. R. 177, 25 Can. Cr. Cas. 165 (re-possession by conditional vendor).

The fraudulent nature of the dealing is to be the test of whether the wrongful conversion is or is not to be treated as theft. Kelly v. The King [1917] 1 W.W.R. 463, 468, 54 S.C.R. 220, 27 Can. Cr. Cas. 282 (Can.), per Idington, J.; and see same case below, R. v. Kelly [1917] 1 W.W.R. 46, 27 Can. Cr. Cas. 140, 27 Man. R. 105, and R. v. Kelly, 10 W.W.R. 1345, 27 Can. Cr. Cas. 94 (Man.); R. v. Schyffer, 15 B.C.R. 338, 17 Can. Cr. Cas. 191.

"Anything capable of being stolen"—Code secs. 344-346. Where authorities having custody of moneys on behalf of the Crown pay such moneys away to a government contractor with the intention of passing the property, it has been doubted whether the contractor can be held guilty of theft if he took the government cheque on the bank where the money was deposited, under cover of false items in his account connived at by the government authorities. R. v. Kelly [1917] 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282, varying R. v. Kelly [1917] 1 W.W.R. 46, 27 Can. Cr. Cas. 140, 27 Man. R. 105. There would at least be an obtaining of money by false pretences under such circumstances. R. v. Kelly [1917] 1 W.W.R. 46. It is suggested by Idington J., in the last-mentioned case, that the government bank credit, the chose in action, would possibly not be within the phrase "anything capable of being stolen" (Code secs. 344, 347), but that if the accused by reason of his fraudulent acts was not entitled to receive any of the cheques issued to him he had no right to convert the cheques

to his use, and that they remained the property of the Crown and recoverable by the Crown until passed into the hands of the bank without notice. In that view the prosecution might be for theft of the cheques. The case was disposed of on other grounds. It would seem to follow that if the taking of the cheque was theft, the like charge might be laid in respect of the money withdrawn for the benefit of the payee by means of that cheque. Compare *R. v. Dessauer*, 21 U.C.Q.B. 231 (Ont.); *R. v. Moreton* (1913), 8 Cr. App. B. 214, 217, distinguishing *R. v. Gardner*, 25 L.J.M.C. 100, 7 Cox C.C. 136; *R. v. Abbott*, 1 Den. C.C. 273; *R. v. Kenrick*, 12 L.J.M.C.—135, 5 Q.B. 49.

“*Owner*’”—A crop raised by the widow of an intestate on the land belonging to his estate before the taking out of any letters of administration, belongs to her as against a land mortgagee’s right of distress; and persons taking it with her authority are not liable to conviction for theft although they and she may be civilly liable in trespass to the personal representative of the estate under the Devolution of Estates Act, R.S.S. 1909, ch. 43, *R. v. Tchetter* [1918] 1 W.W.R. 934. And see note to sec. 347, *supra*, on statutory theft.

“*Person having any special property or interest*’”—Referring to the phrase “special property or interest” as used in sec. 347, Judge Cumberland said in *R. v. Hassell* [1917] 2 W.W.R. 48, 27 Can. Cr. Cas. 322:

“I think it probably was intended to cover nothing that was not covered by such expressions as ‘special ownership’ and ‘special property’ as used in larceny cases in England. If this is so I take it *possession* is a necessary element of such special property or interest. All the instances of special property that I find in the English authorities were cases of bailees, pawnees, carriers, agisters and such like, where the persons said to have such special property in a chattel were in possession of it, or at least had the right to the immediate possession of it.”

A person who has a right as against the world at large to do with or to any movable thing anything which the law does not specifically forbid him to do with or to it, and the right to prevent all other persons from doing therewith or thereto anything whatever which they are not specifically authorized to do, either by law or by his consent, is said to be the *general owner* of that thing, and that thing is said to be his property, although he may have limited the above-mentioned rights respecting it as regards particular persons by contract. Stephen’s Digest of Crim. Law, art. 280; 2 Austin’s Jurisprudence, 876, 965.

Every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts with the possession under a mistake. *R. v. Vincent*, 2 Den. 464.

Every person who has obtained by any means the possession of any movable thing is deemed to be the special owner thereof, as against any person who cannot show a better title thereto. Stephen's Digest Crim. Law, art. 283.

When one person delivers, or causes to be delivered, to another any movable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as pledge by the person to whom the delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made, shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; and the person to whom it is made is called the bailee. Stephen's Digest of Crim. Law, art. 285; *Coggs v. Bernard*, 1 Sm. L.C. 201; *R. v. Hassall*, L. & C. 58.

The words "special property or interest" are intended to cover cases in which there is a right to possession although no property right. *R. v. Tessier* (1900), 10 Que. Q.B. 45, 5 Can. Cr. Cas. 73; *R. v. Ripplinger*, 14 Can. Cr. Cas. 111 (Sask.); *R. v. Hassell* [1917] 2 W.W.R. 48 (Man.); *Hayden v. Crawford*, 3 U.C.R. (O.S.) 583 (Ont.); *Campbell v. McKinnon*, 14 Man. R. 42; *Robinson v. Lott*, 2 Sask. L.R. 276.

If the property in the goods passes under a document transferring the legal title, although as security only, the fraudulent conversion as against the holder of that legal title does not require to be based on any special property or interest; the charge in that case may be for stealing from such holder as the owner of the goods. *R. v. Ripplinger*, 14 Can. Cr. Cas. 111 (Sask.).

The validity of an alleged chattel mortgage or other document purporting to transfer title may for the purposes of a prosecution for theft or for the purposes of a defence of that prosecution, be attacked in the criminal proceedings. *R. v. Ripplinger*, supra.

A conditional vendee of goods holding possession under a contract reserving title therein to the conditional vendor, has a special property or interest in them. *R. v. Comeau* (1914), *R. v. Comeau*, 43 N.B.R. 177, 25 Can. Cr. Cas. 165.

So has the tutor of a minor appointed under Quebec law in respect of the minor's movable property. *Guillet v. The King* (1904), 12 Can. Cr. Cas. 186.

A sheriff who has seized goods under execution and to whom the debtor has given a bond or undertaking to hold possession for him, has a special property or interest in the goods seized; and the debtor steals the goods if he sells them without the sheriff's authorization. *R. v.*

Hryczink (1915), 8 Sask. L.R. 350, 8 W.W.R. 1169, 24 Can. Cr. Cas. 283; *Dodd v. Vail*, 6 Sask. L.R. 22; *Dodd v. Vail*, 23 W.L.R. 903; *Dixon v. McKay*, 21 Man. R. 762; *R. v. Knight*, 1 Cr. App. R. 186.

But an applicant for a railway freight car under the Manitoba Grain Act, Can., has no "special property or interest" in the car, at least until the notice of assigning the car to him has been received by him. *R. v. McElroy*, 11 Can. Cr. Cas. 34, 6 Terr. L.R. 10.

A crop sharing lease containing no express transfer of title in a share of the growing crop would probably be held to confer on the landlord no property in the share he was to get after the reaping or threshing of the crop until that event had happened. *R. v. Hassell* [1917], 2 W.W.R. 48 (Man.); and this notwithstanding a provincial statute giving the landlord in respect of the share of the crops agreed to be given him, a "right" in priority to the tenant or those claiming under him, which would afford the landlord protection in interpleader with execution creditors of his tenant, but would not enable him to bring replevin for any specific portion of the crop while it remained undivided. *R. v. Hassell*, *supra*; Man. Stat. 1915, ch. 13, sec. 2. If the effect of a statute of that character were that the landlord became a tenant in common of the growing crop, a charge framed on that basis might be sustained under sec. 352 (theft between co-owners). See *R. v. Hassell*, *supra*.

*Sub-sec (2)*—"Begins to cause it to become movable"—To grasp a purse in another's pocket and draw it merely to the edge of the pocket with intent to steal, is theft, although the accused was not successful in getting the purse completely out of the pocket. *R. v. Taylor* [1911] 1 K.B. 674.

*Identity of property stolen with that found in possession of accused*—When a defendant, charged with theft, disputes the identity of property found in his possession with that stolen, there must be a clear direction to the jury on the issue of identity. *Rex v. Bruhin*, 11 Cr. App. R. 276; *Rex v. Buol*, 11 Cr. App. R. 305.

*Theft by clerks and servants*—Code secs. 347, 359.

*Theft by agents or others required to account*—Code secs. 355, 356, 357, 358 (punishment), 348 (exceptions).

*Theft by owner against person having special property or interest*—Code sec. 352.

*Theft by person having special property against owner*—Code sec. 352.

*Unlawful detention of goods by bailee*—A refusal of the borrower to return to the lender the thing borrowed when it should be returned, and setting up a false claim of lien upon it may, if the intention in making such claim was not *bona fide*, amount to theft, although there was no unequivocal act of conversion. *R. v. Wakeman* (1912), 8 Cr. App. R. 18; and see *R. v. Jackson*, 9 Cox C.C. 505; *R. v. Weekes*, 10 Cox C.C. 224; *R. v. Oxenham*, 13 Cox C.C. 349, 46 L.J.M.C. 125.

*Theft by lessee against reversioner*—Code sec. 352.

*Theft by one joint owner against another*—Code sec. 352.

*Theft by one tenant in common against another*—Code sec. 352.

*Theft by one partner against another*—Code sec. 352, and as to mining partners sec. 353.

*Theft by company directors, etc., of company or society*—Code sec. 352.

*Theft as between husband and wife*—Code sec. 354.

*Theft by assisting one spouse to take or convert against the other, fraudulently and without colour of right*—Code sec. 354 (a).

*Theft by knowingly receiving property fraudulently converted by one spouse against the other*—Code sec. 354 (b).

*Theft by trick*—On an indictment for larceny by trick, the jury must be specifically directed on the point whether there was an intention to pass the property. *R. v. Hilliard* (1913), 83 L.J.K.B. 439, 23 Cox C.C. 617, 9 Cr. App. R. 171. There may be an intention to pass the property only on the happening of a certain event. *Oppenheimer v. Fraser* [1907] 2 K.B. 50. In *R. v. Solomon* (1890), 17 Cox C.C. 93, what is known as the purse trick was held not to be larceny by a trick; the determining factor is the state of mind of the person who receives the property. In *R. v. Buckmaster*, 20 Q.B.D. 182, 16 Cox C.C. 339, the prisoner was convicted although the prosecutor admitted that he did not expect to get the same coins back.

Retaining goods sent on the faith of a promise to pay for them on delivery may amount to larceny by a trick. *Rex v. Edmundson*, 8 Cr. App. R. 107.

*Single theft if various takings are in substance the one transaction*—A recent American case states the rule thus: If several different articles have been stolen in substantially the same transaction; if the different asportations are prompted by one design, one purpose, one impulse, they are a single act without regard to time, and the value of the different articles may be aggregated in order to make out a charge of "grand larceny" depending on the total value, although by reason of the small values of each of the articles stolen the larcenies if separate would be petit larceny only. If the larcenies were distinct they cannot be aggregated so as to make the value of the property stolen sufficient to constitute grand larceny where the value of the property taken at any one time was not sufficient for that purpose. *Re Jones* 46 Mont. B. 122, 125; 126 Pac. 929.

The case may be treated as one continuous act of theft, although there were a number of distinct takings. *R. v. Minchin* (1914), 6 W.W.R. 800, 805; *Regina v. Henwood*, 22 L.T.R. 486, 11 Cox C.C. 526; *Rex v. Bleasdale*, 2 Car. & K. 765; *Regina v. Slack*, L.R. 7 Q.B. 408; *Regina v. Balla*, L.R. 1, C.C.R. 328, 40 L.J.M.C. 148.

Evidence that during a defined period of six months a deficiency had occurred equal to the amount by which the accused had falsified

an entry in his employer's books at or about the date at which he is charged with having embezzled this sum, accompanied, as it was, by evidence warranting the inference that the money stolen had reached his hands and had been misappropriated by him, suffices to sustain a conviction for theft of the entire sum (although it may have been taken in numerous small amounts at different times during the period covered by the evidence) without otherwise proving the taking of each or any of such several amounts. *Minchin v. The King* (1914), 6 W.W.R. 800, 23 Can. Cr. Cas. 414, dismissing appeal from *R. v. Minchin* (1913), 5 W.W.R. 1028, 7 Alta. L.R. 148, 22 Can. Cr. Cas. 254.

*Presumption from recent possession*—There is no reason why the prosecution should not give direct evidence of the theft although also relying upon presumptions arising from recent possession. *R. v. McClain* (1915), 7 W.W.R. 1134, 30 W.L.R. 388, 23 Can. Cr. Cas. 488 (Alta.).

As the trial goes on, the burden of proof may be shifted from the prosecutor to the accused by the proof of facts which raise a presumption of his guilt. Thus A. is accused of stealing a five-dollar note. The burden of proof is on the prosecution. He is shown to be in possession of the note soon after the fact. The burden of proof is shifted to A. *R. v. Theriault* (1904), 11 B.C.R. 117, 8 Can. Cr. Cas. 460. A. shows that the note was given him in change for a ten-dollar note. The burden of proof is again shifted to the prosecution. *R. v. Langmead*, 9 Cox C.C. 464; *R. v. Partridge*, 7 C. & P. 551; *R. v. Adams*, 3 C. & P. 600; *R. v. Schama* (1915), 84 L.J.K.B. 396, 11 Cr. App. R. 45 (on an indictment for receiving).

While, under the criminal law, the accused person is not called upon to explain suspicious circumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned. *Rex v. Jenkins*, 14 B.C.R. 61, 14 Can. Cr. Cas. 221.

The burden of giving a reasonable explanation of possession of stolen goods is upon the person in whose possession they are found. *R. v. Langmead* (1864), 9 Cox C.C. 464, L. & C. 427; *R. v. Curnock* (1914), 10 Cr. App. R. 207, 24 Cox C.C. 440; *R. v. Crowhurst* (1844), 1 C. & K. 370; *R. v. Smith* (1845), 2 C. & K. 207; *R. v. Gordon*, 2 Cr. App. R. 285; *R. v. Poolman*, 3 Cr. App. R. 36.

It would seem that the satisfactory account to displace the presumption arising from recent possession may be given either at the time of the finding or later at the trial. *R. v. Schama* (1915), 84 L.J.K.B. 396. While it may be in the interest of the accused to present the reasonable account or explanation at the time of his arrest or on the discovery of the goods by the true owner thereof, there seems no good reason why he should not, if he chooses, reserve his explanation until the trial, when he may be better able to substantiate it by the testimony of others as well as his own; but see contra, *R. v. McKay* (1900), 34 N.S.R. 540, 541.



On a charge of theft of goods from a store, evidence of the finding in prisoner's house of the goods and of keys fitting the store doors, and of the fact that the goods were in the store exposed for sale at the time of the alleged theft and had not been sold, is sufficient to put the onus upon the prisoner of accounting for his possession. Under such circumstances it is not necessary for the Crown to prove that the goods had not passed from the possession of the owners by some means other than sale. *R. v. Theriault*, 11 B.C.R. 117, 8 Can. Cr. Cas. 460.

If the explanation of the accused in a case of recent possession of stolen goods is given on discovery of the goods and it is thought reasonable, there is no presumption and no onus on the prisoner. *R. v. Hagan* (1913), 9 Cr. App. R. 25.

The possession must not be at a time remote from the theft having regard to the nature of the goods; but it may be considered along with other implicating circumstances, such as false statements by the accused and the manner by which he disposed of the goods, where without such implicating circumstances it would not be considered as raising any presumption. See *R. v. Starr*, 40 U.C.Q.B. 268 (Ont.); *R. v. Adams*, 3 C. & P. 600.

*Theft by appropriating lost articles*—The finder of anything lost or mislaid is not to be convicted of theft of the thing unless at the time of the taking or conversion he is shown to have taken or converted it, believing that the owner could be found. *R. v. Carswell* (1916), 26 Can. Cr. Cas. 288, 34 W.L.R. 1042, 10 W.W.R. 1027 at 1037, dictum per Beck, J. (Alta.); *R. v. Moore*, 30 L.J.M.C. 77; *R. v. Shea*, 7 Cox C.C. 147; *R. v. Preston*, 2 Den. C.C. 353. The question for the jury is whether the accused believed he could find the owner. *R. v. Knight*, 12 Cox C.C. 102.

Property left on the desk provided for the use of customers of a bank and not afterwards claimed is not lost within the meaning of the rule giving the finder of lost property title thereto. It is under the protection of the bank and a clerk in its employ who finds it is not entitled to it as against the bank. *Heddl v. Bank of Hamilton* (1912), 2 W.W.R. 560, 17 B.C.R. 306, affirming 19 W.L.R. 897; *Bridges v. Hawkesworth*, 15 Jur. 1079, 21 L.J.Q.B. 75, *South Staffordshire Water Co. v. Sharman*, 65 L.J.Q.B. 460, [1896] 2 Q.B. 44; *McEvoy v. Medina*, 87 American, Dec. 735 and *Kincaid v. Eaton*, 98 Mass. 130.

So a purse left on a stall in a market is stolen by the person who keeps the stall if he appropriates to his own use and denies all knowledge of it on the customer returning to claim it. *R. v. West*, 24 L.J.M.C. 4. Goods left in a passenger train must not be appropriated by the employees of the railway, but turned over to the company's lost property department. *R. v. Pierce*, 6 Cox C.C. 117.

*Theft from an unknown owner*—On a charge of theft it is necessary to prove ownership in some person other than the accused, and though the owner may be a person unknown he must still be individualized

at least by circumstantial description. *R. v. Jennings* (1916), 10 W.W.R. 1049, 34 W.L.R. 1058, 26 Can. Cr. Cas. 270 (Alta.); *R. v. Carswell* (1916), 10 W.W.R. 1027, 26 Can. Cr. Cas. 288, 34 W.L.R. 1042 (Alta.). Property must be proved in somebody at the trial, otherwise the presumption is that the property was in the prisoner by his pleading not guilty to the indictment. *R. v. Carswell*, 10 W.W.R. 1027, 1038, citing *Anonymous case*, 8 Mod. 249. It is only by indicating the owner that it can be established that the taking or conversion was against the will of the owner. *R. v. Jennings*, 10 W.W.R. 1049, 1051 (Alta.); *R. v. Carswell*, 10 W.W.R. 1027 (Alta.).

On a charge of theft if the name of the owner is not known and he is dead or gone, but the stealing is proved, the charge may be laid as stealing from a person unknown. *R. v. Carswell*, 10 W.W.R. 1027 (Alta.), citing *Trainer v. The King*, 4 Com. L.R. 135 (Australia). But if it be not known whether the goods were stolen or not, the difficulty cannot be got over by saying the goods were stolen from a person unknown. *R. v. Carswell*, 10 W.W.R. 1027 (Alta.). The proof of the *corpus delicti* need not always be first in order of time; it may be so connected with the proof of identity of the defendant as being the culprit, that the one point cannot be separated in proof from the other. *Ibid.*

*Bribe distinguished from misappropriated transportation charge*—

If a railway conductor misuses his employer's property for his own benefit, *e.g.*, by taking a bribe for some one's free transportation, he in fact steals the use of the property and sells that; but that is something different from stealing the money. *R. v. Thompson* (1911), 1 W.W.R. 277, 280, 21 Can. Cr. Cas. 80 (Alta.).

And in the case of a railway conductor taking from a passenger a sum much less than the regular fare received as a bribe to allow the passenger to ride without paying his fare, and both given and received without any intention that the money should be paid to the company, it has been held that the conductor is not guilty of theft of the money from the railway company. *R. v. Thompson*, *supra*. The bribe so given and taken was held in the last-mentioned case not to be money received by the conductor "on terms requiring him to account for or pay the same" to the company within the meaning of Code sec. 355. There might, of course, be a prosecution under the statute dealing with secret commissions and benefits (Can. Stat. 1909, ch. 33). *R. v. Thompson* (1911), 1 W.W.R. 277, 21 Can. Cr. Cas. 80 (Alta.); disapproving of majority opinion in *R. v. McLennan*, 10 Can. Cr. Cas. 1, 7 Terr. L.R. 309.

If, on the other hand, the money had been paid and received as a fare, although manifestly less than the correct fare, a charge of theft might be supported in respect of his wilful failure to turn in the amount to the company. *R. v. McLennan* (1905), 7 Terr. L.R. 309, 10 Can. Cr. Cas. 1; *R. v. Sinclair*, 36 O.L.R. 510, 27 Can. Cr. Cas.

327, 10 O.W.N. 119. Failure to issue a conductor's duplex ticket to the passenger paying his fare on the train is some evidence of an intention to retain the money. *R. v. Martin* (1912), 2 W.W.R. 602, 21 W.L.R. 658, 19 Can. Cr. Cas. 376 (Alta.). So also the denial to the railway superintendent that he had received the fare is some evidence of intention to fraudulently convert. *R. v. Martin*, *supra*. If in answer to the failure to account with the particular returns in which the fare should have been included, the real defence raised was a denial of receiving it, this would dispense with the necessity of the prosecution putting in strict proof that the omitted fare had not been accounted for at some other time or at some other place than the time and place when and where the accounting should properly have been made. *R. v. Martin*, *supra*.

The prosecution may be either in the province in which in the usual course the money would be accounted for or in another province in which the money was received from the passenger and in which there was a failure to account when required by his superior in the railway employ. *R. v. Martin*, *supra*; *R. v. Rogers*, 14 Cox C.C. 22; *R. v. Murdoch*, 5 Cox C.C. 360; *R. v. Burdett*, 4 B. & Ald. 95; *R. v. Taylor*, 3 B. & P. 596; *R. v. Sinclair*, (1916) 36 O.L.R. 510, 27 Can. Cr. Cas. 327, 10 O.W.N. 119, per Clute, J. An appeal from the decision in 36 O.L.R. 510, which came up on *certiorari* process instead of by a reserved case or by an appeal by leave on its refusal, was quashed, although leave to appeal had been granted by a judge of the High Court Division under Ont. Crown Rule 1287, permitting an appeal by leave from an order in a *certiorari* matter. *R. v. Sinclair*, 38 O.L.R. 149, 11 O.W.N. 131, 28 Can. Cr. Cas. 350. If it were intended to hold that *certiorari* would not lie in respect of a police magistrate's jurisdiction under Code sec. 777 because the point might have been brought up by a reserved case, the quashing of the appeal in *R. v. Sinclair*, *supra*, is not in accordance with the practice in some of the other provinces. See *R. v. Calvin* [1918] 2 W.W.R. 1039; *R. v. Young Kee* (No. 1) [1917] 2 W.W.R. 442 (and see *R. v. Young Kee* (No. 2), [1917] 2 W.W.R. 654); *R. v. Emery* [1917] 1 W.W.R. 337, 10 Alta. L.R. 139, 27 Can. Cr. Cas. 116; *Dierks v. Altermatt*, [1918] 1 W.W.R. 719 (Alta.). But in New Brunswick *certiorari* has been refused because of the alternative remedy of appeal under Code sec. 1013. *R. v. Limerick*, (1917) 45 N.B.R. 269.

If the conductor has paid over to the company a part of the money received from the passenger although accompanied by a false voucher intended to show that it was received for a shorter transportation, this may be considered a recognition by the conductor that the money belonged to the company. *R. v. Sinclair* (1916), 36 O.L.R. 510, 27 Can. Cr. Cas. 327.

*Attempts*—Code secs. 72, 570, 571, 949, 950.

*Arrest without warrant*—See secs. 386, 646, 648-650.

*Defending movable property under a claim of right*—See secs. 56-58.

*Receiving stolen property*—Code sec. 399 where the theft is indictable; Code sec. 401 where the theft is punishable on summary conviction only.

A charge of theft does not by implication include that of having received the thing stolen, and a prisoner acquitted on indictment for theft cannot, on that account, plead *autrefois acquit* to an indictment for receiving. *R. v. Groulx*, 18 Que. K.B. 118, 15 Can. Cr. Cas. 20; and see Code sec. 399.

*Extradition*—A charge of “grand larceny” in the United States is within the extradition arrangement in effect between Canada and the United States, as a species of larceny or theft. *Re Lewis*, 9 Can. Cr. Cas. 233.

“Embezzlement” and “larceny” are extraditable offences with the U.S.A. Extradition Convention of 1889.

The abandonment of the term “larceny” in Canadian jurisprudence on the enactment of the Criminal Code of Canada subsequent to an extradition convention including such offence, does not affect the liability to extradition of a person charged with what was larceny at common law and is by the Criminal Code still an offence in Canada under the name of “theft” or “stealing.” *Re Gross* (1898), 2 Can. Cr. Cas. 67, 25 A.R. 83 (Ont.).

Offences formerly coming under the term “embezzlement” are designated “theft” under the Code. Secs. 347, 355-357.

**Agent pledging goods.—Servant feeding master's horse, etc., contrary to orders.**

**348.** No factor or agent shall be guilty of theft by pledging or giving a lien on any goods or document of title to goods entrusted to him for the purpose of sale or otherwise, for any sum of money not greater than the amount due to him from his principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange accepted by him for or on account of his principal.


2. Any servant, contrary to the orders of his master, taking from his possession any food for the purpose of giving the same or having the same given to any horse or other animal belonging to or in the possession of his master, shall not, by reason thereof, be guilty of theft.

*Origin*—Sec. 305, Code of 1892; R.S.C. 1886, ch. 164, sec. 63. The second sub-section of sec. 348 is similar to the Imperial statute, 26-27 Vict., ch. 103, sec. 1.

*Misapplication of proceeds of sale*—See secs. 355-359.

*Sales under consignment in British Columbia*—A penalty recoverable on summary conviction is provided for failure to account for sales

under consignment. B.C. Statutes, 1916, ch. 56, secs. 3-10. But it may be doubted whether the enactment is *intra vires*.

*Fraud by consignor against consignee making advances*—See sec. 424. 

*Misapplication of horse-feed supplied to its owner's horses*—The second sub-section, following the Imperial statute to the same effect, abrogates the rule laid down with some dissent in the cases of *R. v. Morfit*, Buss. & Ry. 307, *R. v. Handley*, Carr. & M. 547, and *R. v. Privett*, 1 Den. C.C. 193; *Roscoe Cr. Evid.*, 11th ed., 633.

### 349. (Repealed by Canada Statutes 1909, chap. 9.)

#### Killing animals with intent to steal.

**350.** Every one commits theft and steals the creature killed who kills any living creature capable of being stolen with intent to steal the carcass, skin, plumage or any part of such creature.

*Origin*—Sec. 307, Code of 1892.

*Theft of animals*—Code secs. 345, 350, 369, 370, 953, 989 (cattle brands).

*Fraudulently taking cattle found astray*—Code secs. 392, 953, 989 (cattle brands).

*Cruelty to animals*—See secs. 542-544A.

#### Theft of electricity.

**351.** Every one commits theft who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity.

*Origin*—57-58 Vict., Can., ch. 39, sec. 10; 45-46 Vict., Imp., ch. 56, sec. 23.

*Compensation*—Where a fine was imposed it was held that the conviction was irregular in directing that part of it be paid to the electric company. *R. v. Sperdakes* (1911), 40 N.B.R. 428, 24 Can. Cr. Cas. 210.

#### Theft by co-owner or by owner as against person having special property or interest.

**352.** Theft may be committed by the owner of anything capable of being stolen against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner, or by one of several joint owners, tenants in common, or partners of or in any such thing against the other

persons interested therein, or by the directors, public officers or members of a public company, or body corporate, or of an unincorporated body or society associated together for any lawful purpose, against such public company or body corporate or unincorporated body or society.

*Origin*—Sec. 311, Code of 1892; R.S.C. 1886, ch. 164, sec. 58; 24-25 Vict., Imp., ch. 96, sec. 3.

*Special property or interest in goods*—See secs. 347, 352; R. v. Biplinger, 14 Can. Cr. Cas. 111; R. v. McElroy, 6 Terr. L.R. 10; R. v. Hassell [1917] 2 W.W.R. 48, 27 Can. Cr. Cas. 322 (Man.). See note to sec. 347.

*Punishment*—Code secs. 386, 387.

*Cases under prior law*—R. v. Webster, L. & C. 77; R. v. McDonald, 15 Q.B.D. 323; McIntosh v. The Queen, 23 S.C.R. 180, 5 Can. Cr. Cas. 254; *Ex parte Seitz*, 8 Que. Q.B. 345, 3 Can. Cr. Cas. 57; McIntosh v. The Queen, 23 S.C.R. 180, 5 Can. Cr. Cas. 254; Major v. McCraney, 29 S.C.R. 183, 2 Can. Cr. Cas. 547.

#### **Theft by defrauding partner in mining claim.**

**353.** Every one commits theft who, with intent to defraud his co-partner, co-adventurer, joint tenant or tenant in common, in any mining claim, or in any share or interest in any such claim, secretly keeps back or conceals any gold or silver found in or upon or taken from such claim.

*Origin*—Code of 1892, sec. 312; R.S.C. 1886, ch. 164, sec. 31.

*Theft of minerals*—Code secs. 353, 378, 424, 424A, 637, 866, 893.

#### **Theft as between husband and wife.—Theft while living apart.—**

##### **Theft by assisting spouse.—Receiving property of spouse.**

**354.** During cohabitation no husband or wife shall be convicted of stealing the property of the other, but a husband or wife shall be guilty of theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything which is by law the property of the other in a manner which in any other person would amount to theft.

2. Every one commits theft who, while a husband and wife are living together, knowingly,—

- (a) assists either of them in dealing with anything which is the property of the other in a manner which would amount to theft if they were not married; or,

(b) receives from either of them anything, the property of the other, obtained from that other by such dealing as aforesaid.

*Origin*—Can. Stat., 1913, ch. 13, sec. 15; Code of 1892, sec. 313; Married Woman's Property Act, 1882, Imp.

*Theft on desertion of spouse*—The amendment in 1913 of this section is similar to sec. 12 of the Married Women's Property Act 1882 (Imp.) as regards wife desertion. Whether there is an intention to desert the wife depends on the circumstances of each case and is for the jury. *R. v. Thos. King* (1914), 10 Cr. App. R. 44, 110 L.T. 788.

*Receiving property of spouse*—"Receiving" is ordinarily a separate crime, see Code sec. 399, but this particular species is declared to be theft by the terms of sec. 354.

**Theft by person required to account.—Entry in account.**

**355.** Every one commits theft who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, fraudulently converts the same to his own use, or fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid.

2. If it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of such money or proceeds or any part thereof, in such account, shall be sufficient accounting for the money or proceeds, or part thereof, so entered.

3. In such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place.

*Origin*—Sec. 308, Code of 1892.

*Punishment*—Code sec. 358.

*Restitution order*—Section 358, covering offences under sec. 355, 356 and 357, is excepted from the statutory powers of sec. 1050 of ordering restitution. See sec. 1050 (5).

*"Money or valuable security"*—Code sec. 2, sub-sec. (40), and sec. 4, as to valuable securities.

*"Other thing whatever"*—The "other thing whatever" must, because of the context, mean something of a like nature to money or valuable security. *R. v. Fraser* [1918] 2 W.W.R. 324, 11 Sask. L.R. 209. It is not sufficient to charge the receiving of merchandise on terms requiring the consignee to account for same. *R. v. Fraser, supra*; *R. v. Kimbrough* [1918].

*"On terms requiring him to account for"*—Where money was delivered to an employer carrying on a genuine business as a guarantee of the honesty of persons employed by him, it may be found that it became a loan and that the employer was entitled to use the money; *R. v. Hotine* (1904), 68 J.P. 143; *R. v. Lord* (1905), 69 J.P. 467; and so be distinguishable from a case where the money was entrusted to the deposittee for safe custody only, as in *R. v. Noel* (1914), 10 Cr. App. R. 255.

It is a case falling within the ordinary definition of theft, and not within sec. 355, where the accused was required to deliver a ring or other article in specie. The words "account for" are not appropriate words to describe a delivery in specie, as to which sec. 347 would apply. *R. v. Shyffer or Schyffer*, 17 Can. Cr. Cas. 191; 15 B.C.R. 338; *R. v. Kimbrough* [1918] 2 W.W.R. 892 (Alta.); and see *R. v. Fraser* [1918] 2 W.W.R. 324, 11 Sask. L.R. 209.

Where the proprietor of a taxicab delivers it to a driver for the purpose of his plying with it for hire upon the terms that the driver will hand over to him a certain percentage of the day's takings while retaining the balance for himself, it is competent for the jury to find that, to the extent of the proprietor's share, the fares received by the driver from the public are so received by him for or on account of the proprietor, within sec. 1 of the Larceny Act, 1901, 1 Edw. VII, Imp., ch. 10. *Bex v. Messer* [1913] 2 K.B. 421, 82 L.J. (K.B.) 914, 23 Cox C.C. 59. That Act is, however, of a different phraseology from sec. 355 of the Code, and deals with "property" entrusted, and not merely "money or valuable security" (Code sec. 355). But under the Larceny Act, 1901, Imp., it has also been held that a person may be "entrusted" with property or may "receive" it "for or on account of any other person" although it was not delivered directly to him by the owner and although the owner did not know of his existence and had no intention of entrusting it to him. *R. v. Grubb* [1915] 2 K.B. 683, 84 L.J.K.B. 1744, 11 Cr. App. R. 153.

The "terms" requiring him to account mean the terms on which the accused held the money. They may or may not have been imposed



by the identical person from whom the money was received. *B. v. Unger*, 5 Can. Cr. Cas. 355, 14 C.L.T. 294 (Ont.).

In *B. v. Sinclair* (1916), 36 O.L.R. 510, 10 O.W.N. 119, 27 Can. Cr. Cas. 327, it was held that the conductor having turned in 15 cents although he had received \$5.00, he had thus recognized the latter sum as belonging to the railway company while appropriating all but the 15 cents, and *B. v. McLennan* (1905), 7 Terr. L.R. 309, 2 W.L.R. 227, 10 Can. Cr. Cas. 1, was applied in preference to *B. v. Thompson* (1911), 1 W.W.R. 277, 21 Can. Cr. Cas. 80. In the latter case it was held that money paid as a bribe to a railway conductor to permit a passenger to ride without paying his fare is not money received by the conductor "on terms requiring him to account" to the company, and failure to turn in the money so received would not support a charge of theft; and that it is a question of fact whether the money was paid as a bribe or as a reduced fare. If as a reduced fare, although he may have been forbidden to take a reduced fare, the money was the property of the company and he could be charged with theft on withholding it in his accounting, but if it were paid and received as a bribe, the conductor should have been prosecuted under the Secret Commissions Act, 8-9 Edw. VII, Can., ch. 13. *B. v. Thompson*, *supra*.

There are classes of employment in which the employee is under obligation to turn in to the employer the identical money received, and is given no right to make change or otherwise deal with the cash received. In that event the doctrine of *B. v. Schyffer*, 15 B.C.B. 338, 17 Can. Cr. Cas. 191, would apply, and reliance would not have to be placed on sec. 355, for the conversion of the money fraudulently and without colour of right, with intent to deprive the employer of it, would be "theft" under sec. 347. *B. v. Kimbrough* [1918] 2 W.W.R. 892 (Alta.). And the circumstance that the identical money originally received by the employee had properly been exchanged for other money or securities probably would not prevent the application of sec. 347 to a fraudulent conversion and embezzlement of such other money or security quite apart from the provisions of sec. 355. There may be an overlapping of sections 347 and 355, so that under some circumstances a charge may be laid under either; but if the offence is laid in the terms of sec. 355, the penalty is to be found in sec. 358, and if under sec. 347, charged as a theft by a clerk or servant from his master or employer, the penalty is to be found in sec. 359. Differing theories were advanced in *R. v. MacKay* [1918] 1 W.W.R. 945, 29 Can. Cr. Cas. 194, as to the meaning of the phrase "on terms requiring him to account for or pay the same." Beck, J., said (page 954): "In my opinion this clause by its terms makes it reasonably clear that the person who receives the money, valuable security or other thing is a person who stands in the relation of agent, in the proper sense of the term, to the person to whom he is to pay or account; and not merely a person who by virtue of.

some contract between the two in which both are under mutual obligations, is under an obligation, arising out of that contract, to pay or account. In the latter case, my mind is clear, it is quite inappropriate to say of one of the two contractors that money or property coming to his hands in pursuance of the contract are received by him 'on terms *requiring*' him to account or pay and the money or property, as money or property 'which he was *required*' to account or pay for. The use of the word 'terms,' the expression 'terms *requiring*,' and the word 'required' indicate to my mind something more and something different from a mere obligation arising out of an ordinary contract—something involving a superiority in the person requiring, and a right to require, that is, to direct, arising not out of a contract respecting the particular money or property but out of an already existing legal relationship conferring that superiority. The section appears in exactly the same form as sec. 308 of the Criminal Code as originally passed in 1892, and though marginal notes are, it is said, not properly referred to to assist in interpretation, I nevertheless call attention to the fact that the marginal note to sec. 308 is 'theft by agent' and I am not at all sure that the reason for the rule applied by the courts in England is applicable to statutes passed by the Dominion or provincial legislatures as government bills."

Stuart, J., concurred with Beck, J., that the conviction should be quashed, but did not assent to the interpretation which Beck J., gave to sec. 355. Stuart, J., doubted if the word "requiring" refers to a person at all. In his view it is the terms or conditions of some bargain or contract, not a person, that are said to "require" an accounting (page 950). Harvey, C.J., said, that in the main he agreed with the opinion of Stuart, J., but not in his finding that there was no evidence from which a fraudulent intent could be inferred. Hyndman, J., concurred in quashing the conviction and held that the failure to pay the moneys in question in the case was a mere breach of contract giving rise to a civil action, but not in any sense constituting a "relationship" between the parties as contemplated by sec. 355, i.e., as principal and agent, or trustee, in any sense. In *R. v. Fraser* [1918] 2 W.W.R. 324, 326, 11 Sask. L.R. 209, sec. 355 was considered by Lamont, J.A., who said: "To be guilty of an offence under this section, the accused must have received money or valuable security or other thing on terms requiring him to hand over the thing received, or the proceeds thereof, if he has converted it into money, to some other person, i.e., to some person other than the person from whom he received it, and instead of turning it over he fraudulently converts it to his own use. The gist of the offence is, that he has received something which, in reality, belongs to the person to whom he has to account and to whom he would turn it over if he performed his duty." *R. v. Fraser*, supra.

*Fraudulently converting proceeds of valuable security*—The offence of fraudulent conversion of the proceeds of a valuable security, men-

tioned in this section, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. *E. v. Hogle* (1896), 5 Can. Cr. Cas. 53, 5 Que. Q.B. 59. So where the valuable security in respect of which a charge of fraudulent conversion was laid was received and the terms were agreed to in the district of Iberville, and the person to whom the accused was to account for the proceeds resided in that district, but the accused collected the money in the district of Bedford, proceedings taken in the district of Iberville were held good. *Ibid.*

Agency has been defined in the case of *Pole v. Leask*, 33 L.J., Ch. 155 (H.L.), per Lord Cranworth, thus:—"As to the constitution by a principal of another to act as his agent; no one can become the agent of any person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by will of the employer that an agency can be created. Another proposition to be kept constantly in view is that the burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must show that the agency did exist and that the agent had the authority he assumed to exercise or otherwise that the principal is estopped from disputing it."

As to failure of a broker to sell stocks as directed, see *E. v. Bastien*, 15 Que. K.B. 16, 11 Can. Cr. Cas. 306. An indictment is not bad for including in one count the fraudulent conversion and the fraudulent omission to account for proceeds. *E. v. Cross*, 14 Can. Cr. Cas. 171, 43 N.S.R. 325, *R. v. Weir* (No. 1), 3 Can. Cr. Cas. 102; Code secs. 852-855.

*Embezzlement*].—The term "embezzlement" is not applied to any offence under the Code but the definition of theft is so extended as to cover the offence formerly known as embezzlement. See secs. 344, 347, 348, 352, 353, 355-358. Varying degrees of punishment are provided so that the facts which formerly would have proved embezzlement will, as heretofore, justify a more onerous punishment than is usual for simple theft. See secs. 357, 358, 359, 386, 390.

Embezzlement by a servant was made a felony by 2 Henry VIII, ch. 7, and was limited to such cases as where the article was received by the defendant "for, or in the name" or "on account of the master." Thus a servant could not commit an embezzlement of such things as he received from another servant. The law was amended in 1811 as to appropriation by agents and was made more comprehensive from time

to time and these modifications were codified in the Act of 24 and 25 Vict., (Imp.), ch. 96, secs. 75-79, and the Larceny Act of 1901, Imp.

At common law the offence of larceny or theft could not be established unless a wrongful taking in the first instance was proven. This rule did not cover the case where the person charged has innocently received into his possession the chattel alleged to have been stolen and had subsequently fraudulently converted it to his own use. The statutory offence of larceny by a bailee was created to remedy this defect in the law. Thereafter while it was no longer necessary to prove a wrongful taking it was still necessary to show that the chattel alleged to have been stolen belonged to the person named as the owner in the indictment. Still this enactment did not cover the case where the accused was not expected nor in duty bound to deliver the identical chattel, *e.g.*, the identical coins or notes received over to the owner from whom or on whose account he had received them, but was only bound to account therefor by paying over a similar amount when properly called upon to do so. It was to meet this case, and also to remove a difficulty about possession that the statutory offence of embezzlement was created. *R. v. Thompson* (1911), 1 W.W.R. 277, 21 Can. Cr. Cas. 80, per Stuart, J.

The English Act, 24 and 25 Vict., ch. 96, sec. 68, is confined to the case of persons coming within the narrower meaning of the words "clerk or servant," and the wider case of embezzlement by an agent generally, such as is covered by sec. 355 of our Code, is met by the Larceny Act, Imp. (1901).

*Sales under consignment*!—As to theft of the consigned goods by the bailee, see secs. 347, 348. If the goods themselves or the bill of lading, or other document of title, were merely pledged for advances, this would not be theft unless the pledge were for a greater sum than the consignor owed the consignee who pledged the same including as an indebtedness any outstanding acceptance by bill of exchange upon which the consignee had made himself liable for account of the consignor. Code sec. 348. See also Code sec. 390 (criminal breach of trust) making it an indictable offence for a person who is a trustee of any "property" for the use or benefit, either in whole or in part, of some other person to convert anything of which he is trustee to any use not authorized by the trust, with intent to defraud and in violation of his trust. The maximum penalty for an offence under sec. 390 is less than the maximum under secs. 355, 358 (theft by an agent receiving on terms, etc.), or under sec. 359 (theft by clerk or servant). If the consignment contract makes the consignee, either expressly or impliedly a trustee of the proceeds of sale, there seems no good reason why the prosecution should not be based on 390, if the consignee fraudulently converts the proceeds of sale to his own use.

See as to British Columbia, the provincial statute of 1916, ch. 56, secs. 3-10, and note to Code sec. 348.

An indictment should not be framed under sec. 355 for failure to account for the merchandise consigned; if sec. 355 applies at all, the charge would have to be for failure to account for the cash or other proceeds, being something *ejusdem generis* with money and valuable security. *R. v. Fraser* [1918] 2 W.W.R. 324, 11 Sask. L.R. 209.

So also an indictment does not lie under sec. 355 against a mortgagor for selling goods seized under a distress warrant by the land mortgagee and as to which the mortgagor had given an undertaking to hold the goods as agent and bailee of the mortgagee. *R. v. Kimbrough* [1918] 2 W.W.R. 892 (Alta.). But the offence was theft, although it should have been laid under secs. 347, 386, 387 or secs. 352, 386, 387, and not under sec. 355. Much of the difficulty in reference to sec. 355 may be due to misleading references made to it, as if it were the only section dealing with theft "by an agent," whereas sec. 347 may apply to many cases of agency.

"*Though not requiring him to deliver over in specie*"—In *R. v. Kimbrough* [1918] 2 W.W.R. 892, 30 Can. Cr. Cas. 86 (Alta.), it was said that "though" is here used in the sense of "but"; and the entire phrase quoted above was considered as definitely excluding from, or at least showing an intention not to include within the operation of sec. 355, the cases where the specific article delivered is to be re-delivered by the person receiving it. *R. v. Kimbrough* [1918] 2 W.W.R. 892 (Alta.), doubting *R. v. Fraser* [1918] 2 W.W.R. 324 (Sask.).

*Conversion of proceeds by various acts in different jurisdictions*—

The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in this section, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. *R. v. Hogle* (1896), 5 Que. B. 59, 5 Can. Cr. Cas. 53. So where the valuable security in respect of which a charge of fraudulent conversion was laid was received and the terms were agreed to in the district of Iberville, and the person to whom the accused was to account for the proceeds resided in that district, but the accused collected the money in the district of Bedford, proceedings taken in the district of Iberville were held good. *Ibid.*

*Estoppel from disputing agent's authority*—"No one can become the agent of any person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by will of the employer that an agency can be created. Another proposition

to be kept constantly in view is that the burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must show that the agency did exist and that the agent had the authority he assumed to exercise or otherwise that the principal is estopped from disputing it." *Pole v. Leask*, 33 L.J. Ch. 155; *Low v. Boverie* [1891] 3 Ch. 82, 60 L.J. Ch. 594; *Clark v. Hepworth*, [1918] 1 W.W.R. 147, 55 S.C.R. 614, affirming *Clark v. Hepworth*, [1917] 1 W.W.R. 806 (Alta.); *Alexander v. Enderton*, 5 W.W.R. 1022, 26 W.L.R. 535, 25 Man. R. 82; *Sutherland v. Rhinhart* (1912), 1 W.W.R. 1060, 5 Sask. L.R. 343; *Agnew v. Davis*, 17 W.L.R. 570 (Sask.); *Gowans Kent & Co. v. Assiniboia Club*, 8 Sask. L.R. 344, 9 W.W.R. 936, 33 W.L.R. 266; *Sayward v. Dunsmuir*, 11 B.C.R. 375, 2 W.L.R. 319; *Elk Lumber Co. v. Crow's Nest Pass Coal Co.*, 39 S.C.R. 169, affirming 12 B.C.R. 433.

A person may so act as to estop himself from disputing that an agency existed or the person acting as agent may be estopped by his conduct from denying that he is liable to account to the other. See *Imperial Elevator Co. v. Hillman*, 8 W.W.R. 381, 8 Sask. L.R. 91, 30 W.L.R. 951; *Low v. Boverie*, 60 L.J. Ch. 594, [1891] 3 Ch. 82.

An agent may by his conduct be estopped from setting up the irregularity of his appointment. *Jones v. North Vancouver Land Co.* [1910] A.C. 317, 79 L.J.P.C. 89 (estoppel as to irregularity in appointment of directors).

Moneys or property received by the agent on his principal's behalf must be paid over or transferred to the principal. *Bruce v. James*, 4 W.W.R. 1019, 23 Man. R. 339, 24 W.L.R. 752; *Chambers v. Goldthorpe* [1901] 1 K.B. 624, 70 L.J.K.B. 482.

If the agent is intrusted with money to buy goods, the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the money. *Carter v. Long*, 26 S.C.R. 430.

Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest, though their remuneration may come from the borrower. *Lowenburg v. Wolley*, 25 S.C.R. 51, varying *Wolley v. Lowenburg*, 3 B.C.R. 416; and see *Alexander v. Enderton*, 5 W.W.R. 1022, affirmed, 25 Man. R. 82.

If money is paid to the agent in respect of an illegal transaction, he is bound to pay it over, provided that the contract of agency is not itself illegal. *De Laval Separator Co. v. Walworth* (No. 2), 7 W.L.R. 395, 13 B.C.R. 295. As soon as one party to an illegal gaming contract receives notice from the other that the former declines to abide any longer by the wagering contract, money deposited by him thereupon ceases to be money deposited in the hands of the latter "to abide the event on which any wager shall have been made," and any money still in the latter's hands upappropriated by him becomes money of the former, without any good reason for the latter detaining it; and, in such

circumstances, an action for money had and received to the plaintiff's use will lie. *Donald v. Edwards-Woods Co.*, 4 W.L.R. 128 (Terr.). This notice may be given before as well as after the event to abide which the money has been deposited, has come off; but in the latter case it must be given before the money has been appropriated to the purpose for which it had been deposited, for if appropriated it is no longer money of the plaintiff in the defendant's hands. If it is still unappropriated, the defendant cannot set up the gaming and wagering contract to retain it. *Donald v. Edwards-Woods Co.*, 4 W.L.R. 128, where this doctrine was applied to a deposit made with a broker or agent for gaming transactions on margin, illegal under the Gaming Act, 8-9 Vict., (Imp.), ch. 109, which was held to be in force in the N.-W. Territories; and see *Strachan v. Universal Stock Exchange* [1895] 2 Q.B. 695, 65 L.J.Q.B. 178.

An agent may, upon equitable grounds, be compelled in a civil action to pay over to his principal a secret profit he had made out of the transaction in which he acted as agent. *McLeod v. Higginbotham*, 18 W.L.R. 296 (B.C.), distinguishing *Lister v. Stubbs*, 45 Ch. D. 1, 59 L.J. Ch. 570; *Fry v. Yates*, 6 W.W.R. 746, 28 W.L.R. 23, 19 B.C.B. 355, 17 D.L.R. 485, affirming 4 W.W.R. 1055, 12 D.L.R. 418; *Hutchinson v. Fleming*, 40 S.C.R. 134. But such secret profit would not necessarily be subject to Code sec. 355, as money received "on terms requiring" him to account for it to his principal. But there might be a criminal charge under the Secret Commissions Act, 8-9 Edw. VII, Can., ch. 33. See *R. v. Rabinovitch*, 30 W.L.R. 609, 24 Can. Cr. Cas. 350, 25 Man. R. 341, 23; *R. v. Howes* (1914), 7 W.W.R. 683; *re Buchanan* 26 W.L.R. 447, 22 Can. Cr. Cas. 200.

The acceptance of a secret profit in fraud of the principal will disentitle the agent to his commission. *Hutchinson v. Fleming*, 40 S.C.R. 134; *Manitoba & N.W. Land Corp'n. v. Davidson*, 34 S.C.B. 255, reversing *Davidson v. Manitoba, etc. Corp'n.*, 14 Man. R. 232.

Where an agent has dishonestly committed a breach of duty, a principal is entitled not only to recover any profit received by the agent, but to deprive him of his commission; where, however, the agent has committed a breach of duty as the result of an honest but mistaken notion of his rights, while liable to his principal for any profit received, he is nevertheless entitled to commission. *Complin v. Beggs*, 4 W.W.B. 1081, 24 W.L.B. 871, 24 Man. R. 596; *Hippisley v. Knee Bros.* [1905] 1 K.B. 1, 74 L.J.K.B. 68; *Manitoba & North West Land Corporation v. Davidson*, 43 S.C.B. 255.

A claim for money received cannot in general be made upon a sub-agent who receives it only on account of the agent without any privity or relation to the principal to whose use it is paid. *Ross v. Webb* (1913), 3 W.W.B. 932, affirmed 4 W.W.B. 1122, 23 Man. R. 503.

*Criminal breach of trust*—See sec. 390.

*Theft by clerks or servants*—See sec. 359.

*Theft of proceeds held under direction*—See sec. 357.

*Punishment of theft where value over \$200*—See sec. 357.

*Value of valuable security*—See sec. 4.

*Factor or agent pledging goods for amount due him*—See sec. 348.

*When arrest without warrant is permissible*—See secs. 358, 646, 648-650.

*Extradition*—*Re Deering*, 49 N.S.R. 41, 24 Can. Cr. Cas. 133.

### **Theft by persons holding power of attorney.**

**356.** Every one commits theft who, being entrusted, either solely or jointly with any other person, with any power of attorney for the sale, mortgage, pledge or other disposition of any property, real or personal, whether capable of being stolen or not, fraudulently sells, mortgages, pledges or otherwise disposes of the same or any part thereof, or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was entrusted with such power of attorney.

*Origin*—Sec. 309, Code of 1892, R.S.C. 1886, ch. 164, sec. 62.

*Restitution order*—Sec. 358, covering offences under secs. 355, 356 and 357, is excepted from the statutory powers of sec. 1050 of ordering restitution. See sec. 1050 (5).

*Power of attorney*—The power of attorney must be in writing, and evidence of a verbal power will not bring the accused within the scope of this section. *R. v. Choinard* (1874), 4 Que. Law Rep. 220.

*Theft under power of attorney*—An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property, but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not. *R. v. Fulton* (1900), 5 Can. Cr. Cas. 36; 10 Que. Q.B. 1.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. *R. v. Fulton*, *supra*.

*Punishment*—See sec. 358.



"For some purpose other than that for which he was intrusted with such power of attorney"]—Unless a power of attorney contains express power to exercise it in favour of the attorney, the latter cannot exercise it in favour of himself. The presumption is against the validity of a transfer made under power of attorney to the agent himself, who is the donee of the power, and in equity such a transfer could not be upheld except by evidence of full disclosure, fair consideration and good faith on the part of the donee, the burden of proving which would be upon him. *Re Land Registry Act* and *Shaw*, 8 W.W.R. 1270, 22 B.C.R. 116, 32 W.L.R. 85, per Macdonald, C.J.A., citing *Dunne v. English*, L.R. 18 Eq. 524.

*Principal may not retain benefit fraudulently obtained for him by agent*—

The principal will not be allowed to retain the benefit of a transaction fraudulently obtained by his agent within the general scope of his authority although the principal knew nothing of the fraud. *Woolfson v. Oldfield*, 1 W.W.R. 920, 22 Man. R. 170, 20 W.L.R. 484, 2 D.L.R. 110, affirming 22 Man. R. 159; *Bowles v. Chatfield*, 25 W.L.R. 32; *Canadian Financiers v. Hong Wo*, (1912), 1 W.W.R. 677, 17 B.C.R. 8; *Tonucci v. Livingstone* (1912), 3 W.W.R. 770, 23 W.L.R. 20. When one of two innocent persons must suffer, the person who renders it possible for the wrongdoer to do the wrong, by reason of the trust he reposed in the wrongdoer, must suffer rather than the person who suffers from the agent having that opportunity. The person who, by trusting the agent, makes his fraud possible, is to suffer rather than the person who has no relation to the agent. *The King v. C.P.R.*, 14 Can. Exch. R. 150, at 210, citing *Bocklesby v. Temperance Permanent*, [1895] A.C. 173; and *Fry v. Smellie*, [1912] 3 K.B. 295. The decision in 14 Can. Exch. R. 150 was affirmed on an equal division of the Supreme Court of Canada, *C.P.R. v. The King*, 55 S.C.R. 374.

*Criminal breach of trust*—See sec. 390.

**Misappropriation of proceeds held under direction.—Direction in writing when necessary.**

**357.** Every one commits theft who, having received, either solely or jointly with any other person, any money or valuable security or any power of attorney for the sale of any property, real or personal, with a direction that such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, or such property, shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person such money or proceeds, or any part thereof.

2. When the person receiving such money, security or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply, unless such direction is in writing.

*Origin*—Sec. 310, Code of 1892.

*Punishment*—Code sec. 358.

*Restitution order*—Sec. 358, covering offences under sec. 355, 356 and 357, is excepted from the statutory powers of sec. 1050 of ordering restitution. See sec. 1050 (5).

*“Valuable security”*—See sec. 2, sub-sec. (40) and sec. 4.

*“Property”*—Code sec. 2, sub-sec. (32).

*Theft of fund held under direction*—Sec. 357 covers a class of cases which would not be punishable under sec. 359 as theft by a servant or agent. *R. v. McDonald* (1915), 49 N.S.R. 245, 25 Can. Cr. Cas. 106. The section is a further amplification of the definition in sec. 347 with an express exception intended for the protection of persons whose customary method of dealing with the same customer had by mutual arrangement been to treat the proceeds as a credit on general account from being fixed with criminal liability in so doing in a later transaction with that customer because of an alleged oral direction for applying the fund claimed to have been given by that customer. As to the direction in writing, see *R. v. Christian*, L.R. 2 C.C.R. 94, 12 Cox C.C. 502.

*Criminal breach of trust*—See sec. 390.

### *Punishment of Theft.*

#### **Penalty under last three sections.**

**358.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything by any act or omission amounting to theft under the provisions of the three last preceding sections.

*Origin*—Sec. 320, Code of 1892; C. 1886, ch. 164, sec. 58.

*Restitution orders*—Code sec. 1050 as to restitution of stolen property does not apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for any indictable offence under sec. 358 or 390. See sec. 1050 (5).

*Criminal breach of trust*—Where the offence does not amount to theft but is a criminal breach of trust see sec. 390 as to the punishment.

**Theft by clerk.—Theft by cashier.—Theft by government employee.  
—Theft by municipal employee.**

**359.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals anything belonging to or in the possession of his master or employer; or,
- (b) being a cashier, assistant cashier, manager, officer, clerk or servant of any bank, or savings bank, steals any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects of such bank, or lodged or deposited with any such bank; or,
- (c) being employed in the service of His Majesty, or of the Government of Canada or the government of any province of Canada, or of any municipality, steals anything in his possession by virtue of his employment.

*Origin*—57-58 Vict., Can., ch. 57, sec. 1; Code of 1892, sec. 319; R.S.C. 1886, ch. 164, secs. 51-54, 59.

*Special provision as to indictment*—Code sec. 368.

*Clerk or servant or person employed for the purpose or in the capacity of a clerk or servant*—The test as to whether a person is a "clerk or servant" is: was he under the control of and bound to obey his alleged master? *Hill v. Beckett* [1915] 1 K.B. 582; *R. v. Negus* (1873), L.R. 2 C.C.R. 34, 42 L.J.M.C. 62, 28 L.T. 646, 12 Cox 492; *Ferris v. Irwin*, 10 U.C.C.P. 117; *re Western Coal Co.*, 4 W.W.R. 1238, 7 Alta. L.R. 29, 25 W.L.R. 26; *re Shirleys, Limited*, 10 W.W.R. 919, 9 Sask. L.R. 258, 34 W.L.R. 805; *re Yellowhead Pass Coal & Coke Co.* [1917] 2 W.W.R. 985 (Alta.); *re Morlock & Cline, Ltd.*, 23 O.L.R. 165, 18 O.W.R. 545; *Turner v. Fee* (1904), 24 C.L.T. 402 (Que.); *Cairney v. Back* [1906] 2 K.B. 746, 75 L.J.K.B. 1014; *re Ontario Forge & Bolt Co.*, 27 Ont. R. 230.

Where the accused was employed by the prosecutor to solicit orders and collect moneys, for which he was paid by commission, being at liberty to get orders when and where he pleased, but to be exclusively in the employ of the prosecutor and to give his whole time to the prosecutor's service, it was held that he was the "servant" of the prosecutor. *R. v. Bailey* (1871), 12 Cox 56.

Where a director of a joint stock company was employed at a salary to superintend its business and collect moneys due to the com-

pany, he is a servant of the company. *R. v. Stuart* [1894] 1 Q.B. 310, 17 Cox C.C. 723, 63 L.J.M.C. 63.

And a company secretary would be a servant of the company if he personally performed the duties of that position instead of delegating the work. *Cairney v. Back* [1906] 2 K.B. 746, 75 L.J.K.B. 1014.

A person employed by the prosecutors as their agent for the sale of coal on commission and to collect money in connection with his orders, but who was at liberty to dispose of his time as he thought best and to get or abstain from getting orders as he might choose was held not to be a "clerk" or "servant." *R. v. Bowers* (1866), L.R. 1 C.C.R. 41, 10 Cox C.C. 250.

Where the accused was a collector and accountant carrying on an independent business, and was employed by the prosecutors to collect certain accounts for them on commission, and he was to pay over the net proceeds as the collections were made, but time and mode of collecting were left to the discretion of the collector, it was held that he was not a "clerk" or "servant" of the prosecutors. *R. v. Hall* (1875), 13 Cox C.C. 49.

The accused, not having been in the employ of the prosecutor, was sent by him to one M. with a horse, as to which M. and the prosecutor, who owned the horse, had some negotiations, with an order to M. to give the bearer a cheque if the horse suited. Owing to a difference in the price the horse was not taken, and the accused brought it back. Shortly afterwards the accused, without any authority from the prosecutor, took the horse to M. and sold it as his own property or professing to have the right to dispose of it, and received the money. It was held the money was not received by the accused as clerk or servant of the prosecutor, and a conviction for embezzlement was set aside. *R. v. Topple*, 3 Russell & Chea. 566 (N.S.).

The relationship of servant or clerk, etc., is essential to this offence and should be proved by the prosecution with proper evidence. If the contract of hiring was in writing, and the writing is still in existence, it should be produced. *R. v. Taylor* (1867), 10 Cox C.C. 544. The prisoner's answer to the charge may be that by the terms of the hiring he was entitled to retain money received by him for the firm to be spent for the firm's purposes, and in that case it is essential that the written contract should be produced if the firm have it. *R. v. Dobson*, 33 L.J. (Eng.) 547.

A false account or false entries of the expenditure of money will afford evidence from which a jury may say that a clerk who had money entrusted to him by his master has been guilty of embezzling it, just as much as not accounting for money received from others for the master will, if the receipt of it or the like be denied, afford evidence from which to infer embezzlement. *R. v. Cummings* (1858), 16 U.C.Q.B. 16, 31; *R. v. Glass* (1877), *Ramsay's Cases* (Que.) 186, 1 L.N. 141 (Que.).

It has, however, been held that a company manager is not a "clerk or other person in or having been in the employ of the company" within the meaning of the Winding-Up Act so as to have a preferential claim for his salary under that Act, R.S.C. 1906, ch. 144, sec. 70. *Girard v. Gariépy*, 49 Que. S.C. 284, 17 Qua. P.R. 396; *re Ritchie-Hearn Co.*, 6 O.W.R. 474; *re Shirleys Limited* (1916), 10 W.W.R. 919, 921, 9 Sask. L.R. 258, 34 W.L.R. 805; *re American Tire Co.*, 2 O.W.R. 29; *re Ontario Forge Co.*, 27 Ont. R. 230; *White Star Hotel Co. v. Turgeon*, 17 Que. P.R. 299; *re Newspaper Proprietary Syndicate* [1900] 2 Ch. 349; 69 L.J. Ch. 578. But under a statute giving a preference for wages or salary of "all persons in the employ" of the company, the manager would be entitled to claim the preference. *Hives v. Imperial Canadian Trust Co.* (1916), 10 W.W.R. 596, 9 Sask. L.R. 248, 34 W.L.R. 433.

*Theft by municipal employee*—If the money were received by virtue of his employment, it would make no difference to this offence that the municipality was not the owner; *R. v. Tessier* (1900), 10 Que. Q.B. 45, 5 Can. Cr. Cas. 73; but the ownership should be alleged and proved. If a charge were laid in respect of money collected by a city official on the pretence that it was payable to the city when such was not the case, and he was not authorized to ask for it, it should, it seems, be laid as for obtaining money on false pretenses and not under sec. 359, as the money would not have been received "by virtue of his employment." See *R. v. Tessier*, *supra*.

*Joinder of counts for several thefts*—Code secs. 856, 857.

*Evidence of similar criminal acts where issue of intent is raised*—Proof cannot be made of another crime committed by an accused in order to show that he is really capable, from his character, of committing that of which he is charged. Such proof would be unjust and illegal for it does not follow that having committed a crime under certain circumstances he would also have committed that of which he is charged. But there are exceptions to this rule. If by his plan of defence the accused wishes to throw upon another person the crime of which he is charged, if the irregularities charged against an accused are of the same nature as the principal act imputed to him, if they have been committed very nearly at the same time in the same place and to the detriment of the same person, these irregularities are so connected to the principal charge that they become incorporated with it and may legally be proved. *Rivet v. The King* (1915), 24 Que. K.B. 539, 25 Can. Cr. Cas. 235; *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478, affirming *R. v. Thompson*, 86 L.J.K.B. 1321; *Makin v. Attorney-General of New South Wales* [1891] A. C. 57, 63 L.J.P.C. 41; But it is so difficult to establish the true line of demarcation between legal and illegal evidence in these cases that it will be excluded in a case of doubt. *Rivet v. The King* (1915), 24 Que. K.B. 539.

Compare *Brunet v. The King*, (1918) 57 S.C.R. 83, 30 Can. Cr. Cas. 16; *R. v. Crippen*, 27 Times L.R. 69.

See also *R. v. Geering*, 18 L.J.M.C. 215; *R. v. Hesson*, 14 Cox C.C. 40; *R. v. Sternaman*, 27 Ont. R. 33, 1 Can. Cr. Cas. 1; *R. v. Wilks* (1914), 10 Cr. App. R. 16; *R. v. Boyle*, 10 Cr. App. R. 180; *R. v. Ellis* [1910] 2 K.B. 746; *R. v. Rhodes* [1899] 1 Q.B. 77; *R. v. Mason* (1914), 10 Cr. App. R. 169; *R. v. Komiansky*, 12 Que. K.B. 463, 7 Can. Cr. Cas. 27.

There is an essential difference between evidence tending to show generally that the accused has a fraudulent or dishonest mind, which evidence is not admissible, and evidence tending to show that he had a fraudulent or dishonest mind in the particular transaction, the subject-matter of the charge being then investigated, which evidence is admissible. It has been laid down that to make such evidence admissible there must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give evidence. *R. v. Rhodes* [1899] 1 Q.B. 77, per Lord Russell, C.J., and *R. v. Ellis* [1910] 2 K.B. 746. In the more recent case of *R. v. Mason* (1914), 10 Cr. App. R. 169, the Court of Criminal Appeal (Eng.) followed the decision in *R. v. Rhodes*, and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible in order to rebut the defence set up. And see *R. v. Boyle*, 10 Cr. App. R. 180, at 193.

*Cross-examination as to prior convictions for any offence*—When the accused becomes a witness on his own behalf (Can. Evidence Act, sec. 4) he may be cross-examined as to whether he has been convicted of any offence (Can. Evidence Act, sec. 12) even though the conviction is altogether irrelevant to the matter in issue, the inquiry being relevant as affecting the credibility of the accused. *R. v. Mulvihill*, 22 Can. Cr. Cas. 354, 5 W.W.R. 1229, 19 B.C.R. 197, and see *Mulvihill v. The King*, 6 W.W.R. 462, 49 Can. S.C.R. 587, 23 Can. Cr. Cas. 194. And in case of denial or refusal to answer, the conviction may be proved by the prosecution. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 12.

The limits of relevancy must be less tightly drawn upon cross-examination than upon direct examination. The introduction upon cross-examination of the issue of the witness's credibility necessarily enlarges the field. But it does not follow that all barriers are therefore thrown down. That which is clearly irrelevant to this issue or to the issues raised in the case is no more admissible in cross-examination than in examination in chief. *Brownell v. Brownell* (1909), 42 Can. S.C.R. 368, 374.

If in cross-examination the accused answers a question not relating to the issue nor to his credibility, the prosecution cannot raise a question of credibility by calling evidence to contradict such answer. *R. v. Lapierre*, 1 Can. Cr. Cas. 413.

The principles of the laws of evidence are the same, whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a

party to a civil action; per Lord Reading, C.J., in *Christie's Case* (1914), 10 Cr. App. B. 141.

*Director or manager falsifying company's books*—Code sec. 413.

*Refusal of municipal employee to deliver up municipal property*—Code secs. 391, 868.

*Refusal of government employee to deliver up government property*—Code secs. 391, 868.

#### **Theft by tenants and lodgers.**

**360.** Every one who steals any chattel or fixture let to be used by him in or with any house or lodging is guilty of an indictable offence and liable to two years' imprisonment, and, if the value of such chattel or fixture exceeds the sum of twenty-five dollars, to four years' imprisonment.

*Origin*—Sec. 322, Code of 1892; R.S.C. 1886, ch. 164, sec. 57.

*Formalities of indictment*—See sec. 848.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*Malicious injury*—Code secs. 509, 510, 529 (by tenant or mortgagor), 530 (fences); 533-535 (trees and crops).

#### **Theft of testamentary instruments.**

**361.** Every one is guilty of an indictable offence and liable to imprisonment for life who, either during the life of the testator or after his death, steals the whole or any part of a testamentary instrument, whether the same relates to real or personal property, or to both.

*Origin*—Sec. 323, Code of 1892; R.S.C. 1886, ch. 164, sec. 14.

*"Testamentary instrument"*—Code sec. 2, sub-sec. (37).

*Fraudulently destroying or concealing testamentary instrument*—Code sec. 396.

#### **Theft of documents of title to lands or goods.**

**362.** Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any document of title to lands or goods.

*Origin*—Sec. 324, Code of 1892; R.S.C. 1886, ch. 164, sec. 13.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*"Document of title"*—Code sec. 2, sub-secs. (11) and (12).

*Destroying documents of title*—See sec. 396.

**Theft of judicial or official documents.**

**363.** Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever of or belonging to any court of justice, or relating to any cause or matter begun, depending or terminated in any such court, or of any original document in any wise relating to the business of any office or employment under His Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office.

*Origin*—Sec. 325, Code of 1892; R.S.C. 1886, ch. 164, sec. 15.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*Fraudulently destroying or concealing official documents*—Code sec. 396.

**Theft of post letters, etc., from the mail.**

**364.** Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than three years, who steals,—

- (a) a post letter bag; or,
- (b) a post letter from a post letter bag or from any post office, or from any officer or person employed in any business of the post office of Canada, or from a mail; or,
- (c) a post letter containing any chattel, money or valuable security; or,
- (d) any chattel, money or valuable security from or out of a post letter.

*Origin*—Sec. 326, Code of 1892; R.S.C. 1886, ch. 35, secs. 79, 80, 81.

*Theft of post letters*—A charge of theft of a registered mail package by a post-office employee is not to be laid as for three separate thefts, because there were three separate letters in the package, if they were all wrapped and tied together in a "letter bill" of the post-office department when the employee appropriated the lot. *R. v. Pope* (1914), 5 W.W.R. 1070, 7 Alta. L.R. 169, 22 W.L.R. 659, 22 Can. Cr. Cas. 327.

A letter delivered to a letter carrier, even in the post-office, will



be considered a "post letter" and a person stealing it may be indicted under sec. 364 of the Criminal Code. *R. v. Trepanier*, 10 Que. K.B. 222, 4 Can. Cr. Cas. 259.

"Post letter"; "post letter bag"]—See Code sec. 6; Post-office Act, R.S.C. 1906, ch. 66. A decoy letter is included. *Mayer v. Vaughan*, 11 Que. K.B. 340; *R. v. Ryan*, 9 O.L.R. 137.

*Receiving*—Code sec. 400.

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510D, 516, 538, 867, 869, and the Post-office Act, R.S.C. 1906, ch. 66.

*Place of offence*—Code sec. 584 (a).

#### **Theft of post letters not within sec. 364.—Parcel post.—Lock boxes.**

**365.** Every one is guilty of an indictable offence and liable to imprisonment for any term not exceeding seven years, and not less than three years, who steals,—

- (a) any post letter, other than post letters referred to in the last preceding section;
- (b) any parcel sent by parcel post, or any article contained in any such parcel; or,
- (c) any key suited to any lock adopted for use by the Post Office Department, and in use on any Canada mail or mail bag.

*Origin*—Sec. 327, Code of 1892; R.S.C. 1886, ch. 35, secs. 79, 83, 88.

"Post letter"]—Post-office Act, R.S.C. 1906, ch. 66, sec. 2; Code sec. 6.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510D, 516, 538, 867, 869, and the Post-office Act, R.S.C. 1906, ch. 66.

*Place of offence*—Code sec. 584 (c).

#### **Stealing mailable matter.**

**366.** Every one is guilty of an indictable offence and liable to five years' imprisonment who steals any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter, other than a post letter, sent by mail.

*Origin*—Sec. 328, Code of 1892; R.S.C. 1886, ch. 35, sec. 90.

"Post card"]—Code sec. 3.

*Sent by mail*—Post-office Act, R.S.C. 1906, ch. 66; Code sec. 6.

*Second offences*—See secs. 465, 963 and 964.

*Receiving stolen mail matter*—Code sec. 400.

*Wilful damage to mailable matter*—Code sec. 510d, sub-sec. (d).

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510d, 516, 538, 867, 869, and the Post-office Act, R.S.C. 1906, ch. 66.

*Place of offence*—Code sec. 584 (c).

#### **Theft of election documents.**

**367.** Every one is guilty of an indictable offence and liable to a fine in the discretion of the court, or to seven years' imprisonment, or to both fine and imprisonment, who steals, or unlawfully takes from any person having the lawful custody thereof, or from its lawful place of deposit for the time being, any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, ballot, or any document or paper made, prepared or drawn out according to or for the requirements of any law in regard to Dominion, provincial, municipal or civic elections.

*Origin*—Sec. 329, Code of 1892; R.S.C. 1886, ch. 8, sec. 102; R.S.C. 1886, ch. 164, sec. 56.

*Destroying election records*—See sec. 528.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*Offences under election laws*—See the Dominion Elections Act, R.S.C. 1906, ch. 6 and amendments, and the Elections Acts of the various provinces.

#### **Theft of railway tickets.**

**368.** Every one is guilty of an indictable offence and liable to two years' imprisonment who steals any tramway, railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamboat or other vessel.

*Origin*—Sec. 330, Code of 1892; R.S.C. 1886, ch. 8, sec. 102, ch. 164, sec. 56.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*Obtaining transportation by false ticket*—Code sec. 412.

#### **Cattle stealing.**

**369.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle.

*Origin*—Sec. 331, Code of 1892; R.S.C. 1886, ch. 164, secs. 7, 8.

*"Cattle"*—Code sec. 2, sub-sec. (5).

*Statutory onus as to cattle brands*—When a person is charged with theft of cattle (or with an offence under paragraph (a) or paragraph (b) of sec. 392) respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval.

Code sec. 989, as to cattle brands, is intended specially for the protection of cattle owners in ranching districts where cattle run at large, and to prevent the appropriation and re-branding of stray cattle by other ranchers. Where the evidence shows that the accused stockman appropriated and re-branded with his own brand a stray three-year-old steer on which appeared the brand of another rancher, and turned the stray steer into his own herd on his home range, there is such proof of possession of the animal as throws upon the accused the onus under Code sec. 989 of proving on a charge of stealing the steer that the same came into his possession lawfully. *R. v. Dubois*, 15 Can. Cr. Cas. 485, 15 W.L.R. 238 (Alta.).

*Cattle brands as evidence*—Code sec. 989.

Even prior to the statute now embodied in Code sec. 989 it was held that the production of a steer's hide with the prosecutor's brand and earmarks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, justified a finding that the steer in question was the property of the prosecutor. *R. v. Forsythe*, 4 Terr. L.R. 398, 5 Can. Cr. Cas. 475; approved in *Zeats v. Johnston* (1910), 3 Sask. L.R. 364 (Sask.).

Where the prisoner was charged with the theft of certain cattle, the brands upon which had been obliterated, it was held that evidence that the brands upon other cattle had been similarly obliterated and that the prisoner had in his possession branding irons adapted to causing an obliteration of the character found, was admissible. *R. v. Collyns*, 3 Terr. L.R. 82, 4 Can. Cr. Cas. 572.

*Summary trial under Territories Act*—*R. v. Pachal*, 4 Terr. L.R. 10, 5 Can. Cr. Cas. 34.

*Verdict for lesser offence*—On a charge of cattle stealing a verdict may be given for the lesser offence of fraudulently refusing to deliver up strayed cattle (sec. 392), if the evidence warrants the latter offence. Code sec. 953.

*Fraudulently defacing cattle-brand*—Code sec. 392.

*Malicious damage to cattle*—Code secs. 510 (b), 536.

*Open wells laws*—In Saskatchewan a provincial statute prohibits the keeping of open wells and other things dangerous to live stock left un-

protected so as to be likely to damage stray live stock. R.S.S., ch. 124; *Baldrye v. Fenton*, 6 W.W.R. 1441, 29 W.L.R. 258 (Sask.); *Hill v. Mallach* [1918] 1 W.W.R. 10 (Sask.).

*Progeny of animals*—See note to Code sec. 392.

**Theft of dogs, birds, beasts and other animals.**

**370.** Every one who steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, or for any lawful purpose of profit or advantage, is, if the value of the property stolen exceeds twenty dollars, guilty of an indictable offence and liable to a penalty not exceeding fifty dollars over and above the value of the property stolen, or to two years' imprisonment, or to both, and if the value of the property stolen does not exceed twenty dollars, is guilty of an offence and liable upon summary conviction to a penalty not exceeding twenty dollars over and above such value, or to one month's imprisonment with hard labour.

2. Every one who, having been previously convicted of an offence under this section, is summarily convicted of another offence thereunder, is liable to three months' imprisonment with hard labour.

*Origin*—Sec. 332, Code of 1892; 63-64 Vict., Can., ch. 46, sec. 3;

*Value as affecting jurisdiction*—For the offence of stealing domestic fowl, the limit of imprisonment is two years on indictment under Code sec. 370 if the value of the fowl is over \$20 and one month's imprisonment on summary conviction if the value is less than \$20; consequently a conviction under the Speedy Trials clauses with a sentence exceeding two years must be set aside as unauthorized either by the Code or at common law if the record does not disclose the value. Although at common law the theft was punishable with more than two years' imprisonment on indictment without regard to the value, Code sec. 370 has the effect of limiting the punishment where the value is over \$20 to two years' imprisonment, and a greater punishment on indictment could only be supported, if at all, on its appearing that the value was less than \$20 and, semble, in the latter case the court in passing sentence should have regard to the limit of imprisonment which might have been imposed on summary conviction. *R. v. Williams*, 16 Can. Cr. Cas. 482, 21 O.L.R. 467. The punishment for receiving a stolen domestic animal is similarly affected under Code sec. 401, *R. v. Frizell*, 5 O.W.N. 801, 25 O.W.R. 697, 22 Can. Cr. Cas. 214.

*Summary conviction if value does not exceed \$20*—See sec. 729, as to paying the damages to person aggrieved in first offences.

*Summary convictions in case of joint offenders*—See sec. 728.

*Second offence on indictment*—See secs. 465, 851, 963, 964 and 982.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 851, 963, 982, 1053, 1081.

*Wilful injury of dog, domestic bird, etc.; killing or poisoning*—Code sec. 537.

*Breaking and entering cage, etc., to steal*—Code sec. 460.

**Stealing oysters.—Using dredge or other means to take oysters.—Exception.**

**371.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals oysters or oyster brood.

2. Every one is guilty of an indictable offence and liable to three months' imprisonment who unlawfully and wilfully uses any dredge or net, instrument or engine whatsoever, for the purpose of taking oysters or oyster brood, within the limits of any oyster bed, laying or fishery the property of any other person, and sufficiently marked out or known as such, although none are actually taken, or unlawfully and wilfully with any net, instrument or engine, drags upon the ground of any such bed, laying or fishery.

3. Nothing in this section applies to any person fishing for or catching any swimming fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking swimming fish only.

*Origin*—Sec. 334, Code of 1892; R.S.C. 1886, ch. 164, sec. 10.

*"Unlawfully and wilfully"*—Compare the sections of Part VIII dealing with wilful destruction of property, sec. 509 *et seq.*

*Indictment*—The oyster bed may be described by name or otherwise without stating it to be in a particular county; sec. 864, sub-sec. (e); and as to description of the offence, see secs. 852-860, 864.

*Second offences*—See secs. 465, 851, 963, 964, 982.

**Stealing things fixed to buildings or in land.**

**372.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed

in any land, being private property, for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground.

*Origin*—Sec. 335, Code of 1892; R.S.C. 1886, ch. 164, sec. 17.

*Dwelling-house*—Code sec. 335 (e).

*Stealing fixtures or material affixed to building*—The offence may be committed by the tenant in fraudulently making demolition of and appropriating fixtures or material not requiring repair, although he was under a general covenant to do repairs. *R. v. Richards* [1911] 1 K.B. 260; *R. v. Munday*, 2 Leach C.C. 850.

The evidence of a house agent that he managed the property for a non-resident and collected the rents for him is sufficient evidence of the ownership of such non-resident in proving an offence under this section. *R. v. Brummitt* (1861), L. & C. 9.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*Wilful demolition or severance of fixtures by tenant*—Code sec. 529.

**Theft of trees, etc., of the value of twenty-five dollars.—Or of the value of five dollars in certain cases.**

**373.** Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the whole or any part of any tree, sapling or shrub, or any underwood, the thing stolen being of the value of twenty-five dollars, or of the value of five dollars if the thing stolen grows in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house.

*Origin*—Sec. 336, Code of 1892; R.S.C. 1886, ch. 168, sec. 18.

*Summary conviction in cases of lesser value*—Code sec. 374, 395. If the value is less than the amount specified in sec. 373, the offence is not indictable (except for a third or subsequent offence), but is to be punished on summary conviction under sec. 374. *R. v. Beauvais*, 7 Can. Cr. Cas. 494; *R. v. Dugas, ex parte Legere* (1915), 43 N.B.R. 357, 24 Can. Cr. Cas. 377.

*Summary trial*—If the value of the trees stolen from a park or garden were over \$5, and therefore indictable, but under \$10, the provision of sec. 773 would enable two justices having summary trial jurisdiction to proceed under Part XVI. If the case is before a city magistrate having the extended jurisdiction of sec. 777, he may proceed for the indictable offence so long as the value is over \$5.00 in the case of parks, gardens, etc., or over \$25.00 in other cases. If the trees stolen be of value less than \$5.00 on theft from a garden, or less than \$25.00 on theft from ground not belonging to any dwelling-house and not being

a park, etc., the procedure for summary conviction under sec. 374 is to be followed. *R. v. Dugas, ex parte Legere*, (1915), 43 N.B.R. 357, 24 Can. Cr. Cas. 377.

*Wilful damage to trees, etc.*—Code sec. 533.

*Second indictable offence*—See secs. 465, 851, 963, 964, 982.

**Theft of trees, etc., of the value of twenty-five cents.—Second offence.—Subsequent offence.**

**374.** Every one who steals the whole or any part of any tree, sapling or shrub, or any underwood, the value of the article stolen, or the amount of the damage done, being twenty-five cents at the least, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable, on summary conviction, to three months' imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to five years' imprisonment.

*Origin*—Sec. 337, Code of 1892; R.S.C. 1886, ch. 164, sec. 19.

*Stating the value*—The summary conviction proceedings should state the value so as to show jurisdiction, the minimum being 25 cents and the maximum \$5.00 or \$25.00, according to the circumstances indicated in sec. 373. *R. v. Dugas* (1915), 43 N.B.R. 357, 24 Can. Cr. Cas. 377; *R. v. Beauvais*, 7 Can. Cr. Cas. 494.

*"The amount of the damage done"*—This refers to the actual damage to the tree itself not consequential injury resulting from the act of the accused, and in estimating the amount regard cannot be had to the extra expense of replacing part of a hedge. *R. v. Whiteman* (1854), *Deara*, 353, 23 L.J.M.C. 120.

If several trees be stolen at the same time, or so continuously as to form one transaction, it will be sufficient if the value or damage in the aggregate is of the statutable amount. *R. v. Shepherd* (1868), L.R. 1 C.C.R. 118, 11 Cox C.C. 119.

*Bona fide claim*—If the taking of the trees is done upon a *bona fide* claim of right in respect of the title to the land upon which they are growing, the criminal intent will be negatived. *Robichaud v. La Blanc* (1898), 34 C.L.J. 324 (N.B.).

*Wilfully damaging trees or shrubs*—Code sec. 533.

*Unlawful possession of tree*—See sec. 395.

*First offenders on summary conviction*—See Code sec. 729, as to discretion to discharge on making satisfaction to person aggrieved.

*Proof of previous conviction*—Code sec. 982.

*Summary convictions when joint offenders*—See sec. 728.

*Receiving*—Code sec. 401.

**Plants, etc., growing in garden.—Subsequent offence.**

**375.** Every one who steals any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, green-house or conservatory is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with or without hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to three years' imprisonment.

*Origin*—Sec. 341, Code of 1892; R.S.C. 1886, ch. 164, sec. 23.

*First offenders on summary conviction*—See Code sec. 729 (discretion to discharge on making satisfaction to person aggrieved).

*Second offence indictable*—See secs. 757, 982.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 851, 963, 982, 1053, 1081.

*Summary convictions when joint offenders*—See sec. 728.

*Receiving*—Code sec. 401.

**Cultivated plants, etc., growing elsewhere.—Subsequent offence.**

**376.** Every one who steals any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground or nursery ground, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable to three months' imprisonment with hard labour.

*Origin*—Sec. 342, Code of 1892; R.S.C. 1886, ch. 164, sec. 24.

*Stealing crop from land*—It is theft fraudulently and without



colour of right to take, or fraudulently and without colour of right to convert the crop to the use of any person with intent to deprive the owner of it, or with intent to deprive a person having a special property or interest therein. Code sec. 347 and note; *R. v. Beboning*, 17 O.L.R. 23.

*First offenders on summary conviction*—See Code sec. 729.

*Summary convictions when joint offenders*—See sec. 728.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 757, 851, 963, 982, 1053, 1081. . . .

*Receiving*—Code sec. 401.

#### **Fences, stiles or gates.—Subsequent offence.**

**377.** Every one who steals any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article or articles so stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour.

*Origin*—Code of 1892, sec. 339; R.S.C. 1886, ch. 164, sec. 21.

*Summary convictions when joint offenders*—See sec. 728.

*First offenders on summary conviction*—See Code sec. 729.

*Summary proceedings for unlawful possession*—See sec. 395.

*Receiving*—Code sec. 401.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 757, 851, 963, 982, 1053, 1081.

#### **Theft of ores or minerals from mines.—Exception.**

**378.** Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the ore of any metal, or any quartz, lapis calaminaris, manganese, or mundic, or any piece of gold, silver or other metal, or any wad, black cawk, or black lead, or any coal, or cannel coal, or any marble, stone or other mineral, from any mine, bed or vein thereof respectively.

2. It is not an offence to take, for the purposes of exploration or scientific investigation, any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging.

*Origin*—Sec. 343, Code of 1892; R.S.C. 1886, ch. 164, sec. 25.

*Search warrant for mined ore*—Code sec. 637.

*Special provision as to indictment*—Code sec. 866.

*Second offences*—See secs. 465, 851, 963, 964, 982.

*Unlawful possession of rock, etc., bearing gold or silver*—Code sec. 424A.

*Unauthorized transactions in gold or silver ore*—Code secs. 424 (b), 424 (c).

*Defrauding of royalty payment in gold or silver mining*—Code sec. 424 (a).

*Theft defined*—Code secs. 344, 347, 352, 353.

### Stealing from the person.

**379.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any chattel, money or valuable security from the person of another.

*Origin*—Code of 1892, sec. 344; R.S.C. (1886), ch. 164, sec. 32; 32-33 Vict., Can., ch. 21, sec. 39.

*Theft from the person*—In an English case the prisoner put his hand into the prosecutor's pocket, got hold of his purse, and pulled it up to the edge of the pocket when the corner caught on a belt worn by the prosecutor. The prosecutor at that moment grasped the purse and put it back. Held, that the prisoner was guilty of simple larceny and not of larceny from the person. *R. v. Taylor*, 27 Times L.R. 108. The effect of sec. 347, sub-sec. (2) may be to make the decision inapplicable in Canada as it declares that theft is committed when the offender moves the thing or causes it to move or be moved, or *begins* to cause it to become movable, with intent to steal it. As theft generally may be laid in respect of a beginning to move the article with intent to steal, it would seem to follow that theft from the person is complete on the like beginning to move the article from the person. See, under the prior law, *R. v. Hamilton*, 8 C. & P. 49; *R. v. Thompson*, R. & M. 78; *R. v. Simpson*, 24 L.J.M.C. 7. Compare *re Patrick White*, 31 S.C.R. 383.

The plan of the Code eliminates the separate names "embezzlement" and "pocket-picking" by including both as theft. Where the offence is pocket-picking the common form of theft from the person, it will be found preferable in practice to charge it in the words of the Code. See Code sec. 852; Code form 64. But an indictment stating the material ingredients of the offence in popular language is good. Code sec. 852; *R. v. Morgan* (1901), 5 Can. Cr. Cas. 63 and 272, 3 O.L.R. 356.

The material ingredients of the offence must be proved. *R. v. Winslow*, 12 Man. R. 649, 3 Can. Cr. Cas. 215; *R. v. Daley*, 16 Can. Cr. Cas. 168.

*Theft of less than \$10 from the person*—The theory has been advanced in Ontario that "theft from the person," being the offence formerly known as "aggravated larceny," is not included in the term

"theft" as used in sec. 773 as to "summary trial" for theft not exceeding \$10. *R. v. Conlin*, 29 Ont. R. 28.

The offences which can be tried under sec. 773 by a magistrate as defined by sec. 771, include theft where the value of the property does not in the judgment of the magistrate exceed \$10. Sec. 773, sub-sec. (a). The punishment under sec. 773 is limited to six months' imprisonment under sec. 780. If theft, although from the person under sec. 379, is within sec. 773, then sec. 780 applies; otherwise the only power of summary trial would be by a magistrate having the extended jurisdiction of sec. 777. A magistrate of the latter class trying an offence not included in sec. 773 would be restricted as to the punishment to be imposed only by the maximum which might be awarded on an indictment. Code sec. 777. The *Conlin* case, *supra*, supported a conviction by a city magistrate having these extended powers and also empowered under sec. 773, where the conviction imposed more than the six months mentioned in sec. 780. As to the meaning of the word "theft" in sec. 773, the court was divided in opinion. That of *Boyd, C.*, that it is a generic term, is submitted as preferable to that of *Robertson, J.*, who appears to have been of opinion that "theft from the person" was a distinct offence not included in the word "theft" as there used, any more than would robbery be included. It may be said that while robbery includes theft, it is treated in the Code under a separate definition (Code sec. 445), and there is in it the added element of violence or threats; while "theft from the person" is not given a separate definition and is found mixed in with various other classes of theft which would be within sec. 773 if the value were under \$10, and which make distinctions as to the place from which the theft was made. Can a magistrate qualified under sec. 777 by taking an election of summary trial (whether required or not under sec. 773), exercise his extended jurisdiction conferred by sec. 777 by trying an offence which he might try under sec. 773? The weight of authority appears to be in the negative, and to uphold the view that sec. 777 applies only to "other" cases than those already mentioned under sec. 773. The marginal note to sec. 777 upholds this view, but see *contra* the *Conlin* case above mentioned. There is, however, a special jurisdiction conferred by sub-sec. (5) of sec. 777 upon magistrates of cities of over 25,000 for the offences mentioned in sub-sec. (a) of sec. 773; and that jurisdiction is absolute and not dependent upon the consent of the accused. Code amendment of 1909.

*Restitution orders*—Code sec. 1050.

To entitle the aggrieved party to an order for the restitution to him of the money found on the prisoner convicted of stealing money from the person proof must be adduced identifying the money so found as the money which was stolen. When the accused was convicted of the theft of bank notes but there was no evidence to identify the same with the bank notes found on and taken from the prisoner at the time of

arrest, and no application was made immediately after the conviction for an order of compensation to the prosecutor for his loss, an order may properly be made *ex parte* for the restoration to the prisoner of the money so taken from him. *R. v. Haverstock*, 5 Can Cr. Cas. 113.

*Attempts to steal from the person*—Code sec. 72, 570, 949-951.

**Stealing in dwelling-house.—Stealing with threats or menaces.**

**380.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) steals in any dwelling-house any chattel, money or valuable security to the value in the whole of twenty-five dollars or more; or,
- (b) steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat puts any one therein in bodily fear.

*Origin*—Sec. 345, Code of 1892; R.S.C. 1886, ch. 164, secs. 45, 46; Larceny Act, 1861, Imp., secs. 60 and 61.

*Theft defined*—Code sec. 347.

*"Dwelling-house" defined*—Code sec. 335, sub-sec. (e).

*"Valuable security" defined*—Code sec. 2, sub-sec. (40).

*"In any dwelling-house"*—A theft by the owner or occupier of the house is covered by this section: *R. v. Bowden*, 2 Mood. C.C. 285; *R. v. Taylor*, R. & R. 418. But goods which are under the protection of the person of the prosecutor at the time they are stolen are not within it. So where the prosecutor was induced by the trick of ring dropping to lay down his money upon a table and the defendant took it up and carried it away, it was held not to be the offence of "stealing in a dwelling-house." *R. v. Owen*, 2 Leach 572. And where money was delivered to the defendant for a particular purpose by his procurement, and he forthwith ran away with it, it is not an offence under this section. *R. v. Campbell*, 2 East P.C. 644. But if a person on going to bed puts his clothes and money by his bedside they are under the protection of the dwelling-house and not of the person, *R. v. Thomas*, Car. Supp. 295; *R. v. Hamilton*, 8 C. & P. 49.

It is a question for the court and not for the jury whether goods are under the protection of the dwelling-house or in the personal care of the owner. *R. v. Thomas*, Car. Supp. 295. The section corresponds with sec. 60 of the Imperial Act, 24 and 25 Vict., c. 96, under which it is said that it is necessary that the goods should be under the protection of the house and be deposited in it for safe custody. Archbold Cr. Pl. (1900), 612. But property left at a house for a person supposed to reside there will be under the protection of the house, and the stealing of them will be stealing in a dwelling-house. *R. v. Carroll*, 1 Mood. C.C. 89.

*Sub-sec. (a)—Value of \$25 or over*—Sub-sec. (a) applies where the theft in any dwelling-house was of property exceeding \$25 in value. If below that value the punishment is found in sec. 386 (theft not otherwise provided for).

*Sub-sec. (b)—“By any menace or threat”*—Compare sec. 452 (demanding with menaces); sec. 453 and 454 (extortion by threats).

*Restitution order*—Code sec. 1050.

#### **Stealing by pick-locks, etc.**

**381.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, by means of any pick-lock, false key or other instrument steals anything from any receptacle for property locked or otherwise secured.

*Origin*—Sec. 346, Code of 1892.

*“Property” defined*—Code sec. 2, sub-sec. (32).

*Theft by false keys or picklocks*—If upon a summary trial for the theft of money from a locked box on a ship in port, effected by picking the lock, it is shown that the accused, one of the ship's seamen, had access in common with the other seamen to the place where the box was kept, that shortly before the theft was committed he had borrowed a small sum of money on the plea that he had none, that shortly after the stolen money was missed he had considerably more money on him, that he had meanwhile received nothing in respect of wages, that on the money being missed he suggested that he should not be suspected as he had borrowed money from another party named, which latter statement was shown to be untrue, such constitutes legal evidence to support a conviction. *R. v. MacCaffery* (1900), 4 Can. Cr. Cas. 193 (N.S.). If, however, the trial judge, in making his finding, bases the same upon the theory that, as a matter of law, it would be presumed that it was possible for him to show how he had come by the money seen in his possession and that the onus was upon him to do so, such is an error in law entitling the accused to a new trial. *Ibid.*

#### **Stealing from vessels.—From wharfs.**

**382.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) steals any goods or merchandise in any vessel, barge or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or,

(b) steals any goods or merchandise from any dock, wharf or quay adjacent to any such haven, port, river, canal, creek or basin.

*Origin*—Sec. 349, Code of 1892; Larceny Act, 1861, Imp., sec. 63; 24 Geo. II, Imp., ch. 45.

*Stealing in boats or from docks*—While theft is committed when the offender moves the thing or causes it to move or "begins to cause it to become movable" with intent to steal it (Code sec. 347) it is doubted whether there is theft "from" a dock unless the thing stolen is removed. See *re Patrick White*, 31 S.C.R. 383; same case below, *R. v. White*, 34 N.S.B. 436, 4 Can. Cr. Cas. 430.

See also note to sec. 379 as to theft from the person.

*"Goods or merchandise"*—The words "goods, wares and merchandise" in a similar statute, 24 Geo. II, c. 45 (Imp.), were held to extend to such goods only as are usually lodged in vessels or on wharves and quays. *R. v. Grimes*, Fost. 79 (a), 2 East P.C. 647; *R. v. Leigh*, 1 Leach C.C. 52. A passenger's luggage is included. *R. v. Wright*, 7 C. & P. 159.

#### Stealing wreck.

**383.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any wreck.

*Origin*—Sec. 350, Code of 1892; R.S.C. ch. 81, sec. 36 (c); Larceny Act, 1861, Imp., sec. 64.

*"Wreck" defined*—Code sec. 2, sub-sec. (41).

*Second offences*—See secs. 465, 851, 963, 964, 982.

#### Stealing on railway.

**384.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything in or from any railway station or building, or from any engine, tender or vehicle of any kind on any railway.

*Origin*—Sec. 351, Code of 1892.

*"In or from any railway station," etc.*—In *R. v. White*, 34 N.S.B. 436, 4 Can. Cr. Cas. 430, a case brought up on habeas corpus, the accused had been convicted by a city magistrate of stealing "in or from" a railway building. Three of the judges of the Supreme Court of Nova Scotia supported the conviction and held that the use of the phrase "in or from" did not invalidate the conviction. See Code sec. 854. But two of the judges dissenting were of opinion that the conviction was bad as charging two crimes in the alternative. A further application to a judge of the Supreme Court of Canada was dismissed as his habeas corpus jurisdiction is concurrent only to that of a provincial court and not one of review thereof. *Re Patrick White*, 31 S.C.R. 383.

See notes to secs. 379 and 382.

**Stealing things deposited in Indian graves.**

**385.** Every one who steals, or unlawfully injures or removes, any image, bones, article or thing deposited in or near any Indian grave, is guilty of an offence and liable, on summary conviction, for the first offence, to a penalty not exceeding one hundred dollars or to three months' imprisonment, and for a subsequent offence to the same penalty and to six months' imprisonment with hard labour.

*Origin*—Sec. 352, Code of 1892; R.S.C. 1886, ch. 164, sec. 12.

*Summary convictions when joint offenders*—See sec. 728.

*First offenders on summary conviction*—See Code sec. 729.

*Second offence*—See secs. 757, 982.

*Receiving*—Code sec. 401.

**Stealing things not otherwise provided for.—Subsequent offence.**

**386.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals anything for the stealing of which no punishment is otherwise provided or commits in respect thereof any offence for which he is liable to the same punishment as if he had stolen the same.

2. The offender is liable to ten years' imprisonment if he has been previously convicted of theft.

*Origin*—Sec. 356, Code of 1892; R.S.C. 1886, ch. 164, secs. 5, 6, 85.

*Arrest without warrant if found committing*—See sec. 646 as amended, 8-9 Edw. VII, Can., ch. 9.

*Search warrants*—Code secs. 629-631.

*Trial of juvenile offender for theft*—See sec. 802 (Part XVII) and the Juvenile Delinquents Act, 1908, ch. 40 and amendments.

*Summary trial under N.W.T. Act*—For special provisions as to summary trial, see N.W.T. Act, R.S.C., ch. 62, sec. 38.

*Yukon Territory*—Summary trial for theft not exceeding \$200.00, see the Yukon Act, R.S.C., ch. 63, sec. 65.

*Summary trial for theft*—There are two classes of officials entitled to hold summary trial and a difference in their jurisdiction as regards offences and punishment.

Code sec. 773 (a) enables a magistrate as defined by sec. 771, to hold a summary trial for "theft where the value of the property does not, in the judgment of the magistrate, exceed \$10.00." The punishment under the jurisdiction conferred by sec. 773 (a) is not to exceed six months' imprisonment (Code sec. 780), and the jurisdiction of the magistrate is absolute in the provinces of British Columbia, Prince

Edward Island, Saskatchewan and Alberta and also in the North-West Territories and the Yukon. Code sec. 776.

A conviction for theft not exceeding \$10.00 made under Code sec. 773, should show the value as determined by the magistrate. *R. v. Taylor* (1914), 5 W.W.R. 1105, 7 Alta. L.R. 72, 26 W.L.R. 652, 22 Can. Cr. Cas. 234.

If the value is over \$10.00 the magistrate of the class mentioned in sec. 771 may not try the case on a plea of not guilty, but may accept a plea of guilty along with an election of summary trial and impose punishment as upon an indictment. Code secs. 782, 783. *R. v. Williams*, 11 B.C.R. 351, 10 Can. Cr. Cas. 380.

The other class of magistrates are city police magistrates and certain others given an extended jurisdiction to try cases which in Ontario would be within the jurisdiction of the court of sessions (Code sec. 777) and which were not otherwise under their jurisdiction under sec. 773 because of their qualification under that section. *R. v. Davidson* (No. 2) [1917] 2 W.W.R. 718, 11 Alta. L.R. 491, 28 Can. Cr. Cas. 56; *R. v. Hayward*, 6 Can. Cr. Cas. 399, 5 O.L.R. 65; *Ex parte McDonald*, 9 Can. Cr. Cas. 368 (N.B.).

The magistrate having the extended jurisdiction of sec. 777 is enabled to try *inter alia*, cases of theft not coming within sec. 773, but only where the accused elects summary trial in conformity with the mode of election laid down in sec. 778, except in the special cases for which sec. 777, sub-sec. (5) provides where the jurisdiction is absolute if the value is not over \$10 and the magistrate is the police magistrate of a city with a population of over 25,000.

So on a trial in Alberta, British Columbia, Saskatchewan or Prince Edward Island, another magistrate although empowered under sec. 777 to try offences of the class for which an offender might be tried in Ontario at the sessions, may proceed with a trial of theft where the information declares the value under \$10.00 without asking the consent of the accused, but if it developed in the evidence that the value was over \$10.00, his absolute jurisdiction to try without consent under sec. 776 would be gone. To obviate this he may take the election of the accused so that, with the consent of the accused, he may dispose of the case in any event. Sec. 776 does not prohibit the asking of the consent on a charge of theft as does sec. 774 in a disorderly house case. And if the accused pleads not guilty and elects summary trial on a charge of theft, and the magistrate finds the value to be over \$10.00, the same punishment may be imposed as upon an indictment. *R. v. Bowers*, 34 N.S.R. 550, 6 Can. Cr. Cas. 264.

The reason generally assigned for the exclusion from sec. 777 of cases which are within sec. 773, is that the marginal note to sec. 777 and which was included in the original statute enacting it read as follows: "Summary trial in certain other cases," but this marginal note was eliminated in some of the amendments made by repeal of the



former law and the first amendment was without any marginal note; but the marginal note was reinstated in its original form in later amendments.

*Speedy trial before a county judge without a jury*—Code secs. 822-842 (Part XVIII); Code forms 60, 61; *George v. The King*, 35 S.C.R. 376, 8 Can. Cr. Cas. 401, affirming 35 N.S.R. 42.

*Procedure on trial of indictment*—Code sec. 940, *et seq.*

*Court of sessions in Ontario*—It shall not be necessary for any court of general sessions in the province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do. Code sec. 601.

*Motion to quash indictment*—Before the defendant has pleaded he may move to quash the indictment, but not afterwards, except by leave of the court, for a defect apparent on the face of it. Code sec. 898. The court may order the defect remedied and proceed with the trial as if no such defect had appeared. Code sec. 898. If the defendant demurs to the indictment for a defect which may be remedied, the court may in like manner amend it. Code sec. 898.

A charge brought for theft on an election of speedy trial without a jury is sufficient, if it follows Code forms 60 and 61; and it need not specifically allege the taking as fraudulent and without colour of right (Code sec. 347), if it charges that the accused "unlawfully did steal," etc. *George v. The King* (1904), 35 S.C.R. 376, 8 Can. Cr. Cas. 401, affirming 35 N.S.R. 42, 5 Can. Cr. Cas. 469.

An indictment for theft of money which discloses the date of the offence, the name of the person from whom taken and the amount, if sufficient to enable the accused to defend, is not bad for lack of stating further details of the mode in which the alleged offence was committed. *R. v. Lemelin*, 22 Can. Cr. Cas. 109.

*Plea of autrefois convict*—If the former conviction relied upon in support of this plea was made by justices having no jurisdiction to try the charge, the plea fails. *R. v. Taylor*, 5 W.W.R. 1105, 26 W.L.R. 652, 22 Can. Cr. Cas. 234.

*Several connected takings treated as one theft*—A series of defalcations by an employee entrusted with money may be treated as one theft. *Minchin v. The King*, 23 Can. Cr. Cas. 414, affirming *R. v. Minchin* (1913), 22 Can. Cr. Cas. 254, 7 Alta. L.R. 148, 26 W.L.R. 633.

The theft is a single one on the taking of a packet containing post letters and large sums of money. *Rex v. Birdseye*, 4 C. & P. 386, and separate charges are not justified as to the various letters contained in the packet. *R. v. Pope* (1914), 5 W.W.R. 1070, 22 Can. Cr. Cas. 327, 15 D.L.R. 664, 7 Alta. L.R. 169, 26 W.L.R. 659.

*Trial together of separate theft charges against same person*—

By sec. 857 of the Code the court may direct that the accused be tried "upon any one or more of such counts separately." Then comes the proviso in sec. 857, which is in effect that the court shall not, except there be special reasons to the contrary, prevent the trial at the same time of distinct charges of theft, not exceeding three in number, which have been committed within six months from first to last, whether against the same person or not. The effect of secs. 856 and 857 is, in so far as theft is concerned, that any number of charges of theft against an accused person may be tried together, unless the court makes an order to the contrary; but if the court does make an order for the trial of the charges separately, the order is not to prevent, unless there be special reasons, three or less than three distinct charges from being tried together where the offences have been committed within six months from the first to the last offence. By the English Act the election in such case by the prosecutor is imperative. By our Code the question whether the accused shall be tried on one or more counts separately shall be decided by the trial judge. *R. v. Kelly* [1917] 1 W.W.R. 46, 27 Can. Cr. Cas. 140, 27 Man. R. 105, per Perdue, J.A., and see same case in appeal, *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.R. 220.

*Sub-sec. (2)—Second offence of theft*—When a prisoner is convicted, on a summary trial before a police magistrate, of theft, he cannot be sentenced under sub-sec. 2 of sec. 386 of the Criminal Code, to more than seven years' imprisonment, although he has been previously convicted of theft, unless such previous conviction has been charged in the information by analogy to sec. 851 and proved in accordance with sec. 963, and, where in such a case a greater punishment is inflicted, the Court of Appeal, upon an application under sub-sec. 2 of sec. 1016 of the Code, will set aside the sentence and pass what it considers a proper sentence. *R. v. Edwards*, 17 Man. R. 288, 13 Can. Cr. Cas. 202.

Sec. 465 also in Part VII provides that every one who, after a previous conviction for "any indictable offence, specified in this Part" for which the punishment on a first conviction is less than 14 years' imprisonment, is liable to 14 years' imprisonment. Sub-sec. (2) of sec. 386 would supersede sec. 465 as regards a previous conviction of "theft," but *quære* as to its operation if the former conviction were for some other offence.

See as to prior convictions generally, secs. 757, 851, 963, 964, 982, 1053, 1081.

*Instructing the jury on a theft charge*—On a charge of theft, when the facts are compatible with an honest mistake on the defendant's part, there should be a direction on intent to steal. *R. v. Sturgess*, 9 Cr. App. R. 120. Where defendant has sold some of the goods alleged to be stolen by him, it may be necessary to direct the jury whether he in-

tended to account to the owners for the proceeds. *R. v. Sturgess*, 9 Cr. App. R. 120.

Where the trial judge, in his charge to the jury, called attention to the fact that the prisoner charged with theft was not called to testify on his own behalf, and warned the jury that they were not to take that fact to his prejudice, but stated that if the accused were innocent he could have proved that he was not in the locality at the time, this is a prohibited "comment" within the meaning of sec. 4 of the Canada Evidence Act, entitling the accused to a new trial. *R. v. McGuire*, 36 N.B.R. 609, 9 Can. Cr. Cas. 554.

Retaining goods sent on the faith of a promise to pay for them on delivery may amount to theft by a trick. *R. v. Edmundson* (1912), 8 Cr. App. R. 107; *R. v. Slowly* (1873), 12 Cox C.C. 269, 27 L.T. 803.

When an issue at the trial is the identity of certain goods with those alleged to have been stolen, it is a grave misdirection to allow the jury to assume such identity. *R. v. Hill* (1912), 7 Cr. App. R. 250.

Where on the trial of a charge of theft the only evidence against the defendant is that of the person who receives the stolen property, and there is a suspicion that he knew that the property was stolen, his evidence must not be left to the jury as that of an untainted witness, but they should be warned that if they think that he was an accomplice there ought to be corroboration of his story. *R. v. Jennings* (1912), 7 Cr. App. R. 242.

The owner of goods is entitled to resort to the criminal law for their recovery, when stolen, and his desire to recover his property does not deprive him of protection in an action for malicious prosecution if the circumstances justify the prosecution. *Truesdell v. Holden* (1913), 4 O.W.N. 1138.

Where the defence is that property alleged to be stolen has been abandoned, there should be a specific direction to the jury on this point. *R. v. White* (1912), 7 Cr. App. R. 266.

*Restitution of stolen property*—See secs. 1050, 795 (on summary trial).

*Compensation out of money found on convict*—See sec. 1049.

*Review of conviction*—If two justices hold a summary trial for a theft under §10 (Code sec. 773, sub-sec. (a)), the limited right of appeal conferred by sec. 797 applies and an appeal on both law and facts with a rehearing of evidence is available to the accused, the procedure being the same as on an appeal from a summary conviction. Code secs. 797, 749-760. Possibly a stated case might be taken on a point of law only under sec. 761, as an alternative mode of appeal. But if the same charge were tried by a single individual authorized in the terms of sec. 771 to do alone such acts as are usually required to be done by two or more justices, there would be no appeal under sec. 797 on a conviction for theft under §10. *R. v. Merker and Daniels*, 37 O.L.R. 582, 10 O.W.N. 452, 27 Can. Cr. Cas. 113; *R. v. Dubuc*, 22 Can. Cr. Cas. 426;

*R. v. Berenstein* (1917), 24 B.C.R. 361, 29 Can. Cr. Cas. 485; *R. v. Brown* (1916), 10 W.W.R. 695, 9 Alta. L.R. 494, 34 W.L.R. 575, 26 Can. Cr. Cas. 97; *R. v. Robertson* (1915), 22 B.C.R. 13, 26 Can. Cr. Cas. 239. And such a functionary summarily trying a charge of theft of goods of the value of less than \$10 under sec. 773 is not a "Court or Judge having jurisdiction in criminal cases" within Code sec. 1013 allowing an appeal by way of case reserved; *R. v. Hawes*, 4 Can. Cr. Cas. 529, 33 N.S.R. 389; *R. v. Davidson* (No. 2) [1917] 2 W.W.R. 718, 11 Alta. L.R. 491, 28 Can. Cr. Cas. 56, except in the case of trial by a police magistrate of a city with over 25,000 population when theft under \$10 is triable without consent under sec. 777 (5) and might be the subject of a reserved case under sec. 1013. See *R. v. Sinclair*, 38 O.L.R. 149.

If the summary trial is for theft over \$10 and the trial consequently has been under sec. 777 before a magistrate with extended jurisdiction, an appeal from the judgment may be taken by the person convicted to the Court of Appeal under Code secs. 1013 and 1014 by a reserved case, upon points of law only, and if the magistrate refuses a reserved case the Court of Appeal may grant leave to appeal and direct that a case be stated by the magistrate. The disposal of the appeal is subject to secs. 1018 and 1019, and under the latter section a conviction is not to be set aside unless there was some substantial wrong or miscarriage at the trial. *R. v. Menard*, 2 O.W.R. 900, 8 Can. Cr. Cas. 80; *Allen v. The King*, 44 S.C.R. 331, 18 Can. Cr. Cas. 1. *R. v. Letain* [1918] 1 W.W.R. 505, 29 Can. Cr. Cas. 389 (Man.); *R. v. Kleparczuk* [1918] 1 W.W.R. 695, 29 Can. Cr. Cas. 336 (Alta.); *R. v. Hyder* (1917), 29 Can. Cr. Cas. 172.

The Court of Appeal will affirm the conviction if supported by sufficient legal evidence although the court may consider that the jury might better have acquitted because of the unsatisfactory nature of the testimony. *R. v. Edmunds* (1914), 28 W.L.R. 965, 23 Can. Cr. Cas. 77 (Alta.). If the conviction is upon indictment, or upon a formal charge taking the place of an indictment in Alberta or Saskatchewan, the procedure applicable is that of by reserved case or leave to appeal on points of law. Code secs. 1013 *et seq.*

Where an objection that there was no evidence to go to the jury is taken by counsel unsuccessfully, and he then calls evidence, the court on appeal is not bound to disregard the effect of that evidence and may see whether any evidence of theft was elicited after the close of the case for the prosecution. *R. v. Fraser* (1911), 7 Cr. App. R. 101.

*Extradition*].—Theft, under the name of larceny, is an extraditable offence between Canada and the U.S.A. See *re Deering* (1915), 24 Can. Cr. Cas. 133, 49 N.S.R. 41.

**Value of things stolen over \$200.—Penalty may be heavier.**

**387.** If the value of any thing stolen, or in respect of which any offence is committed for which the offender is liable to the

same punishment as if he had stolen it, exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence.

*Origin*—Sec. 357, Code of 1892; R.S.C. 1886, ch. 164, sec. 86.

*Indictment or charge to state the value*—See note to sec. 388.

*Arrest without warrant if found committing*—See sec. 646 as amended 8-9 Edw. VII, Can., ch. 9.

*Value of valuable security*—See Code sec. 4.

#### **Theft of goods in process of manufacture.**

**388.** Every one is guilty of an indictable offence and liable to five years' imprisonment who steals, to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of such materials mixed with each other or mixed with any other material, while laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place.

*Origin*—Sec. 347, Code of 1892; R.S.C. 1886, ch. 146, sec. 47.

*"To the value of \$2"*—Where a certain value is essential to give jurisdiction or to constitute the offence, the information or indictment on which the accused is to be tried should specify the value, otherwise it is subject to be quashed. *R. v. Beckwith*, 7 Can. Cr. Cas. 450; *R. v. France*, 1 Can. Cr. Cas. 321 (Que.).

A formal defect or an imperfect averment in an indictment or in a count may be corrected by the court when an objection is raised, but matters of substance cannot be amended, and essential allegations which have been entirely omitted cannot be added by the court. *R. v. Weir*, 5 Can. Cr. Cas. 503. So, on a charge for stealing goods in process of manufacture, it seems that the information should show whether the value is above or below \$2 in order to determine whether the offence comes within sec. 388 or under sec. 386, the latter applying only where no punishment is otherwise provided although the maximum term of imprisonment is greater than under sec. 388. So also if sec. 387 is to be invoked because of the value exceeding \$200, this should appear in the information or indictment. *R. v. Leclerc*, 26 Can. Cr. Cas. 242 (Que.).

*Stage, process or progress of manufacture*—Goods may be within this section though the texture is complete if they have not yet been brought into saleable condition. *R. v. Woodhead*, 1 M. & Rob. 549.

On an indictment under the English statute, 18 Geo. II, c. 27, for stealing yarn out of a bleaching ground, the evidence was that the yarn

had been spread upon the ground, but was afterwards taken up and thrown into heaps in order to be carried into the house, in which state some of it was stolen by the prisoner, Thompson, B., held that the case did not come within the statute, as there was no occasion to leave the yarn upon the ground in the state in which it was taken by the prisoner as a stage, process or progress of manufacture. *Hugill's Case*, 2 Russell Cr. 6th ed. 403.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

### *Offences Resembling Theft.*

#### **Fraudulently disposing of things entrusted for manufacture.**

**389.** Every one is guilty of an indictable offence and liable to two years' imprisonment, when the offence is not within the last preceding section; who, having been entrusted with, for the purpose of manufacture or for a special purpose connected with manufacture, or employed to make, any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax or silk, or any such materials mixed with one another, or having been so entrusted, as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, fraudulently disposes of the same or any part thereof.

*Origin*—Code of 1892, sec. 348; R.S.C. 1886, ch. 164, sec. 48; Frauds by Workmen Act, 1748, Imp., ch. 27; Frauds by Workmen Act, 1777, Imp., ch. 56.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

#### **Criminal breach of trust.**

**390.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a trustee of any property for the use or benefit, either in whole or in part, of some other person, or for any public or charitable purpose, with intent to defraud, and in violation of his trust, converts anything of which he is trustee to any use not authorized by the trust.

*Origin*—Code of 1892, sec. 363.

*"Property" defined*—Code sec. 2, sub-sec. (32).

*"Trustee" defined*—Code sec. 2, sub-sec. (39).

*Consent of Attorney-General to prosecute*—A prosecution for this offence can be brought only if the Attorney-General has given his consent. Code sec. 596. The consent must be shown at the preliminary

enquiry or the charge will be dismissed. *R. v. Jacobs* (1916), 25 Can. Cr. Cas. 414 (Que.).

*Arrest without warrant if found committing*—Code sec. 646.

*Exception from statutory order of restitution*—Code sec. 1050, sub-sec. (5).

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

*Theft by holder of power of attorney*—Code sec. 356, 358.

*Theft of fund held under direction*—Code sec. 357, 358..

*Theft by agent receiving money, etc., on terms requiring him to account*—Code secs. 355, 358.

*Theft by co-owner*—Code sec. 352.

*Theft by clerk or servant*—Code sec. 359.

*Theft generally*—Code sec. 347.

#### **Public servants refusing to deliver up property lawfully demanded.**

**391.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of His Majesty or of the Government of Canada or the government of any province of Canada, or of any municipality, and entrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it.

*Origin*—Code of 1892, sec. 321; R.S.C. 1886, ch. 164, sec. 55.

*"Municipality"*—Code sec. 2, sub-sec. (21).

*"Valuable security"*—Code sec. 2, sub-sec. (40).

*Special provision as to indictment*—Code sec. 868.

*Theft by government employee*—Code sec. 359 (c).

*Theft by municipal employee*—Code sec. 359 (c).

#### **Fraudulently taking cattle.—Fraudulently refusing to deliver up cattle.—Defacing brand on cattle.**

**392.** Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

- (a) without the consent of the owner thereof fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, or fraudulently causes or procures, or assists in the taking possession, concealing, appropriating, purchasing or selling of any cattle which are found astray; or,

- (b) fraudulently refuses to deliver up any such cattle to the proper owner thereof, or to the person in charge thereof on behalf of such owner, or authorized by such owner to receive such cattle; or,
- (c) without the consent of the owner, fraudulently, wholly or partially obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand or mark on any cattle, or makes or causes or procures to be made any false or counterfeit brand or mark on any cattle.

*Origin*—1 Edw. VII, Can., ch. 42, sec. 2.

*Fraudulent retention of cattle found astray*—As to the statutory onus being shifted if the cattle found in possession have another's brand, see sec. 989, sub-sec. (2).

There can, of course, be no fraudulent taking or retention, if the act can be justified under either federal or provincial law. There may be a right of distress damage feasant which under the English system of law would justify the retention of the cattle if distrained at the time the damage was done. *Carmichael v. Feltoe*, 9 W.L.R. 15 (B.C.). Various provincial statutes confer a right to impound stray cattle. See *Campbell v. Halvorsen* [1918] 1 W.W.R. 462 (Sask.); *R. (ex rel. Roberts) v. Bell* (1913), 3 W.W.R. 759 (Alta.); *Kennedy v. Grose*, 7 W.W.R. 74, 7 Sask. L.R. 104, 29 W.L.R. 364; *Fodge v. Parsenan* [1918] 1 W.W.R. 25.

*Fraudulently defacing a cattle brand*—See sec. 989 as to registered cattle brand being *prima facie* evidence that the branded cattle are the property of the registered owner of the brand.

*Where cattle stealing is charged*—Special provision has been made by sec. 953 for convicting under sec. 392 where the evidence establishes an offence under 392, but does not establish a theft under sec. 369.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

*Stealing cattle*—Code sec. 369.

*Progeny of cattle*—At common law the progeny of cattle belong to the owner of the dam; *Temple v. Nicholson*, Cass. S.C. Dig. 114, Cont. S.C. Dig. 240, on appeal from 4 P. & B. 246 (N.B.); at least so long as the progeny are being nurtured by the dam. *Wallace v. Scott*, 5 W.L.R. 341, 344 (Man.); *Case Threshing Machine Co. v. Gouley* (1914), 7 W.W.R. 584 (Sask.); *Dillares v. Doyle*, 43 U.C.Q.B. 442, 444 (Ont.). The cases on the point have arisen principally in respect of colts (which are within the statutory definition of cattle), Code sec. 2, sub-sec. (5). It has been held that a mare's foal dropped after default under a chattel mortgage of the mare, belonged to the chattel mortgagee as against an execution creditor of the mortgagor, for the chattel mort-



gagee after default was both the owner of the mare and entitled to possession. *Temple v. Nicholson*, *supra*; *a fortiori*, if the mortgage had expressly mentioned the future progeny. *Case Threshing Machine Co. v. Gouley* (1914), 7 W.W.R. 584 (Sask.). After the foal has left its dam it would seem that neither a chattel mortgage nor a lien note in respect of the dam given before the foal was dropped, would include the foal unless the document contained an express clause including it by anticipation; *Johnson v. Cole* (1914), 7 W.W.R. 593, 30 W.L.R. 290; *Case Threshing Machine v. Gouley* (1914), 7 W.W.R. 584, 29 W.L.R. 811.

And, in the event of the document expressly including by anticipation the future progeny of the animal, it would seem that after leaving the dam, a claim of a chattel mortgagee to progeny of which possession had not been taken by him before the progeny left the dam, might be held to be an equitable right only and subject to being displaced as in the case of a mortgage of after-acquired property by a disposal made by the mortgagor to a purchaser without notice. And in any case the civil right of ownership would be subject to the provincial laws and its requirements as to registration of documents affecting the right of property in chattels.

As to bills of sale and chattel mortgages generally, see 1 C.E.D. 397.

#### Unlawfully injuring pigeons.

**393.** Every one who unlawfully and wilfully kills, wounds or takes any house-dove or pigeon, under such circumstances as do not amount to theft, is guilty of an offence and liable, upon complaint of the owner thereof, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the bird.

*Origin*—Code of 1892, sec. 333; R.S.C. 1886, ch. 164, sec. 10.

*Theft of pigeons*—Code sec. 345, 347, 350.

*Malicious injury to domestic animals, birds, etc.*—Code sec. 537.

*First offenders on summary conviction*—See 729.

*Summary convictions when joint offenders*—See sec. 728.

**Fraudulently taking, possessing, etc., drift timber.—Defacing mark on same.—Refusing to deliver to owner.**

**394.** Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

(a) without the consent of the owner thereof,

(i) fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be

taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log, shingle bolt or other description of lumber which is found adrift in, or cast ashore on the bank or beach of, any river, stream, or lake, in Canada, or in the harbours or any of the coast waters (including the whole of Queen Charlotte Sound, the whole of the Strait of Georgia or the Canadian waters of the Strait of Juan de Fuca) of British Columbia, or,

- (ii) wholly or partially defaces or adds or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, or makes or causes or procures to be made, any false or counterfeit mark on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber; or,
- (b) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber.

*Origin*—Can. Stat. 1912, ch. 18; Code of 1892, sec. 338; R.S.C. 1886, ch. 164, sec. 87.

*Fraudulent appropriation of drift timber*—Fraud is of the essence of the offence. See *Robitaille v. Mason*, 9 B.C.B. 499.

*Timber liens*—See *Woodmen's Lien for Wages Act*, R.S.O. 1914, ch. 141; *McNulty v. Clark*, 34 O.L.R. 434, 9 O.W.N. 58; *Woodmen's Lien and Wages Act* (B.C.); *Mills v. Smith-Shannon Lumber Co.*, 10 W.W.R. 454 (B.C.); *Woodmen's Lien Act* (N.B.); *Olsen v. Goodwin* (1915), 43 N.B.R. 449; *Baxter v. Kennedy*, 35 N.B.R. 179. *Woodmen's Lien Act* (Alta.), 1913, 2nd session, ch. 28; *Desantels v. McClellan* (1915), 7 W.W.R. 1221, 30 W.L.R. 486 (Alta.). *Civil Code, Quebec*, article 1994; *Hebert v. Lavoie* (1915), 22 R. de Juris. 380, (Que.); *Battle Island Paper Co. v. Lapage* (1915), 24 Que. K.B. 413; *Desjardins v. Veilleux* (1916), 23 R. de Juris. 125 (Que.); *Marinier v. Riordan Paper and Pulp Co.* (1917), 51 Que. S.C. 532; *Rheault v. Brown Corporation* (1917), 53 Que. S.C. 296; *Laurentide Paper Co. v. Bompré*, 27 Que. K.B. 194; *Pelletier v. Lagace*, 24 R. de Juris. 21 (Que.).

*Registered timber marks as evidence*—Code sec. 990; the Timber Marking Act, B.S.C. 1906, ch. 72; The (B.C.) Forest Act, 1912, B.C. Stat. 1912.

*Onus of proof*—Code sec. 990, sub-sec. (2).

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

**Possessing trees, etc., without being able to account therefor.**

**395.** Every one who, having in his possession, or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came lawfully by the same, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the article so in his possession or on his premises.

*Origin*—Code of 1892, sec. 340; R.S.C. 1886, ch. 164, sec. 22; 32-33 Vict., Can., ch. 21, sec. 25.

*"Having in possession" defined*—Code sec. 5.

*First offenders on summary conviction*—Sec. 729.

*Summary convictions when joint offenders*—See sec. 728.

*Theft of trees*—Code secs. 374, 375.

**Destroying documents of title.**

**396.** Every one who destroys, cancels, conceals or obliterates any document of title to goods or lands, or any valuable security, testamentary instrument, or judicial, official or other document, for any fraudulent purpose, is guilty of an indictable offence and liable to the same punishment as if he had stolen such document, security or instrument.

*Origin*—Code of 1892, sec. 353; R.S.C. 1886, ch. 164, sec. 12.

*"Document of title to goods"*—See definition, sec. 2 (11).

*"Document of title to lands"*—See definition sec. 2 (12).

*"Valuable security"*—See definition in sec. 2 (40).

*"Testamentary instrument"*—See definition in sec. 2 (37).

*Second offence*—See secs. 465, 757, 851, 963, 964, 982.

*Arrest without warrant*—See secs. 396 (k), 646.

*Same punishment as for theft*—The punishment stated for theft of documents of title is three years' imprisonment, sec. 362; for theft of testamentary instruments, imprisonment for life, sec. 361; for theft of

judicial or official documents, three years' imprisonment, sec. 363; for theft of election documents, seven years' imprisonment, sec. 367; for theft of a valuable security under sec. 355, by person required to account, or under sec. 357, by misappropriation, fourteen years' imprisonment, sec. 358; and see secs. 386 and 387.

These are the maximum punishments. If there is no minimum term expressly provided for an offence, the court may impose any shorter term. Code sec. 1054.

*Judicial, official or other documents*].—These are more fully described in sec. 363, dealing with theft. A police court information is within the description. *R. v. Mason*, 22 U.C.C.P. 246 (Ont.).

### Concealing anything capable of being stolen.

**397.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen.

*Origin*].—Code of 1892, sec. 354.

*"Anything capable of being stolen"*].—See secs. 344-346. The owner of the goods may himself be guilty of the offence of concealing them for a fraudulent purpose, *e.g.*, to defraud the insurance companies, and the offence may be complete although no claim was in fact made against the insurance companies. *R. v. Goldstaub* (1895), 10 Man. R. 497, 5 Can. Cr. Cas. 357; *R. v. Hurst* (1901), 13 Man. R. 584, 5 Can. Cr. Cas. 338.

*Second offences*].—See secs. 465, 757, 851, 963, 964, 982.

### Bringing stolen property into Canada.

**398.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, having obtained elsewhere than in Canada any property by any act which if done in Canada would have amounted to theft, brings such property into or has the same in Canada.

*Origin*].—Code of 1892, sec. 355; R.S.C. 1886, ch. 164, sec. 88.

*"Property" defined*].—Code sec. 2, sub-sec. (32).

*Recent possession*].—Recent possession will be taken into account in proof of the felonious taking in the foreign country. *R. v. Jewell*, 6 Man. B. 460.

Accused was convicted of bringing stolen property into Canada knowing it to have been stolen. It was proved that a team of horses was stolen in North Dakota on the 6th of March, 1909, that on the 12th of the same month they were found in the possession of the accused in

Canada, and there were circumstances from which the jury might find that the accused brought the horses into Canada. It appeared that the accused was in the locality where the horses were stolen at the time they disappeared and he gave no account of his possession. On a crown case reserved it was held that the evidence was sufficient to warrant the jury in finding that the accused stole them and brought them into Canada. *R. v. Duff* (1909), 2 Sask. L.R. 323, 15 Can. Cr. Cas. 351; and see as to formalities of a formal charge, *R. v. Duff* (No. 2) 2 Sask. L.R. 388, 15 Can. Cr. Cas. 454; *re Lord's Day Act*, 16 Can. Cr. Cas. 459, 43 S.C.R. 457.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

*Receiving or retaining in Canada goods stolen there or elsewhere*—Code sec. 399.

### *Receiving Stolen Goods.*

**Receiving property obtained by indictable crime.**

**399.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained.

*Origin*—Code of 1892, sec. 314; R.S.C. 1886, ch. 164, sec. 82.

*Exception as to receiving after restoration or after passing of legal title*—Code sec. 403.

*Search warrants*—Code secs. 629-631.

*"Receives or retains"*—If there is a continuous transaction, the thief cannot be convicted both for stealing and receiving. *R. v. Carmichael* (1915), 22 B.O.R. 375, 26 Can. Cr. Cas. 443. When the amendment was made of the definition of receiving (see sec. 402), it was to meet the case of the receiver receiving the stolen property innocently, but afterwards retaining it guiltily. *R. v. Carmichael*, *supra*; *R. v. Lum Man Bow and Hong* (1910), 15 B.C.R. 22; *R. v. Theriault* (1904), 11 B.C.R. 117; *R. v. Hodge*, 12 Man. R. 319; *R. v. Kelly* [1917] 1 W.W.R. 46, on appeal from 10 W.W.R. 1345; in appeal, *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282.

There is the possibility of one having in his possession goods which he knew had been stolen but which prior to their having reached him may have lost the character of stolen goods. *R. v. Watchman* (1914), 7 W.W.R. 880, 7 Sask. L.R. 350, 23 Can. Cr. Cas. 362, 30 W.L.R. 534, citing *R. v. Schmidt*, 35 L.J.M.C. 112; Code sec. 403.

As Code sec. 399 makes it an offence to retain in possession with guilty knowledge, a person who did not know when he received the article that it had been stolen but subsequently learns that it was

stolen, will be subject to the punishment if he refuses to give it up (*R. v. Johnson*, 27 Times L.R. 489, distinguishable).

If the property in the thing which had been unlawfully obtained has passed from the owner to someone else, the subsequent receiving is excepted from the operation of secs. 399, 400 and 401 by Code sec. 403. So also if the thing unlawfully obtained has been restored to the owner, the subsequent receiving is not an offence although the receiver may know that the thing had been "previously unlawfully obtained." Code sec. 403.

*Stating the offence*—An information as well as a conviction for receiving is bad if it does not contain an allegation that the goods had been stolen, or obtained by means of some indictable offence, as the case may be. *R. v. Watchman* (1914), 7 W.W.R. 880; 7 Sask. L.R. 350, 23 Can. Cr. Cas. 362, 30 W.L.R. 534; *R. v. Leschinski*, *infra*; *R. v. Lamoreaux*, *supra*.

"*Knowing such thing to have been so obtained*"—*Recent possession*—An information does not disclose the criminal offence of receiving unless it charges that the accused knew the goods to have been stolen (or otherwise obtained by a criminal offence); *scienter* is of the essence of the offence of receiving. *R. v. Leschinski*, 9 W.L.R. 602, 17 Can. Cr. Cas. 199; *R. v. Lamoreaux*, 10 Que. Q.B. 15, 4 Can. Cr. Cas. 101. The offence is not included as a lesser offence of the crime of house-breaking and theft, and where the latter is charged a verdict on that count for the offence of receiving is not good. *R. v. Lamoreaux*, *supra*. Purchase at a gross under-value from a non-trader in such articles puts the purchaser on inquiry as to their ownership. *Klein v. Kats* (1914), 24 Can. Cr. Cas. 153, 21 Rev. Leg. 275 (Que.); *Desaulniers v. Hird*, 15 Que. K.B. 394. The circumstances of the receiving may prove guilty knowledge. *R. v. Sbarra*, (1918) 87 L.J.K.B. 1003.

On a charge against a person of being in possession of recently stolen property, well knowing it to have been stolen, when the prosecution have proved recent possession of stolen goods, then in the absence of any explanation which may reasonably be true the jury may find the prisoner guilty but are not bound to do so. If an explanation is given and the jury think that it may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the onus is on the prosecution to establish the guilt of the prisoner beyond reasonable doubt. *Rex v. Schama* and *Rex v. Abramovitch*, 84 L.J.K.B. 396, 11 Cr. App. B. 45; *R. v. Lum Man Bow*, 15 B.C.R. 22, 16 Can. Cr. Cas. 274; *Desaulniers v. Hird*, 15 Que. K.B. 394; *R. v. Langmead*, 9 Cox C.C. 464; *R. v. Theriault* (1904), 11 B.C.R. 117, 8 Can. Cr. Cas. 460; *R. v. Thornton* (1909), 2 Cr. App. B. 284; *Klein v. Kats* (1914), 21 Rev. Leg. 275, 24 Can. Cr. Cas. 153 (Que.).

Evidence that one of the persons jointly in possession, although not shown to have been aware of the theft when possession was obtained, had, on becoming aware of the fact, taken steps to prevent the police

from discovering them, will be material to show unlawful retention. *R. v. Pritchard*, 9 Cr. App. R. 210 [1913] W.N. 338; Code secs. 69, 402.

Two persons are together, one carrying a bag containing stolen goods. If that one were shown to be the thief, it would not be enough to convict the other as a receiver that he was afterwards with the thief on the street when the latter was carrying the stolen goods, although he was seen to put up his hand as if to take the bag, but his companion refused to let him have it. There would in such case have been no possession by the alleged receiver as opposed to possession by the thief. But where both were charged with receiving, there being no evidence as to who stole the goods, it would be proper to leave such evidence to the jury against both, as the possession of a receiver may be actual or constructive. *R. v. Newton* (1912), 7 Cr. App. R. 214.

An agent or servant holding possession for his principal or master is subject to the same rule as to recent possession. *R. v. Gordon* (1909), 2 Cr. App. R. 52.

When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen if not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession. Code sec. 993. Such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. Code sec. 993 (2).

That provision does not apply to admit proof in respect of other property stolen within the twelve months and disposed of by the prisoner; it must be found in his possession at the time when he was found in possession of the property in respect of which the charge is laid. *R. v. Carter* (1884), 12 Q.B.D. 522; *R. v. Drage* (1878), 14 Cox 85. Apart from the provisions of sec. 993, other instances of receiving similar goods which had been stolen from the same party may be proved. *R. v. Dunn* (1826), 1 Mood. C.C. 146; *R. v. Davis* (1833), 6 C. & P. 177; *R. v. Nicholls* (1858), 1 F. & F. 51.

If evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, if not less than three days' notice in writing has been given to the person accused that proof is

intended to be given of such previous conviction. Code sec. 994; *R. v. Davis*, L.R. 1 C.C.R. 272.

It is not necessary, for the purposes of sec. 994, to charge in the indictment the previous conviction of the person so accused. Code sec. 994, sub-sec. (2).

Recklessness and carelessness are not sufficient to constitute guilty knowledge that property has been stolen. *Rex v. Havard*, 11 Cr. App. R. 2.

Where it is plain that the prisoner denies any guilty knowledge, but admits receiving the goods, his plea of guilty associated with such denial should not be accepted as he may have thought he would be held guilty apart from guilty knowledge. *R. v. Ingleson* [1915] 1 K.B. 512.

*Proving the goods to have been stolen or obtained by indictable offence*—There must be proof against the receiver that the goods were stolen. *R. v. Watchman* (1914), 7 W.W.R. 880, 7 Sask. L.R. 350, 23 Can. Cr. Cas. 362, 30 W.L.R. 534; *McIntosh v. The Queen* (1894), 23 S.C.R. 180; *R. v. Densley* (1884), 6 C. & P. 399; *R. v. Deer*, 1 L. & C. 240. The circumstances of the receiving may prove it. *R. v. Sbarra*. (1918) 87 L.J.K.B. 1003.

On a trial for receiving the point that there is no proof that the goods have been stolen ought to be distinctly taken at the trial. *R. v. Barker*, 11 Cr. App. R. 191.

It is sufficient that the prosecution has proved that the property was in fact stolen and that the receiver knew it, it is not essential to prove by whom the theft was committed. *R. v. Groulx* (1908); 15 Can. Cr. Cas. 20 (Que.).

There may be a verdict of receiving money stolen "by a person unknown," although the indictment charges receiving money stolen by a person named. *R. v. Groulx*, 18 Que. K.B. 118, 15 Can. Cr. Cas. 20 (Que.).

The record of conviction of the principal is presumptive evidence only against the receiver that the goods were stolen, and he may controvert the fact. *R. v. Dunn*, 4 C. & P. 377; *R. v. Smith*, 1 Leach 288; *McIntosh v. The Queen* (1894), 23 S.C.R. 180. The conviction is presumptive evidence that everything in the former proceeding was rightly and properly transacted. *McIntosh v. The Queen*, 23 S.C.R. 180, 189.

On a joint indictment of two persons, the one for the theft and the other for receiving, if the first pleads guilty to the theft, the court may require other evidence as against the receiver to prove the fact of the goods having been stolen; *R. v. Turner*, 1 Lewin C.C. 119; which may be supplied by calling as a witness the co-defendant convicted on his own plea. See Can. Evidence Act, R.S.C. 1906, ch. 145, secs. 3 and 4, and *R. v. Connors* (1893), 3 Que. Q.B. 100, 5 Can. Cr. Cas. 70.

The evidence of the thief was admissible against the receiver even before the Canada Evidence Act; *R. v. Haslam*, 2 Leach C.C. 467, sub-



ject, however, to proper directions being given to the jury as to its weight if uncorroborated, it being the evidence of an accomplice. *R. v. Robinson* (1864), 4 F. & F. 43. The confession of the thief is not evidence against the receiver unless made in the presence of and concurred in by the latter. *R. v. Cox* (1858), 1 F. & F. 90; *R. v. Turner* (1832), 1 Mood. 347.

*Instructions to jury in cases of receiving*—Where a prisoner is charged with receiving stolen goods, the jury should be directed that, to justify a verdict of "guilty," they must be satisfied that the goods have been in the possession and under the control of the prisoner; *Reg. v. Wiley* (1850), 2 Den. C.C. 37; *R. v. Berger*, 84 L.J.K.B. 541, 11 Cr. App. R. 72, or that he aided in concealing or disposing of the goods. Code sec. 402. The possession requisite may be either an exclusive or a joint possession with the thief or with another person. Code sec. 402. The true test of receipt of the goods is control over them. *R. v. Smith* (1855), Dears. C.C. 494; *Rex v. Gleed*, 12 Cr. App. R. 32.

The jury should be directed clearly to the question of the identity of the goods found with those stolen. *Rex v. Smith*, 11 Cr. App. R. 19. The question whether defendant was in possession is for the jury and not for the judge. *R. v. Leary* (1913), 9 Cr. App. R. 85.

If there is evidence that it was found in defendant's possession, the jury must be carefully directed on the question whether he had any knowledge where it was. *R. v. Higginbotham* (1912), 8 Cr. App. R. 79.

The evidence of possession by the accused must be clear. *R. v. Foreman*, 9 Cr. App. R. 216.

The fact that the accused had been the tenant of the house to which the stolen property was brought and was under notice to quit but had already removed, may not be sufficient to raise any presumption against him, although one of the other parties concerned in the theft was his traveller and the other his lodger, where there was no proof that he had been in the house since the date of his removal prior to the robbery. *R. v. Batty* (1912), 7 Cr. App. R. 286.

When stolen goods are found in part of a house sub-let by the occupier, the alleged possession of the occupier must be strictly proved. *R. v. Holmes*, 11 Cr. App. R. 130.

The fact that stolen goods are bought at an undervalue is not conclusive proof of guilty knowledge; it should be left with the other facts to the jury. *Rex v. Holmes*, 11 Cr. App. R. 130.

Upon the trial of an indictment for receiving the onus always remains upon the prosecution. The judge, in directing the jury, should tell them that, upon the prosecution establishing that the person charged was in possession of goods recently stolen, they might, in the absence of any explanation by the accused of the way in which the goods came into his possession, which might reasonably be true, convict the prisoner. *R. v. Schama*, 84 L.J.K.B. 396, 11 Cr. App. R. 45; *R. v. Lam Man Bow*, 15 B.O.R. 22, 16 Can. Cr. Cas. 274; *Dessaulvièrs v. Hird*, 15 Que. K.B.

394; *R. v. Langmead*, 9 Cox C.C. 464; *R. v. Theriault* (1904), 11 B.C.B. 117, 8 Can. Cr. Cas. 460; but that, if an explanation were given which the jury thought might reasonably be true, although they were not convinced of its truth, the prisoner was entitled to be acquitted, inasmuch as the Crown would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. *Rex v. Schama*, and *Rex v. Abramovitch*, 84 L.J.K.B. 396, 11 Cr. App. R. 45; *R. v. Aubrey*, 11 Cr. App. R. 182; *R. v. Badash*, (1918) 87 L.J.K.B. 732; *R. v. Hamilton*, (1918) 87 L.J.K.B. 734.

The jury should be expressly asked to consider whether the defendant's explanation of his possession of the goods soon after the theft of them is reasonable or not. *R. v. Hampson*, 11 Cr. App. R. 75.

An attempt to evade arrest should not be unduly insisted upon as evidence of guilt. *R. v. Hampson*, 11 Cr. App. R. 75.

The trifling value of the chattel in question may be relevant to the accused's explanation. *Rex v. Millington*, 11 Cr. App. R. 86.

On a joint indictment of husband and wife for receiving stolen property the evidence of the guilty knowledge of each defendant must be carefully distinguished in the summing up. *R. v. Pritchard* (1913), 9 Cr. App. R. 210; *R. v. Dring* (1857), 7 Cox C.C. 382, Dears. & B. 329.

If the court hearing an appeal thinks there was evidence from which the jury might infer guilty possession, it will not quash a conviction, though there was not (as there should have been) a direction on the point to the jury. *R. v. McQueen* (1912), 8 Cr. App. R. 89; Code sec. 1019.

When the accused is tried upon two indictments by the same jury, care should be taken in directing them that the latter charge is not affected by the former. *Rex v. Brereton*, 10 Cr. App. R. 201. Where the case was a simple one of receiving stolen goods and turned wholly on the facts which were such that the jury could not have found otherwise than a verdict of guilty, it is not error that the trial judge omitted with the jury's consent to sum up the case. *R. v. Newman* (1913), 9 Cr. App. R. 134.

*Aiding in concealing or disposing of the goods*—Sec. 402 provides, *inter alia*, that the act of receiving anything unlawfully obtained is complete as soon as the offender aids in concealing or disposing of it. This enlarges the scope of sec. 399 so as to include such cases. For this reason, the case of *R. v. Watson* [1916] 2 K.B. 385, 12 Cr. App. R. 62, 85 L.J.K.B. 1142, does not apply.

*Subsequent receiving by the thief*—There may be circumstances under which an accused may in respect of the same act properly be charged by different counts in one indictment both for theft and for receiving what in the other count he is alleged to have stolen. *R. v. Kelly* [1917] 1 W.W.R. 46 (Man.), but where only one offence has been committed he should be punished for one only, although found guilty on both counts. *Kelly v. The King* [1917] 1 W.W.R. 463, 27

Can. Cr. Cas. 282, 54 S.C.B. 220, (in which the lesser offence was selected as the basis of punishment).

It is only a receiving which is an act done in the commission of the principal offence that cannot be treated as a separate offence of unlawfully receiving money or goods which have been stolen. *R. v. Hodge*, 12 Man. R. 319; *R. v. Kelly*, 10 W.W.R. 1345 at 1353. But notwithstanding convictions for both offences it would seem that if they were involved in one continuous series of transactions, the penalty to be imposed would be restricted to that applicable to one offence. *R. v. Kelly* [1917] 1 W.W.R. 46, 27 Man. R. 105, 27 Can. Cr. Cas. 94; *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.B. 220, 27 Can. Cr. Cas. 282, citing *R. v. Norman* [1915] 1 K.B. 341, and *R. v. Lockett* [1914], 2 K.B. 720, 83 L.J.K.B. 1193.

*Receiving from owner's wife his property fraudulently taken by her on deserting*—See Code sec. 354.

*Evidence of finding other stolen goods in possession of accused*—Code sec. 993.

*Joint or separate trials of receivers*—Receivers at different times or of different portions of the stolen property may be tried together. Sec. 849. The receiver may also be indicted along with the thief; or may be charged separately whether or not the thief has been indicted or is amenable to justice. Sec. 849. But separate trials may be ordered as to separate counts. Secs. 856-858.

On a joint indictment for receiving stolen property, the evidence of the guilty knowledge of each defendant must be carefully distinguished in the summing-up. *R. v. Pritchard*, 9 Cr. App. R. 210, [1913] W.N. 338; *R. v. Dring* (1857), Dears. & B. 329.

An unlawful receiving by both may appear from a preconcerted arrangement between them which would make the one a party to the acts of the other in his absence. *R. v. Pritchard*, supra; Code sec. 69.

*When receiving complete*—Code sec. 402.

*Compensation to bona fide purchaser out of money found on convict*—When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, if it is his, a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser. Code sec. 1049.

*Order for restitution or compensation to owner*—Code secs. 1050 (restitution), 1048 (compensation).

*Separate convictions against each for receiving parts of property stolen, allowed on joint charge of receiving all*—Code sec. 954.

*Joint indictment of several receivers taking separate portions of goods stolen*—Code sec. 849.

*Receiver may be charged although thief not prosecuted*—Code sec. 849.

*Summary trial for unlawfully receiving "stolen property" of value not over \$10*—Code secs. 773, 774.

*Summary trial in other cases by magistrate with extended jurisdiction*—Code sec. 777.

*Summary trial under North-West Territories Act*—For special provisions as to trial, see N.W.T. Act, R.S.C., ch. 62, secs. 37-55.

*Yukon Territory*—Summary trial for receiving stolen property, see the Yukon Act, R.S.C., ch. 63, sec. 65.

*Prior acquittal of the theft*—The acquittal for the theft does not support a plea of *autrefois acquit* to an indictment for receiving. *R. v. Groulx*, 18 Que. K.B. 118, 15 Can. Cr. Cas. 20.

#### Receiving stolen mail matter.

**400.** Every one is guilty of an indictable offence and liable to five years' imprisonment who receives or retains in his possession, any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offence, knowing the same to have been stolen.

*Origin*—Sec. 315, Code of 1892; the Post Office Act, R.S.C. 1886, ch. 35, sec. 84.

*"Any chattel," etc.*—This section is taken from the "Post Office Act" and the opinion is submitted that the words "any chattel, etc., the stealing whereof is hereby declared to be an indictable offence," have reference only to the postal offences now dealt with by the Code.

The use of the word "hereby" has resulted from a transposition of an entire clause from the Post Office Act, R.S.C. 1886, ch. 35, sec. 84, a reference to which was subjoined to the corresponding section of the original Code of which the present Code is a revision only. See Code of 1892, 55-56 Vict., Can., ch. 29, sec. 315. The reference in the second Code to the original section of the first Code and in that to the section of the Post Office Act, seem to make it clear that only offences under the postal laws were in contemplation. While it remained a part of the Post Office Act its meaning was well defined notwithstanding the use of such general terms as "post letter or any chattel, etc., the stealing whereof is hereby declared to be" a felony or (since the Code) an indictable offence. The question has arisen whether the transposition of this clause into the Code enlarges the effect of the transposed word "hereby" so as to include in the penalty of sec. 400 the stealing of any article the theft of which is made indictable by the Code in terms under which specific articles are described or named. That it should at least be limited to

articles of the class last-mentioned is supported by a decision in Manitoba in which it was held unnecessary to decide whether or not it should be further limited to crimes of theft so declared by sections now incorporated in the Code, but taken from the Post Office Act of 1886. *R. v. Nimchonok* (1915), 9 W.W.R. 598, 25 Man. R. 766, 25 Can. Cr. Cas. 66.

Many of the penal clauses of the former Post Office Act have now been incorporated in the Code and the present sec. 400 would apply, it is submitted, to those sections of the Code so derived which deal with the stealing of postal matter.

*Place of offences for prosecution of postal offences*—Code sec. 584, sub-sec. (c).

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510D, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

**Receiving property obtained by offence punishable on summary conviction.**

**401.** Every one who receives or retains in his possession anything, knowing the same to have been unlawfully obtained, the stealing of which is punishable on summary conviction, either for every offence, or for the first and second offence only, is guilty of an offence and liable on summary conviction, for every first, second or subsequent offence of receiving, to the same punishment as if he were guilty of a first, second or subsequent offence of stealing the same.

*Origin*—Code sec. 316; R.S.C. 1886, ch. 164, sec. 84.

*Exception when legal title acquired after theft*—See sec. 403.

*Receiving after restoration to owner*—See sec. 403.

*When receiving is complete*—See sec. 402.

*Receiving in cases of minor theft punishable on summary conviction*—This section (401) applies only to the few classes of cases in which provision is made for summary conviction for the theft itself. The offence of receiving is generally an indictable one under sec. 399, as is the offence of theft.

The punishment on a summary conviction for receiving is limited by sec. 401 in like manner as for the principal offence. *R. v. Friesell*, 22 Can. Cr. Cas. 214, 15 D.L.R. 674, 5 O.W.N. 801, 25 O.W.R. 697.

As to summary conviction in certain minor classes of theft, see Code secs. 370, dogs and domestic animals; 374, shrubs, trees, etc.; 375, garden produce; 376, cultivated plants not in garden; 377, fences and gates; 385, images, etc. at Indian graves; 393, killing or injuring pigeons.

*"Knowing the same to have been unlawfully obtained"*]—Compare sec. 399; and see sec. 993 (evidence of property previously stolen); and sec. 994 (proof of previous conviction) as evidence of guilty knowledge.

*Theft of trees, etc.*]—Summary conviction for first and second offences, indictment for third; see sec. 374.

*Theft of plants, etc., from garden*]—Summary conviction for first offence, indictment for second; see sec. 375.

*Theft of growing plants, etc., otherwise than from garden*]—Summary conviction for all offences; see sec. 376.

*Theft of fences or gates*]—Summary conviction; see sec. 377.

*Possessing trees, etc., without being able to account*]—See sec. 395.

*Summary conviction when joint offenders*]—See sec. 728.

*First offenders on summary conviction*]—Code sec. 729.

#### When receiving is complete.

**402.** The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over such thing, or aids in concealing or disposing of it.

*Origin*]—Code of 1892, sec. 317.

*Receiving stolen property generally*]—Code sec. 399.

*Receiving property obtained by indictable offences*]—Code sec. 399.

*Exception when legal title acquired after theft*]—See sec. 403.

*Receiving property obtained by a "summary conviction" offences*]—Code sec. 401.

*Receiving stolen property brought into Canada*]—Code secs. 398, 399.

#### Receiving after restoration to owner.

**403.** When the thing unlawfully obtained has been restored to the owner, or when a legal title to the thing so obtained has been acquired by any person, a subsequent receiving thereof shall not be an offence although the receiver may know that the thing had been previously unlawfully obtained.

*Origin*]—Code of 1892, sec. 318.

*Unlawful receiving*]—Code secs. 399, 402, 400 (postal offences), 401 (summary conviction offences).

*Receiving after legal title has passed from owner*]—Secs. 399 and 401 deal with the offence of receiving with knowledge anything which was obtained by the commission of a criminal offence; and sec. 403 is a declaration in effect that if the crime were such that title passed to the culprit, then the receiving from him afterwards is excepted from the penalty although the receiver knew the goods or money had been

obtained unlawfully by means of the offence. As regards the common law offence of larceny, the theory of English jurisprudence was that the property in the goods, or, in the words of sec. 403, the "legal title to the thing so obtained," either did not pass to the thief, or that on his conviction it reverted to the true owner with a possible exception that the thief might have conferred a good title by a sale in market overt. Subject to the exceptions of sec. 403, the offence of receiving or retaining applies to offences "punishable under indictment"; Code sec. 399; and to certain minor offences referred to in sec. 401 punishable on summary conviction. Many of these offences are statutory and not common law offences and the Code definition of theft extends to offences which were not larceny at common law. Indirectly the legal title may be disposed of by the order of the criminal court under the statutory power to order restitution under Code sec. 1050; but that power is restricted so as not to apply to the case of the prosecution of any factor, agent, trustee, etc. for statutory theft from the principal (Code secs. 358, 390). And in other cases if it appears before a restitution order has been made by the criminal court that the stolen property had been transferred to an innocent purchaser for value who had "acquired a lawful title thereto," the court is not to order restitution of such property. The court might also award restitution although the person indicted was not convicted, if the jury declared, or the court trying the case without a jury found, that the property which the accused was charged with stealing or with knowingly receiving, belongs to the prosecutor (or the witness for the prosecution) and that he was unlawfully deprived of it by such offence. Code sec. 1050, sub-sec. (3). There is also statutory provision for awarding compensation against the person convicted of any indictable offence "by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the offence"; and the amount awarded is to be deemed a judgment debt. Code sec. 1048. Such an order possibly may have an effect on the passing of the legal title. Then sec. 1049 enables the court trying a case of "theft or other offence, including the stealing or unlawfully obtaining any property" to give compensation out of money taken from the prisoner on his arrest, to a purchaser without notice if he applies for same and makes restitution of the property "to its owner."

Subject to the provisions of the Code and of the dispositions which may be brought within the scope of the criminal law and so supersede provincial enactments, the question of the right of property in the goods obtained by means of a crime is to be disposed of by reference to the provincial law. See the Sales of Goods Acts of various provinces. A distinction is commonly made by provincial law between a mere change of possession by a theft which would have been larceny at common law, and a charge of possession on obtaining goods by false pretences in which the owner voluntarily gives up the goods to the per-

son guilty of the false pretense. The distinction was not made in England on the enactment of the Larceny Act, 1861, Imp., 24-25 Vict., ch. 96, sec. 100; *Bentley v. Vilmon* (1887), 57 L.J.Q.B. 18, 12 A.C. 471; *R. v. Central Criminal Court*, 18 Q.B.D. 314, 16 Cox C.C. 196; *R. v. Villensky* [1892] 2 Q.B. 597, but the omission was corrected by the later Sale of Goods Act, 1893, Imp. 56-57 Vict., ch. 71, sec. 24. See *Howe v. Schroeder* (1905), 1 W.L.R. 174 (Y.T.), as to owner following proceeds of stolen goods. Sec. 1050, as to restitution orders, does not extend to the offence under sec. 405, of obtaining money under false pretences.

### *False Pretences.*

**Definition of false pretense.—Exaggeration.—Question of fact.**

**404.** A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

2. Exaggerated commendation or depreciation of the quality of any thing is not a false pretense, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.

3. It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact.

*Origin*—Sec. 358, Code of 1892.

"*Representation of a matter of fact either past or present*"—A mere lie, told with intent to defraud, and having reference to the future, is not treated as a crime. A lie, alleging the existence of some fact which does not exist, is regarded as a crime, if property is obtained by it. *Stephen's Dig. Crim. Law*, p. 161; *Alderson v. Maddison*, 5 Ex. D. 303; *R. v. Nowe*, 36 N.S.R. 531, 8 Can. Cr. Cas. 441.

To render a defendant liable, his false representations must have been with regard to a past or existing matter, not to a future undertaking as that he will pay for goods on a certain day. *Mott v. Milne*, 31 N.S.R. 372; *Regina v. Bertles*, 13 U.C.C.P. 607; but there may be a representation by conduct or otherwise of a present ability to pay which would be a pretense within sec. 404. That which is in form a promise may be, in another aspect, a representation. *Clydesdale Bank v. Paton* [1896] A.C. 394, per Lord Herschell.

The false pretence must be a false representation, express or implied, as to the past or present existence of some fact; a mere promise as to future conduct, or representations as to future expectations are not sufficient. *R. v. Woodman*, 14 Cox C.C. 179. For instance, the giving



a cheque in exchange for goods is ordinarily a representation that the drawer has an account at the bank on which the cheque is drawn, and that that account is in such condition that in the ordinary course of events the cheque will be met. If the drawer knows that these conditions do not exist the giving of the cheque is in law a false pretence. But representations of future expectations, unless they are representations of existing facts, do not constitute a false pretence, and obtaining goods on credit by means of such representations is not obtaining goods by false pretences. The false pretence may be made in any way, either by words, by writing, by conduct or by acts. *R. v. Letang*, 2 Can. Cr. Cas. 505; 29 O.L.R. 56. It is no excuse to say that a person of common prudence could easily have found out the pretence was untrue, nor to say the existence of the alleged fact was impossible, or that it was intended to make compensation for the goods in the future. *R. v. Martel* (1916), 27 Can. Cr. Cas. 316 (Que.).

The giving of a post-dated cheque does not alone involve a representation that there are funds presently available, but a promise to have sufficient funds on the future date specified to the credit of the drawer and is not a representation of a fact past or present within sec. 404. *R. v. Richard* (1906), 11 Can. Cr. Cas. 279 (Que.).

In *Reg. v. Cooper*, 13 Cox C.C. 617, 46 L.J.M.C. 219, the accused was charged with falsely pretending that he was a dealer in potatoes, and as such dealer, in a large way of business and in a position to do a good trade in potatoes and able to pay for large quantities of potatoes, as and when the same might be delivered to him. The only evidence thereof was a letter from the prisoner to the prosecutor, reasonably conveying to the mind the construction put upon it in the indictment. Lord Coleridge, C.J., is reported (at p. 620) as follows:—

"The question for the court, as I understand the case, is whether there was evidence upon which the false pretences alleged in the indictment could fairly be sustained."

"It was a question for the jury whether the false pretences alleged did or did not reasonably arise from the letter. The true principle applicable to this case was well enunciated by Blackburn, J., during the course of the argument in *Reg. v. Giles*, 10 Cox C.C. 44: 'It is not requisite that the false pretence should be made in express words, if the idea is conveyed.'"

Deaman, J., at p. 622, said:—

"In *Reg. v. Giles*, 10 Cox C.C. 44, the prisoner pretended that she had power to bring the prosecutrix's husband back, and that was held to be a statement of fact. That warrants us in holding that where a man is not in a position to do what he professes he will do at a given time, he is making a false statement of fact. The indictment charges that the prisoner falsely pretended that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him, and that pretence, I think, is proved by the letter."

And Pollock, B. (*R. v. Cooper*, 13 Cox C.C. 617, 622), said:—

"Having heard the whole of the argument, I have come to the conclusion that the conviction should be affirmed. It is not sufficient for the prisoner to show that the letter might bear another meaning, if it is reasonably capable of bearing the meaning imputed to it in the indictment. It is the duty of the prisoner to show by special circumstances that it bore the construction he contends for. I think that the false pretences charged may be fairly inferred from the letter, and that the conviction should be affirmed."

In the case of *Edgington v. Fitzmaurice*, L.R. 29 Ch.D. 459, at 483, Bowen, L.J., is reported as follows:—

"There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

A misrepresentation that lands submitted for a mortgage loan had a building on it will found a false pretence charge if the pretence was relied upon. *R. v. Huppel*, 21 U.C.Q.B. 281 (Ont.).

*False pretence through innocent agent*—The fraud may be committed through the instrumentality of an innocent agent, in which case the principal is liable although he was not present when the agent made the representation in accordance with his principal's orders and which was intended to perpetrate the fraud. *R. v. Garten* (1913), 29 O.L.R. 56; *R. v. Garrett* (1853), 6 Cox C.C. 260.

*False pretence by conduct*—A charge of obtaining money by false pretences may be founded upon conduct apart from any express words. The question must always be what was intended to be conveyed by the words, acts, conduct, or even silence, of the person said to have made the false pretence. *R. v. Leverton* [1917] 2 W.W.R. 584, 588, 11 Alta. L.R. 355, 28 Can. Cr. Cas. 61; *R. v. Barnard*, 7 C. & P. 784; *R. v. Cooper*, 46 L.J.M.C. 219.

The false pretence may be by acts, that is, by "words or otherwise": sec. 404; *Regina v. Bull* (1877), 13 Cox C.C. 608, and *Regina v. Murphy* (1876), 13 Cox C.C. 298; *R. v. Garten* (1913), 29 O.L.R. 56, 60.

So, handing over cheques which the accused knew to be worthless, after his account had been closed, in exchange for bonds delivered to him on the faith of the cheques, is a misrepresentation by conduct. *State of New York v. Israelowitz* (1917), 29 Can. Cr. Cas. 623, 628 (B.C.). A person tendering to another a promissory note of a third party in exchange for goods, is to be taken to affirm that the note has not, to his knowledge, been paid, either wholly or to such an extent as almost to destroy its value. *R. v. Davis*, 18 U.C.Q.B. 180 (Ont.).

There may be a false pretence in the accused misrepresenting that he was farming in a large way, and obtaining seed grain much in

excess of his farm requirements with the intention of selling the unused surplus. *R. v. Holderman* (1914), 7 W.W.R. 729, 734, 7 Sask. L.R. 279, 23 Can. Cr. Cas. 369, 30 W.L.R. 82; *Edgington v. Fitzmaurice*, 55 L.J. Ch. 650.

In *Reg. v. Cooper*, 46 L.J.M.C. 219, 25 W.R. 696, 2 Q.B.D. 510, the prisoner, who was a mere huckster, wrote a letter to the prosecutor ordering from him two railway-truckloads of potatoes "as samples," and expressing a hope that the quality would be good, as then a good trade would follow for both of them. The Court for Crown Cases Reserved held that this letter might reasonably be construed as containing a representation that the writer was a dealer in potatoes in a large way of business, and that it was a question for the jury whether he intended the prosecutor to put this meaning upon the letter.

In *R. v. King* [1897] 1 Q.B. 214, 18 Cox C.C. 447, the prisoner was convicted of having obtained certain churns by false pretences as to his position and business. He had written a letter to the prosecutor containing these words:—"The two six-gallon milk churns in order do not require name on them, as they are only required for home use." This letter was produced in evidence by the prosecutor, and he was thereupon asked what opinion he had formed from the letter as to the position and occupation of the accused. The question was objected to by counsel for the defence, but was allowed, and the answer was to the effect that the prosecutor inferred from the letter that the writer was either a farmer or a dairyman. The prisoner was convicted, subject to the case stated as to the admissibility of this question and answer.

The objection was based on the ground that the witness was being asked to construe a written document, which was a question of law for the court, and not a question of fact. The court, however, held that the question was admissible, not as to whether the latter was capable of bearing the meaning put upon it, but for the purpose of showing whether the prosecutor believed the statement made. *Hawkins, J.*, pointed out that in a charge for obtaining goods by false pretences it must be proved (1) that a false pretence was made, (2) that the prosecutor believed the pretence, and (3) that the goods were obtained by means of the pretence; and he held that the only way to find out whether the prosecutor believed the pretence in the letter was to ask his opinion of the letter. *R. v. King, supra.*

When in an indictment for obtaining by false pretences, one of the pretences alleged was that defendant was carrying on a genuine business in buying and selling pigs, the mere fact that he did not keep any pigs in his own possession nor hold an option of purchase, does not establish falsity of his advertisement offering pigs for sale where he was in the habit of having deliveries made direct by the breeders. If it were open to the jury to find that the advertisement meant that he was ready to supply pigs of the description advertised although not in his possession or control, the practical withdrawal of that view in the

charge to the jury will be a ground for quashing the conviction. *R. v. Jakeman* (1914), 10 Cr. App. R. 38.

On a charge of obtaining goods by false pretences by giving a bill of exchange due in seven weeks where some of the averments made were that the accused professed to be a man of financial strength and able in due time to meet the bill, it was held to be proper to admit in evidence for the prosecution the bank account of the accused and proof of the number of cheques on it being dishonored during the time of the transaction. *R. v. Fryer* (1912), 7 Cr. App. R. 183.

Where the prisoner was charged with having obtained goods by false pretences and the false pretence alleged in the indictment was that he had pretended that he was carrying on a genuine and *bona fide* business as a manufacturer's agent and merchant, it was held that receipts sworn to by the prisoner as having been given to him as acknowledgments of payments for goods purchased by him other than those the subject of the charge, and entries in his bank pass-books showing payments made by him for goods supplied to him, were admissible as evidence on his behalf that he was in fact carrying on a genuine and *bona fide* business. *Rex v. Sagar* [1914] 3 K.B. 1112, 10 Cr. App. R. 279.

In *R. v. Létang* (1899), 2 Can. Cr. Cas. 505, (Que.), a debtor had made a judicial abandonment for the benefit of his creditors whereby his property became vested in another, and, knowing that he was no longer entitled to receive the rent, he presented himself afterwards as the landlord to a tenant of the property and received the rent as he had formerly been accustomed to do. It was held that he was properly found guilty of a false pretence by his acts and conduct.

An ordinary trader does not by the mere fact that he keeps his doors open for business represent that he is at the moment solvent. *R. v. Parker*, 80 J.P. 271.

It is open to a jury to find that a trade name has been assumed with intent to defraud. *R. v. Whitmore* (1914), 10 Cr. App. R. 204.

If there is evidence of two persons acting together and one assents to a false representation made by the other as an inducement to a contract, such assent may amount to a false pretence by conduct. *R. v. Grosvenor* (1914), 10 Cr. App. R. 404; *R. v. Cadden*, 4 Terr. L.R. 304, 5 Can. Cr. Cas. 45.

*Continuance of the pretense as an inducing cause*.—How long a false pretense once made continues to operate, if goods are obtained, is a question for the jury. *R. v. Moreton*, 8 Cr. App. R. 214, 109 L.T. 417.

The false pretence alleged in a Nova Scotia case was by representing himself to be the owner of a vessel, whereas at the time he had transferred ownership to another person who had again transferred to defendant's wife. The representation to the prosecutor that he was owner was made some three or four months before and was by appending the style "Owner" to his signature to

a letter in relation to another matter. It was held that the pretense was too remote to warrant a conviction. *R. v. Harty*, 31 N.S.R. 272, 2 Can. Cr. Cas. 103; and see *R. v. Brady*, 26 U.C.Q.B. 13 (Ont.).

A foreman of works on roads had certified to the inspector A. that certain persons had worked under him and were entitled to pay. He also produced orders for this pay purporting to be signed by those persons, but which in fact were not genuine. The inspector A. delivered the money to D., his agent, with instructions to pay it to the defendant if satisfied of the genuineness of the orders. On an indictment for obtaining money under false pretenses from D. the defendant was found guilty, and the conviction was upheld on a case reserved. *R. v. Cameron*, 23 N.S.R. 150.

Where on an athletic sport competition one of the competitors personates another party for the purpose of securing a good handicap, and falsely declares that he had never won a prize for a similar contest, the object of obtaining the prize is not too remote from the false representation. *R. v. Button* [1900] 2 Q.B. 597, disapproving *R. v. Larnar*, 14 Cox C.C. 497.

*Obtaining things by false pretenses*—Code sec. 405.

*Obtaining credit under false pretenses or by means of fraud*—Code sec. 405A.

*Obtaining signature to valuable security by false pretenses*—Code sec. 406.

*Fraud in obtaining hotel accommodation; frauds on restaurants, lodging-houses or boarding-houses*—Code sec. 407B.

*Fraud in advertisements to promote sales*—Code sec. 406A.

*Fraudulent financial report as basis of credit*—Code sec. 407A.

#### Obtaining by false pretense.

**405.** Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.

*Origin*—Sec. 359, Code of 1892, R.S.C. 1886, ch. 164, sec. 77.

*Obtains anything capable of being stolen*—See Code secs. 344-357.

If the owner intended to part with the property and consented to the property and possession going to the defendant, the offence was not theft but obtaining the article by false pretenses. *R. v. Illsley* (No. 1) 29 Can. Cr. Cas. 105 (N.S.).

It must appear that the prosecutor had been induced to part with some property right and not merely the possession of the goods. *R. v. Nowe*, 36 N.S.R. 531, 8 Can. Cr. Cas. 441; and see Code sec. 347 (defini-

tion of theft); *R. v. Haines*, 42 U.C.Q.B. 208; *R. v. Middleton*, L.R. 2 C.C.R. 38.

The charge may be founded on the fact of the accused having obtained by his false pretence the difference between the prices under two tenders; where it was open to the jury to infer that it was by reason of the false representations that the additional sum was paid which the accused received, and that his intention in making the representations was to obtain the money for his own benefit, or, in other words, to defraud his employers of the money. *R. v. Leverton* [1917] 2 W.W.R. 584, 11 Alta. L.R. 355, 28 Can. Cr. Cas. 61.

On a charge of obtaining money by false pretences, the question whether evidence as to the value of the property, in respect of which false pretences are made, is or is not material to the charge must be decided according to the circumstances of each case; the general test to be applied is whether the prosecutor was induced by deceit to act to his injury. *Rex v. Newton*, 9 Cr. App. R. 146; 23 Cox C.C. 609.

When any valuable thing is obtained by false pretences, *prima facie* there is an intent to defraud. *Rex v. Hammerson*, 10 Cr. App. R. 121.

Obtaining by false pretences the return of an overdue promissory note made by the accused himself is included. *Abeles v. The King* (1915), 24 Que. K.B. 260, 24 Can. Cr. Cas. 308.

To obtain goods in exchange for a cheque on a cash sale falsely representing that funds are available is to obtain goods, not credit, by false pretences. *R. v. Cosnett* (1901), 20 Cox C.C. 6. And the same result will follow if the funds in bank were not intended to be available but were immediately after the transaction fraudulently withdrawn so that the cheque should be dishonored while the drawer appropriated the goods and re-sold them for his own benefit. *R. v. Garten* (1913), 29 O.L.R. 56, 22 Can. Cr. Cas. 21, 13 D.L.R. 642; *R. v. Jones* [1898] 1 Q.B. 119, 123; *R. v. Garrett*, 6 Cox C.C. 260; *R. v. Hazelton* L.R. 2 C.C.R. 184, 13 Cox C.C. 1. Query whether the same circumstances might not support a charge of theft of the goods as a larceny by trick. See note to sec. 347; *R. v. Middleton*, L.R. 2 C.C.R. 38.

In a New Brunswick case the prisoner wrote to the prosecutor to induce him to buy counterfeit bank notes. The prosecutor, in order to entrap the prisoner and bring him to justice, pretended to assent to the scheme, arranging a meeting place of which he informed the police, and had them placed in position to arrest the prisoner at a signal from the prosecutor. At such meeting the prisoner produced a box which he said contained counterfeit bank notes, which he agreed to sell the prosecutor on payment of a sum agreed upon. The prisoner gave a box which he pretended to be the one containing the notes to the prosecutor who then gave the prisoner \$50 and a watch as security for the balance which he agreed to pay. The prosecutor immediately gave the signal to the police and seized the prisoner and held him until they arrested him and took the money and watch from him. On examining the box

given the prosecutor it was ascertained that he had not given him the one containing the notes as he pretended, but a similar one containing waste paper. The box containing the notes was found on the prisoner's person. It was clear and undisputed that the motive of the prosecutor in parting with the possession of the money and the watch, as he had done, was to entrap the prisoner. The prisoner was found guilty of obtaining the money and watch of the prosecutor by false pretence of giving him the counterfeit notes, which he did not give. It was held by the majority of the court of six judges that the prisoner was rightly found guilty, and that the conviction should be affirmed. *R. v. Cerey*, 22 N.B.R. 543.

*Obtaining goods, etc., by false pretences*—False pretences, before the enactment of the Criminal Code, was only a misdemeanour. By the Code the offender is made liable to imprisonment for three years. It is a serious offence against the public, and although a person who has parted with his money or property by means of a false pretence to him or other fraud practised upon him, or by reason of theft, is entitled to take his own property if offered to him, he is not permitted to screen the offender by an agreement not to prosecute or to drop a prosecution already entered upon. *Morgan v. McFee*, 18 O.L.R. 39, 14 Can. Cr. Cas. 308.

Where the false pretence is made in one jurisdiction and the goods are obtained on the faith of it in another jurisdiction, the latter is the place of the offence. *R. v. Ellis* [1899] 1 Q.B. 230; *R. v. Cooke* 1 F. & F. 64; *R. v. Holmes*, 15 Cox C.C. 343.

In order to establish the offence of obtaining money by false pretences it is necessary to prove what was laid down by *Butkley, J.*, in *re London and Globe Finance Corporation* [1903] 1 Ch. 728. He said: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is 'by deceit' to induce a man to act to his injury." *R. v. Bennett* (1913), 9 Cr. App. R. 146, at 154.

Although it was cheques which the accused directly received and not money, yet if he obtained the money through the cheques which went through the bank, the false pretence charge may be laid in respect either of the money itself or of the cheques. *Kelly v. The King* [1917], 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282; *R. v. Kelly* [1917] 1 W.W.R. 46, 27 Man. R. 105; *R. v. Kelly*, 10 W.W.R. 1345; *R. v. Leverton* [1917] 2 W.W.R. 584, 590, 11 Alta. L.R. 355, 28 Can. Cr. Cas. 613.

A person who does not otherwise make a false representation himself, but who is present when it is made, knows it to be false, and shares in the proceeds obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. *R. v. Cadden*, 4 Terr. L.R. 304, 5 Can. Cr. Cas. 45; and see Code secs. 69-71 as to accessories to a crime.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; but see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*"Or through the medium of any contract"*—The insertion of these words was probably due to the doubts raised in the English case of *R. v. Gardner*, 25 L.J.M.C. 100, which has since been explained in *R. v. Moreton* (1913), 8 Cr. App. R. 214, as having been decided on the ground that there was no continuing false pretence. The offence may be committed by the pretence of a contract fraudulent in fact and which induced the giving of the promissory note or other subject-matter of the charge. *R. v. Daigle*, 23 Can. Cr. Cas. 92, 18 D.L.R. 56 (Que.) (pretended stock subscription); *R. v. Provost* (1918), 29 Can. Cr. Cas. 247 (Que.) (pretended sale of motor-car).

The fact that the goods are obtained under a contract does not make the goods so obtained goods not obtained by a false pretence, if the false pretence is a continuing one and operates on the mind of the person supplying the goods. *R. v. Moreton* (1913), 8 Cr. App. R. 214 at p. 217; *R. v. Martin*, L.R. 1 C.C.R. 56, 36 L.J.M.C. 20; *R. v. Kenrick*, 5 Q.B. 49, 12 L.J.M.C. 135; *R. v. Abbott*, 1 Den. C.C. 273, 2 C. & K. 630; *R. v. Rymal*, 17 Ont. R. 227; *R. v. Hope*, 17 Ont. R. 463.

If the basis of a charge is false pretence, and that false pretence is contained in a written document, the document itself must be produced unless a foundation be laid for secondary evidence to make out a *prima facie* case. *Re Johnston*, 13 B.C.R. 209, 12 Can. Cr. Cas. 559.

*"With intent to defraud"*—There may be an intent to defraud although the prosecutor got something which was of real value for his money. Where money is obtained by pretences that are false, there is, *prima facie*, an intent to defraud, although this presumption may be displaced. *R. v. Hammerson* (1914), 10 Cr. App. R. 121.

A postmaster transmitted to defendant several post-office orders, which defendant, in connivance with him, presented and got cashed. The orders were fraudulently issued, as no moneys had been received by the postmaster for transmission to the defendant, and frauds to a large extent had been thus committed. Defendant might properly have been convicted of having obtained the money by false pretences. *R. v. Dessauer*, 21 U.C.Q.B. 231; and see sec. 399 (receiving) and sec. 359 (c) (theft by government employee).

In *R. v. Lee*, 23 U.O.Q.B. 340, the prisoner sold a mare to B, taking his notes for purchase money, one of which was for \$25, and a chattel mortgage on a mare as collateral security. After this note had matured he threatened to sue, and B. got one R. to pay the money, the prisoner promising to get the notes from a lawyer's office, where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before to another person, who afterwards sued B. upon it, and obtained judgment. It was held that the



prisoner was properly convicted of obtaining the \$25 by false pretences. *R. v. Lee*, 23 U.C.Q.B. 340.

An intent to defraud may be inferred from the wilful use of a forged instrument to support a genuine claim. *Rex v. Hopley*, 11 Cr. App. R. 248; *R. v. Cameron*, 23 N.S.R. 150. Representations as to solvency may be shown to be false by proving insolvency a short time afterwards. *R. v. Boyd* (1896), 4 Can. Cr. Cas. 219 (Que.).

The doctrines of commercial agency do not apply to prevent the operation of the criminal law. So where one Clark, a policy holder of a fire insurance company, conspired with Howse, their local agent, to defraud the company and handed to Howse for transmission to the company an unfounded proof of claim for pretended losses by fire, and obtained the money through Howse from the company, it was held that the knowledge of Howse of the falsity of the pretence could not be imputed as the knowledge of the company so as to affect the criminality of Clark. *R. v. Clark* (1892), 2 B.C.R. 191.

If the money is parted with from a desire to secure the conviction of the prisoner there is no obtaining by false pretences. *R. v. Mills* (1857), Dears. & B. 205, 26 L.J.M.C. 79; *R. v. Gemmell*, 26 U.C.Q.B. 315. The false pretence must have been the inducing cause to the defrauded party to part with his property. *Ibid.*

But the false pretence may have been the inducing cause although a trap had been laid for the arrest of the accused on his obtaining the money and the person parting with the money would consequently be assured of getting it back if it turned out that the pretence was false. *R. v. Corey*, 22 N.B.R. 543.

*Similar criminal acts as proof of intent*—It does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime or that he is generally disposed to crime and even to a particular crime, but, in false pretences and sundry species of frauds, evidence is admissible in proving guilty knowledge or intent or system or in rebutting an appearance of innocence which, unexplained, the facts might wear. *Thompson v. Director of Public Prosecutions* [1918] A.C. 221, 13 Cr. App. R. 61, 87 L.J.K.B. 476, 484; compare *Brunet v. The King* (1918), 57 S.C.R. 83. The evidence is then admissible notwithstanding its general character is to show that the accused had in him the makings of a criminal. *Thompson v. Director, etc.*, *supra*. And there must be a connection ( *nexus* ) between the former offences and the offence which is the subject of trial. *Thompson v. Director, etc.* [1918] A.C. 221, 13 Cr. App. R. 61, 87 L.J.K.B. 478, affirming *R. v. Thompson* [1917] 2 K.B. 630; *R. v. Fisher* [1910] 1 K.B. 149; *Rivet v. The King*, 24 Que. K.B. 559, 25 Can. Cr. Cas. 225; The remoteness in time at which prior similar acts would be excluded must vary largely with the particular facts. *R. v. Wilkes*, 10 Cr. App. R. 16; compare *Brunet v. The King* (1918), 57 S.C.R. 83.

The general rule is that the evidence tendered must be relevant to

the charge for which the accused is being tried. *Brunet v. The King* (1918), 57 S.C.R. 83; *Thiel v. The Queen* (1882), 7 S.Q.R. 397; *Thompson v. Director, etc., supra*; *R. v. Thompson* [1917] 2 K.B. 630, 632, per Lord Reading, C.J.; *Makin v. Attorney-General for New South Wales* [1894] A.C. 57; *R. v. Ball* [1911] A.C. 47; *R. v. Collyas* (1898), 3 Terr. L.R. 82; *R. v. Wilson* (1911), 1 W.W.R. 272, 21 Can. Cr. Cas. 105 (Alta.); *Rivet v. The King*, 24 Que. K.B. 559, 25 Can. Cr. Cas. 235; *R. v. Durecher* (1882), 12 Rev. Leg. 697 (Que.).

In *Regina v. Hope*, 17 Ont. R. 463, the defendant was indicted in the first count of the indictment for obtaining from one H. a promissory note with intent to defraud, and in the second count with inducing H. to make the said note with like intent. The evidence showed that on May 4th, 1887, the defendant's agent called on H. and obtained from him an order addressed to defendant to deliver to H. at B. station, thirty bushels of Blue Mountain Improved Seneca Fall Wheat, which H. was to put out on shares, and to pay defendant \$240 when delivered, and to equally divide the produce thereof with the holder of the order, after deducting the said amount. On 23rd May defendant called, produced the order, and by false and fraudulent representations as to the quality of the wheat and his having full control of it, its growth and yielding qualities, and that a note defendant requested him to sign was not negotiable, induced H. to sign the note. Evidence was received, under objection, of similar frauds on others, showing that the defendant was at the time engaged in practicing a series of systematic frauds on the community.

The defendant was found guilty and convicted. Held, on a case reserved, that the conviction should be affirmed on the second count, as the evidence showed that the note was signed by H. not merely to secure the carrying out of the contract contained in the order, but on the faith of the representations made, and it was immaterial that a note was taken when the order called for cash; and, also, that the evidence objected to was properly receivable. *R. v. Hope*, 17 Ont. R. 463; and see *R. v. Rymal*, 17 Ont. R. 227. If the evidence merely proves, or tends to prove, that the accused is of such evil character or disposition that he is likely to have committed the offence charged against him, it is irrelevant and is inadmissible. *R. v. Thompson, supra*; *R. v. Komiensky* (No. 2), 12 Que. K.B. 463, 7 Can. Cr. Cas. 27.

If the evidence tends to prove that the accused committed the crime charged against him, it is relevant and admissible notwithstanding that incidentally it may also prove, or tend to prove, that the accused is a person of criminal or immoral character or disposition. *R. v. Ollis* [1900] 2 K.B. 758, 781, 782; *Perkins v. Jeffery* [1918] A.C. 221; *R. v. Thompson* [1917] 2 K.B. 630, 86 L.J.K.B. 1821, affirmed *sub nom.*, *Thompson v. Director of Public Prosecutions* [1918] A.C. 221, 87 L.J.K.B. 478; *R. v. Wilks*, 10 Cr. App. R. 16. Such evidence is admissible if there is any connecting relationship between it and the par-

ticular crime with which a prisoner is charged. *Thompson v. Director*, etc., supra, (87 L.J.K.B. 478, at 486, per Lord Parmoor).

Before an issue can be said to be raised which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance, if not in so many words; and the issue so raised must be one to which the prejudicial evidence is relevant. *Thompson v. Director*, etc., supra (87 L.J.K.B. 478, at 484, per Lord Sumner). The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. *Ibid.* As put by Lord Sumner, "the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice." Evidence of other similar offences to rebut the denial of criminal intent could not properly be admitted until that defence is definitely put forward. *Perkins v. Jeffery* [1915] 2 K.B. 702, 708; *Brunet v. The King* (1918), 57 S.C.R. 83. It may be admitted in reply when the denial of criminal intent is not advanced until the defence was opened. *Brunet v. The King*, supra; *R. v. Pollard*, 19 O.L.B. 96; 15 Can. Cr. Cas. 74; *R. v. Higgins*, 7 Can. Cr. Cas. 68; *R. v. Crippen*, 27 Times L.R. 69.

Leave may be given the accused to call further evidence in rebuttal where such evidence for the prosecution has necessarily been brought out in reply. *Brunet v. The King* (1918), 57 S.C.R. 83, 109.

Where the judge entertains a doubt as to the admissibility of evidence, he may suggest to the prosecution that they should not press it, but he cannot exclude evidence which he holds to be admissible. *R. v. Fletcher* (1913), 9 Cr. App. R. 53, at 56.

Upon a trial for false pretences, it is competent, in order to prove intent, to show that the accused made similar representations about the same time to other persons, and by means of such false representations obtained goods; and other acts, part of the same system of fraud, may be put in evidence. *Reg. v. Francis*, 12 Cox C.C. 612, 43 L.J.M.C. 97, L.R. 2 C.C.R. 128; *R. v. Wyatt* [1904] 1 KB. 188; *Blake v. Albion Life Assce. Society*, 14 Cox C.C. 249, L.R. 4 C.P.D. 94.

Evidence which would properly be admissible of similar prior acts under the doctrine laid down in *Makin v. N.S.W.* [1894] A.C. 57, 17 Cox C.C. 366, does not cease to be so because a prosecution for such prior acts has become barred by lapse of time. *R. v. Shellaker* [1914] 1 K.B. 414, 9 Cr. App. R. 240, in which *R. v. Beighton*, 18 Cox C.C. 535, was disapproved.

Evidence of similar crimes will not always corroborate the claim that the defendant was the identical person who obtained the goods in a false pretence charge, where he is shown to have been guilty of similar but unconnected crimes of false pretences; but it may be evidence that in making the pretences he did, he was carrying out a similar plan to defraud as in the other cases and knew that the pretence was false.

*R. v. Komienksy* (No. 2), 7 Can. Cr. Cas. 27, 12 Que. K.B. 463; compare *R. v. Burlison*, 11 Cr. App. R. 39, and *R. v. Rodley*, 9 Cr. App. R. 69.

*R. v. Ollis* [1900] 2 Q.B. 758, was a prosecution for obtaining money by falsely pretending that three cheques which the accused gave to the prosecutors were good and valid orders for the payment of money. The accused had been previously acquitted on a similar charge on the prosecution of another person. It was held that the facts connected with the charge on which the accused had been acquitted could be given in evidence to show that he had no reasonable ground for believing that there would be funds to meet the cheques on which he obtained the money from the prosecutors in the case then being tried. The fact that the accused had on another day passed a cheque which had been dishonoured was a circumstance to show a course of conduct on the part of the accused, and that the passing of the cheques in question was not a matter of forgetfulness, but that they were bad to his knowledge. *R. v. Ollis* [1900] 2 Q.B. 758.

Subsequent similar facts may be admitted to rebut a denial of fraud, if they form part of the same general fraudulent scheme as the transaction in question; *R. v. Rhodes* [1899] 1 Q.B. 77; *R. v. Mason* (1914), 10 Cr. App. R. 169; *R. v. Boyle and Merchant* [1914] 3 K.B. 339, 347, 10 Cr. App. R. 180.

"*False pretence*" defined]—Code sec. 404.

*Stating the offence*]—A conviction would not be good which declared the accused guilty of having stolen or obtained by false pretences a sum of money from the same or different persons. *R. v. Toy Moon* (1911), 1 W.W.R. 50, 53, 19 Can. Cr. Cas. 33, 19 W.L.R. 480 (Man.), (dictum, per *Perdue, J.A.*); and see *R. v. McDonald*, 6 Can. Cr. Cas. 1.

A charge of false pretences is not bad in not setting out the false pretence or stating to whom it was made. *R. v. Leverton* [1917] 2 W.W.R. 584, 590, 11 Alta. L.R. 355, 28 Can. Cr. Cas. 61; Code form 64c; Code secs. 852, 1152.

The remedy of the accused is to apply for an order for particulars if he considers himself prejudiced by any want of information in the charge or indictment. Code secs. 859, 860; *R. v. Leverton* [1917] 2 W.W.R. 584, 590, 11 Alta. L.R. 355, 28 Can. Cr. Cas. 61.

*Instructions to jury*]—On an indictment for obtaining money by false pretences it is essential that the jury should understand that there should be no conviction without an intent to defraud, and, unless such intent is clear from the facts, they should be directed on the point; they should also be directed that the obtaining must be due to the false pretence alleged. *R. v. Ferguson*, 8 Cr. App. R. 113; *R. v. Boyd*, 4 Can. Cr. Cas. 219; *R. v. Brady*, 26 U.C.Q.B. 13; *R. v. Carr* (1916), 12 Cr. App. R. 140. The direction on that point is not an essential where the statement relied upon, and shown to be false,

could not have been made with any other object than that of defrauding the prosecutor. *R. v. Carr* (1916), 12 Cr. App. B. 140.

*Former conviction or acquittal*—After a trial on various counts for false pretences resulting in a conviction on some and acquittal on others, the accused should not be called upon to answer an indictment for theft in respect of the same transactions. *R. v. King* [1897] 1 Q.B. 294, 18 Cox C.C. 447; and see Code secs. 909, 1079.

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 652.

*Yukon Territory*—The offence of obtaining money or property by false pretences may be tried summarily in the Yukon Territory where the value of the whole property alleged to have been obtained or received does not in the opinion of the judge exceed \$200.00.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

*Attempt to obtain property by false pretences*—A person cannot be convicted of an attempt to obtain money by false pretences, unless the false pretence has been brought home to the mind of the person from whom the money is intended to be obtained, or to the mind of his agent. *Rex v. Robinson* [1915] 2 K.B. 342; but where a false pretence was made with the intention of obtaining money, the prisoner may be guilty of attempting to obtain money by false pretences, notwithstanding that the prosecutor had not been misled by the false pretence and had never intended to part with his money. *Reg. v. Roebuck* (1855), 7 Cox, 126; *Reg. v. Hensler* (1870), 11 Cox, 570; *Rex v. Light* [1915] W.N. 97, 31 T.L.R. 257.

If the person from whom the goods are obtained is not deceived by the pretence, but knows it to be false, the goods are not "obtained" by false pretences, but in such a case the person making the false statement may be convicted of attempting to obtain the goods by false pretences. Code sec. 571.

*Credit by false pretences*—See sec. 405A.

*Obtaining execution of valuable security by false pretence*—Code sec. 406.

*False representations in advertisement*—See sec. 406A.

*Extradition*—"Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act, and the extradition arrangement between Great Britain and the United States of America. *Re F. H. Martin* (No. 2), 2 Terr. L.R. 304; 8 Can. Cr. Cas. 326.

It is sufficient if the evidence before the committing judge affords *prima facie* proof that the prisoner has committed in the demanding State some offence which under the law of that State constitutes the crime charged as recognized and defined by that law, provided that such offence if committed in Canada would have constituted under Canadian law any one of the crimes specified in the treaty and in the schedule to the Extradition Act, chapter 55, R.S.C. 1906. *Ex parte Thomas*, 28 Can. Cr. Cas. 396 (N.B.). And although the wrongful acts of the

prisoner as disclosed by the depositions would not, if committed in Canada, have rendered him guilty of theft under our law, yet if these acts were such as would, if committed in Canada, have rendered the prisoner guilty of the crime of obtaining money by false pretences with intent to defraud, extradition will be ordered on the charge as laid, both larceny and false pretences being within the extradition treaty. *Ex parte Thomas*, supra.

False representations made to the demanding government to obtain the request for extradition have been taken into consideration on a motion to discharge on habeas corpus from the extradition committal. *Re Mettler*, 17 Can. Cr. Cas. 80 (Que.).

#### Obtaining credit by false pretence.

**405A.** Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability obtains credit under false pretences, or by means of any fraud.

*Origin*—7-8 Edw. VII, Can., ch. 18, sec. 6; Debtors' Act, Imp., 1869, sec. 13.

*"Obtains" credit*—This section was introduced to overcome the defect in our law pointed out by the Quebec Court of Appeal in *Regina v. Boyd*, 4 Can. Crim. Cas. 219, viz., that sec. 405 applied only to the obtaining by false pretences of something capable of being stolen, and not to the obtaining of credit. The new section 405A, was copied from the Imperial Debtors' Act, 1869, 32 and 33 Vict., ch. 62, sec. 13 (1), which was considered in the case of *Regina v. Bryant*, 63 J.P. 376, and it was there held that the Act did not apply where credit was given to some person other than the party making the application for it. If the accused incurred a liability for himself, if not a debt, and obtained a credit for himself on his guaranty, although the money was actually paid to the company of which he was a director and shareholder, and he benefited by it, he will be liable under sec. 405A. *R. v. Cohen* (1915), 24 Can. Cr. Cas. 238, 33 O.L.R. 340; *R. v. Campbell*, 19 Can. Cr. Cas. 407.

Where an authorized clerk in the stock exchange induced stock jobbers to make bargains for sale of shares for the next account, and gave the names of members of the stock exchange not his employers as the purchasers, it was held that credit was given to them and not to the defendant, and that he was not guilty of an offence under this section. *R. v. Bryant*, 63 J.P. 376.

It would seem that it would be no answer to the charge to say that the credit was obtained in a transaction which was invalid in law because it was a speculation in differences. *R. v. Irons* (1910) Cent. Cr. Court Sess. papers 336; and see *Grisewood v. Blane*, 11 C.B. 526.

*Obtaining credit by means of any fraud*—As to conspiracy to defraud, see sec. 444; false pretences, secs. 404, 405, 406, 406A, 407A, 407B; fraud and fraudulent dealing with property, secs. 415-443; fraud by personation, 408-411. On an indictment for obtaining credit by fraud, it is not enough to prove that, as the result of a fraud, money was obtained, it must be proved that credit was obtained. *R. v. Green* (1913), 9 Cr. App. R. 127.

In reviewing a conviction under the English Bankruptcy Act for obtaining credit without disclosing the fact that he, the accused, was an undischarged bankrupt, *Phillimore, J.*, dealt with the objection that "credit" was not obtained if some security besides the personal obligation to pay was given. He said: "There may be cases where no credit is given at all; for instance, when an exceptionally valuable jewel is pledged for a sum which is obviously less than its value. But where a man obtains goods on the faith of a bill of exchange ~~and~~ on the security of a deposit of shares, not of undoubted value, it is clear that credit is given; there is a personal trust in him none the less, though it is not to the extreme extent." *R. v. Fryer* (1912), 7 Cr. App. R. 183, at 185.

On a charge of obtaining credit by means of fraud, where it was proved that the accused hired furnished apartments and left them without paying for them, evidence that he had also gone to other houses and left without paying was held admissible as negating the existence of any reasonable or honest motive. *R. v. Wyatt*, [1904] 1 K.B. 188.

*Concurrent charges*—Where an indictment contains counts for obtaining goods by false pretences and also counts for obtaining credit under false pretences, the prisoner ought not to be tried on them all at the same time; the prosecution should be called upon to proceed on one count at a time. *Rex v. Norman* [1915] 1 K.B. 341; 84 L.J.K.B. 440; 11 Cr. App. R. 58.

If the commission of the offence charged as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved although the whole offence charged is not proved. Code sec. 951. Obtaining credit on false pretences is closely associated with the offence of theft, but it cannot be said that the offence of theft as described or defined in the Code includes the commission of the offence of obtaining credit by false pretences. The latter is in fact a new statutory offence introduced into the Code. But the alternative of sec. 951 may apply so as to enable a conviction for obtaining the credit as the lesser offence where a charge of the greater offence of theft is not sustained, if the prosecution instead of limiting the theft charge to the statutory form (Code form 64 (b)), chooses to add in the count itself such details as would charge the theft to have been committed under the circumstances of a false pretence under sec. 405A. In that case it might be possible to

have a conviction for the lesser offence of obtaining credit by the false pretence in a case which might be either a theft by trick or an offence under sec. 405A. But the more convenient form in practice is to frame separate counts in such a case, each free from any reference to the other offence. On a conviction upon the one count the Crown prosecutor usually would drop the other charge; see *R. v. King* [1897] 1 Q.B. 214, 66 L.J.Q.B. 87; and in the event of convictions on both counts, it would seem that under the "substantial wrong" clause governing appeals (Code sec. 1019), the result would be merely to affirm a single penalty appropriate to the lesser offence. *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282, varying [1917] 1 W.W.R. 46, 27 Can. Cr. Cas., 27 Man. R. 105; and see *R. v. Kelly* (No. 1) 10 W.W.R. 1345, 27 Can. Cr. Cas. 94 (Man.); *R. v. Norman* [1915] 1 K.B. 341; *R. v. Lockett* [1914] 2 K.B. 720.

Where there are more counts than one in an indictment, or in a formal charge, each count may be treated as a separate indictment. Code sec. 857. The court may, either before or during the trial, order a separate trial of one or more counts in the same indictment. Code sec. 857, sub-sec. (2); sec. 858. And a single count which is double or multifarious, may be divided or amended by order. Code sec. 892. When an indictment on a count charges substantially the same offence as that charged in the indictment (or count treated as a separate indictment) on which the accused was given in charge on "a former trial," but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction is a bar to the subsequent indictment. Code sec. 909. And on a plea of *autrefois acquit* or *autrefois convict*, the evidence taken on the separate charges may be looked at, as well as the count itself, to prove or disprove the identity of the charges. But it is doubtful whether in strict law an acquittal for theft would bar a subsequent prosecution for obtaining either credit or goods on false pretences, although based on the same transaction. See *R. v. Henderson, C. & Mar.* 328; 7-8 Geo. IV, Imp., ch. 29; 24-25 Vict., Imp., ch. 96, sec. 88. Unless the second charge is identical with the first and so within a plea of *autrefois*, the effect of the first as a bar will depend on statute; see Code secs. 909, 1079. And it is a rule of practice rather than a rule of law that "a series of charges shall not be preferred"; *R. v. Erlington*, 31 L.J.M.C. 14, 9 Cox C.C. 86; *R. v. King* [1897] 1 Q.B. 214, 66 L.J.Q.B. 87.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; but see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

*Evidence of similar transactions*—Where the accused was charged with obtaining credit by fraud, evidence was given of two previous occasions upon which he had obtained credit and had not paid. It was



held that if those transactions could not properly have been the subject of a criminal charge, they were not transactions of a similar nature with the transaction in question, and therefore could not be given in evidence to show fraud on the latter occasion. *Rex v. Baird*, 84 L.J.K.B. 1785; 11 Cr. App. R. 186; and see note to sec. 405, as to the general principles applicable to evidence of similar facts in false pretence cases.

*Use of evidence of accused given in civil proceedings under Assignments Act*—In *Reg. v. Scott, Dearaley & B.* 47, 7 Cox C.O. 164, it was held that the examination of the defendant in bankruptcy proceedings against him was admissible against him on a criminal charge, even though the answers were extracted from him under threat of committal and were criminating.

In *Reg. v. Widdop* (1872), L.R. 2 C.C. 3, 42 L.J.M.C. 2, the examination of the accused in bankruptcy proceedings against him was tendered in evidence against him. It appears that the summons requiring him to attend for examination was issued by the trustee in bankruptcy before the resolution appointing him had been registered, so that he was not therefore then authorized to act as trustee. It was held by the Court of Crown Cases Reserved that notwithstanding this defect in the proceedings and notwithstanding the fact that he was threatened with committal in case he refused to answer, his examination was properly admitted as evidence against him. The prisoner, after voluntarily attending and submitting to examination without objection, had waived his right to raise an objection to the validity of the summons afterwards.

The same principle will apply to answers given on an examination under the Assignments Act (Alta.) to questions which were beyond the scope of such examination and might have been objected to on that ground, if in fact no objection is raised. *R. v. Graham* (1915), 8 W.W.R. 460, 8 Alta. L.R. 182; and see *R. v. Van Meter*, 3 W.L.R. 416 (Terr.).

Sec. 7 of The Alberta Evidence Act (ch. 3 of 1910, 2nd session) provides *inter alia*, that a witness shall not be excused from answering any question upon the ground that the answer may tend to criminate him, but that with respect to any such question, if he objects to answer upon that ground and if, but for that section or any act of the Parliament of Canada, he would have been excused from answering it, then, although the witness is by reason of that section or of any such Act, compelled to answer, the answer so given shall not be used against him or receivable in evidence against him in any civil proceedings or in any proceedings under any Act or Ordinance in force in Alberta.

Sec. 5 of The Canada Evidence Act (E.S.C. 1906, ch. 146) provides that a witness shall not be excused from answering any question upon the ground referred to and also provides that, if he objects on that ground to answer any question and that, if, but for that Act or any Act of any provincial legislature, he would therefore have been excused from answering, although he is by reason of that Act or of any such

Provincial Act, compelled to answer, the answer so given shall not be used against him in any criminal trial.

Sec. 35 of the Canada Evidence Act provides that in all proceedings, over which the parliament of Canada has legislative jurisdiction, the laws of evidence in force in the province, in which such proceedings are taken, shall, subject to the provision of any Act of the Parliament of Canada, apply to such proceedings. It has been held in Alberta that the effect of these provisions, if not the effect of the provision in The Alberta Evidence Act, alone, is that the evidence of the accused is admissible against him in a criminal trial unless he objects to answer upon the ground that the answer would tend to criminate him or upon any of the other grounds referred to in those provisions. *R. v. Graham*, (1915), 8 W.W.R. 460, 8 Alta. L.R. 182, 31 W.L.R. 117, 24 Can. Cr. Cas. 54.

A motion by the assignee to commit an insolvent, who had made an assignment for the benefit of creditors, for refusal to answer questions upon an examination under the Assignments and Preferences Act, R.S.O. 1914, ch. 134, sec. 38, was refused by Falconbridge, C.J.K.B., where the solicitor for the insolvent had made affidavit that, in his opinion, it was impossible that the insolvent should be examined under the Assignments Act without informing the private prosecutors of evidence which would expose him to a criminal prosecution, and would amount to giving evidence wherewith to convict himself. Two of the creditors had launched criminal prosecutions against the insolvent on the ground that he procured credit on false representations as to his financial standing and as to the amount of his assets and liabilities *Re Ginsberg*, 27 Can. Cr. Cas. 447 (Ont.).

The chief justice said: "The protection extended in such cases by both Dominion and Ontario legislation, that his answers shall not be used or receivable in evidence against him, does not afford sufficient immunity in a case like this. The prosecutors might well get information from him which would enable them to get convicting evidence *abundante* without using his own evidence against him at all. In fact the proceedings would take the form of an examination for discovery in a criminal case, which cannot be. The rule laid down by the Lord Chancellor (Eldon), in 1812, has always been closely followed: 'The strong inclination of my mind is to protect the party against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards it:' *Paxton v. Douglas* (1812), 19 Ves. 225, at p. 227. See also *D'Ivry v. World Newspaper Co.* (1897), 17 P.R. 387; *re Askwith* (1899), 3 Can. Cr. Cas. 78, 31 O.R. 150; *National Association of Operative Plasterers v. Smithies* [1906] A.C. 434."

*Attempt to obtain credit by false pretences*—See sec. 571 as to attempts to commit certain indictable offences. The maximum penalty for an attempt is one-half of the maximum for the completed offence. Sec. 571.

*Food and lodging cases*—Sec. 407B deals specifically with the offence of defrauding hotel and restaurant proprietors by obtaining accommodation by fraudulent means and provides for summary conviction and a different punishment. This would indicate an intention to exclude such cases from the purview of sec. 405A.

*Extradition where the fraud is by a company director or by a banker or agent*—Fraud by a bailee, banker, agent, factor, trustee, director, member or officer of any company, is extraditable between the U.S.A. and Canada, where made criminal by the laws of both countries. *Re O'Neill*, 19 Can. Cr. Cas. 410; *R. v. Stone*, 17 Can. Cr. Cas. 377.

#### **Execution of valuable security obtained by fraud.**

**406.** Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretense, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security.

*Origin*—Sec. 360, Code of 1892, R.S.C. 1886, ch. 164, sec. 78; The Larceny Act, 32-33 Vict., Can., ch. 21, sec. 95 and sec. 1.

*False pretense defined*—Code sec. 404.

*Valuable security*—It will be noted that sub-sec. (40) of Code sec. 2 declares that "valuable security" includes any order on certain public funds. It is a supplementary declaration only and its phraseology is purposely changed from that of sub-secs. (38) and (39) in each of which certain phrases are declared to "mean" certain things. The term "valuable security" includes a customer's cheque on a bank. *R. v. Prentice and Wright* (1914), 7 W.W.R. 271, 7 Alta. L.R. 479, 23 Can. Cr. Cas. 436, 29 W.L.R. 665, (in which case the court interprets sub-sec. (40) of sec. 2 as covering such a cheque although the entire fund to the drawer's credit was not absorbed by it). See also *R. v. Burke*, 24 Ont. R. 64; *R. v. Wagner*, 6 Can. Cr. Cas. 113, 5 Terr. L.R. 19; *R. v. Hope*, 17 Ont. R. 463; *R. v. Rymal*, 17 Ont. R. 227; *R. v. Brady*, 26 U.O.Q.B. 13, distinguished in *R. v. Burke* (1893), 24 Ont. R. 64.

*Obtaining by false pretense through the medium of a contract*—While there is no express inclusion in sec. 406 as there is in sec. 405 of cases where the obtaining by false pretense is through the medium of a contract, the same principles have been applied; the declaration in that respect made in sec. 405 is merely declaratory of the former law.

In *Rymal's case*, 17 Ont. R. 227, the defendant, by untrue representations, made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay \$240 for seed wheat. The defendant also represented that he was the agent of H. whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his (H's) favour, for the \$240. The contract did not provide for giving of a note, and when the representations were made the giving of a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract. The defendant was indicted for that he, by false pretences, fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security. It was held, upon a case reserved that the charge of false pretences can be sustained as well where the note is procured to be given through the medium of a contract as where procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H. did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on that count. *R. v. Rymal*, 17 Ont. R. 227; and see *R. v. Hope*, 17 Ont. R. 463.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; but see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 652.

*Second offences*—See secs. 465, 963, and 964.

*Evidence of similar criminal acts*—See note to sec. 405.

#### **Publication of false advertisements to promote sales, etc.**

**406A.** Every person who knowingly publishes or causes to be published any advertisement for either directly or indirectly promoting the sale or disposal of any real or personal movable or immovable property, or any interest therein, containing any false statement or false representation which is of a character likely to or is intended to enhance the price or value of such property or any interest therein or to promote the sale or disposal thereof shall be liable upon summary conviction to a fine not exceeding two hundred dollars or to six months' imprisonment or to both fine and imprisonment.

*Origin*—Code Amendment Act, 1914, Can. ch. 24.

*False prospectus by promoters, etc.*—Code sec. 414.

**Falsely pretending to inclose money in letter.**

**407.** Every one is guilty of an indictable offence and liable to three years' imprisonment who, wrongfully and with wilful falsehood, pretends or alleges that he inclosed and sent, or caused to be inclosed and sent, in any post letter any money, valuable security or chattel, which in fact he did not so inclose and send or cause to be inclosed and sent therein.

*Origin*—Sec. 361, Code of 1892, R.S.C. 1886, ch. 164, sec. 79.

*Offence complete without proof of fraudulent intent*—Sec. 846.

*Details of false pretence or fraud not essential to indictment*—See secs. 846, 863 and 864; but see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510*n*, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

**False statements in writing with intent.**

**407A.** Every one is guilty of an indictable offence and liable to one year's imprisonment and to a fine of two thousand dollars who,—

- (a) knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing with intent that it shall be relied upon, respecting the financial condition or means or ability to pay, of himself, or any other person, firm or corporation in whom he is interested; or for whom he is acting, for the purpose of procuring, in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable, or the making, acceptance, discount or endorsement of a bill of exchange, cheque, draft, or promissory note, either for the benefit of himself or such person, firm or corporation; or,
- (b) knowing that a false statement in writing has been made respecting the financial condition or means or ability to pay, of himself, or such person, firm or corporation in which he is interested, or for whom he is

acting, procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation, any of the benefits mentioned in paragraph (a) of this section.

*Origin*—Can. Stat. 1913, ch. 13, sec. 16; compare the Debtors' Act (Imp.), 1869, sec. 13.

*Statement in writing*—See sec. 2 (42), as to what is included in the word "writing."

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; but see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963, and 964.

*False statement by directors, etc.*—See Code sec. 414; R. v. Cohen (1915), 33 O.L.R. 340, 24 Can. Cr. Cas. 238.

*Extraditable frauds*—Fraud by a bailee, banker, agent, factor, trustee, director, member or officer of any company, is extraditable between the U.S.A. and Canada if made criminal by the laws of both countries.

#### Obtaining food and lodging fraudulently.—Evidence.

**407B.** Every one is guilty of an offence and liable upon summary conviction to a fine of one hundred dollars and costs or three months' imprisonment who fraudulently obtains food, lodging or other accommodation at any hotel or inn or at any lodging, boarding or eating house.

2. Proof that a person obtained food, lodging or other accommodation at any hotel or inn, or any lodging, boarding or eating house, and did not pay therefor, and made any false or fictitious show or pretence of having baggage, or had any false or pretended baggage, or surreptitiously removed or attempted to remove his baggage or any material part thereof, or absconded or surreptitiously left the premises, or knowingly made any false statement to obtain credit or time for payment, or offered any worthless cheque, draft or security in payment for such food, lodging or other accommodation, shall be *prima facie* evidence of fraud.

*Origin*—Can. Stat. 1913, ch. 13, sec. 16.

*Summary convictions when joint offenders*—See sec. 728.

*Paying damages and costs to person aggrieved*—See sec. 729.

*Case under prior law*—R. v. Jones [1898] 1 Q.B. 119.

*Personation.***Personation with intent fraudulently to obtain property.**

**408.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who, with intent fraudulently to obtain any property, personates any person, living or dead, or the administrator, wife, widow, next of kin or relation of any person.

*Origin*—Sec. 456, Code of 1892.

*"Any property"*—Both real and personal property are included and certain documents of title. Sec. 2 (32).

*Evidence*—Although the fund to obtain which the personation takes place has, in fact, been previously paid to the party entitled, there may be a conviction of the personator endeavouring to obtain payment. *R. v. Cramp* (1817), R. & R. 324. But it would appear doubtful whether a conviction could be supported for personation in respect of a supposed property or fund which had never existed. Cf. *R. v. Pringle* (1840), 2 Mood. C.C. 127, 9 C. & P. 408. Under the English Army Prize-money Act, 2 and 3 Wm. IV, ch. 53, sec. 49, it was declared an offence to knowingly and willingly personate or falsely assume the name or character of a soldier in order to receive prize-money, and it was held that it was no defence that the prisoner was authorized by the soldier to personate him or that the prisoner had bought from the soldier personated the prize-money to which the latter was entitled. *R. v. Lake* (1869), 11 Cox C.C. 333.

*Attempts and conspiracy to personate*—See secs. 444, 570, 573.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; but see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*False pretence by conduct*—See secs. 404-406.

**Personation at certain examinations.**

**408.** Every one is guilty of an indictable offence, and liable, on indictment or summary conviction, to one year's imprisonment, or to a fine of one hundred dollars, who falsely, with intent to gain some advantage for himself or some other person, personates a candidate at any competitive or qualifying examination, held under the authority of any law or statute, or in connection with any university or college, or who procures himself or any other person to be personated at any such

examination, or who knowingly avails himself of the results of such personation.

*Origin*].—Sec. 457, Code of 1892.

*Personation at a civil service examination*].—There may be a prosecution either by summary proceedings under the Civil Service Act, R.S.C. 1906, ch. 16, sec. 14, where that Act applies, or under the Code. *R. v. Lartie* (1916), 25 Can. Cr. Cas. 300 (Que.).

*Time limitation*].—An information may be laid and proceedings taken for the prosecution by indictment of an indictable offence although the case is one which might have been summarily tried by a justice, had the information been laid within the six months provided by the Criminal Code (sec. 1142), and although that period had expired before the laying of the information. *R. v. Edwards*, 29 Ont. R. 451, 2 Can. Cr. Cas. 96; *R. v. Lartie* (1916), 25 Can. Cr. Cas. 300, 301 (Que.).

*Knowingly avails himself of the results*].—This is a continuing offence and summary proceedings would not necessarily be barred by the lapse of more than six months between the examination and the commencement of the prosecution. *R. v. Lartie* (1916), 25 Can. Cr. Cas. 300; Code sec. 1142.

*Details of false pretence or fraud not essential to indictment*].—See secs. 863 and 864; see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Punishment on summary conviction*].—The offence under sec. 409 is amongst those excepted by sec. 729 from the power given a justice on summary conviction for certain offences to remit the fine on compensation being made to the party aggrieved.

*Summary convictions of joint offenders*].—See sec. 728.

**Personating owner of Government stock or company stock.—  
Dividends.—Grant of land or scrip.—Person under power of  
attorney.—Transfer under personation.**

**410.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who falsely and deceitfully personates,—

- (a) any owner of any share or interest of or in any stock, annuity or other public fund transferable in any book of account kept by the Government of Canada or of any province thereof, or by any bank for any such Government; or,
- (b) any owner of any share or interest of or in the debt of any public body, or of or in the debt or capital stock of any body corporate, company, or society; or,



- (c) any owner of any dividend, coupon, certificate or money payable in respect of any such share or interest as aforesaid; or,
- (d) any owner of any share or interest in any claim for a grant of land from the Crown, or for any scrip or other payment or allowance in lieu of such grant of land; or,
- (e) any person duly authorized by any power of attorney to transfer any such share or interest, or to receive any dividend, coupon, certificate or money on behalf of the person entitled thereto;

and thereby transfers or endeavours to transfer any share or interest belonging to such owner, or thereby obtains or endeavours to obtain, as if he were the true and lawful owner or were the person so authorized by such power of attorney, any money due to any such owner or payable to the person so authorized, or any certificate, coupon or share warrant, grant of land, or scrip, or allowance in lieu thereof, or other document which, by any law in force, or any usage existing at the time, is deliverable to the owner of any such stock or fund, or to the person authorized by any such power of attorney.

*Origin*—Sec. 458, Code of 1892; R.S.C. 1886, ch. 165, sec. 9; Forgery Act, 1861, 24-25 Vict., Imp., ch. 98.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; see also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

#### **Acknowledging instrument in false name.**

**411.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority or excuse, the proof of which shall lie on him, acknowledges, in the name of any other person, before any court, judge or other person lawfully authorized in that behalf, any recognizance of bail, or any *cognovit actionem*, or consent for judgment, or judgment, or any deed or other instrument.

*Origin*—Code of 1892, sec. 459; R.S.C. 1886, ch. 165, sec. 41.

*Second offences*—See secs. 465, 963 and 964.

*Fraud and Fraudulent Dealing with Property.***Obtaining passage by false ticket.**

**412.** Every one is guilty of an indictable offence and liable to six months' imprisonment who, by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any carriage, tramway or railway, or in any steam or other vessel.

*Origin*—Code of 1892, sec. 362; R.S.C. 1886, ch. 164, sec. 81.

*Fraudulently and unlawfully*—"Fraud," in general, consists of some deceitful practice or wilful device resorted to with intent to deprive another of his right, or in some manner to do him an injury (Black, Law Dict.).

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

**Falsification of accounts by officer of company.—Making false entry in book.**

**413.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a director, manager, public officer or member of any body corporate or public company, with intent to defraud,—

- (a) destroys, alters, mutilates or falsifies any book, paper, writing or valuable security belonging to the body corporate or public company; or,
- (b) makes, or concurs in making, any false entry, or omits or concurs in omitting to enter any material particular, in any book of account or other document.

*Origin*—Sec. 364, Code of 1892; R.S.C. 1886, ch. 164, sec. 68.

*Director, etc., of "any body corporate or public company"*—Compare sec. 414.

*Forgery of stock transfers, stock registers, etc.*—Code sec. 468, sub-sec. (l) to sub-sec. (q) inclusive.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

*Extradition*—In *R. v. Nesbitt*, 28 O.L.R. 91, 4 O.W.N. 747, 21 Can. Cr. Cas. 251, 253, Middleton, J., said:—"The kind of fraud falling within the Extradition Treaty is that indicated by secs. 412 *et seq.* of

the Criminal Code, which bear a general caption 'Fraud and Fraudulent Dealing with Property.' These sections point to the kind of thing which was intended to be made extraditable; e.g., under sec. 413, "a director, manager, public officer," etc., who destroys any record or makes a false entry in a book of account, is guilty of an offence. In sec. 415, any officer, clerk or servant, who makes or concurs in making a false entry in a material particular in a security or document, with intent to defraud, is also guilty of an offence. Under sec. 425, it is penal for a warehouseman to deliver a receipt for goods without receiving them. Under sec. 426, it is penal to dispose fraudulently of merchandise upon which money has been advanced or security given by a consignee. Under sec. 427, it is an offence to make a false statement in a receipt given under the Bank Act, or fraudulently to alienate property upon which such security is given." "In comment he said: "These serve as illustration of the kind of fraud which is thus rendered punishable under the law to which the Extradition Treaty applies. It is not everything which is criminal or reprehensible that is intended to be included; for we find separately catalogued, forgery, larceny, embezzlement, obtaining money or securities by false pretences, robbery, threatening with intent to extort, and perjury—all more or less akin to fraud, which it would be unnecessary to catalogue separately if intended to be covered by the same general words." *R. v. Nesbitt*, 21 Can. Cr. Cas. 251, 28 O.L.R. 91, 4 O.W.N. 747.

*Employee falsifying books*—Code sec. 415.

#### False prospectus, etc., by directors, etc.

**414.** Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates, or publishes, or concurs in making, circulating or publishing any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons whether ascertained or not to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them, whether ascertained or not, of such body corporate or public company, or with intent to induce any person to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof.

*Origin*—Sec. 365, Code of 1892; R.S.C. 1886, ch. 164, sec. 69; Larceny Act, 32-33 Vict., Can., ch. 21, sec. 85; Larceny Act, 24-25 Vict., Imp., ch. 96, sec. 84; 20-21 Vict., Imp., ch. 54, sec. 8.

*Prospectus, statement or account*—It has been said in view of the history of sec. 414, and having regard to the introduction of the word "prospectus," (in 1892) that what the section deals with is a prospectus, statement, or account made, circulated, or published by a promoter, director, public officer, or manager, in that capacity, and that it does not apply to a statement made by a guaranteeing director which related to his own financial standing, and had no relation to the company of which he was director or to its business or affairs or to its assets or liabilities. *R. v. Cohen* (1915), 33 O.L.R. 340, 24 Can. Cr. Cas. 238, 245.

It has been held that a newspaper article, which the director or manager of a company causes to be published as a news item and not over his own or the company's name and so done for the purpose of advancing the interests of the company, is included within the term "prospectus, statement or account" in Code sec. 414. *R. v. Buck*, [1917] 1 W.W.R. 867, 874, 10 Alta. L.R. 437. An appeal to the Supreme Court of Canada was allowed on other grounds. *Buck v. The King*, 55 S.C.R. 133, [1917] 3 W.W.R. 117, 29 Can. Cr. Cas. 45, Mr. Justice Anglin adding that he was not altogether satisfied that persuading a reporter to publish in a newspaper an untrue article of the kind in question (a laudatory write-up of an alleged new oil-well) is an offence within sec. 414 of the Code.

*"Director"*—If the charge be against the company's president, the incorporation law of the province in which the company was incorporated may be looked at to establish that the president under that law must necessarily be a director, as where the directors elect a president from amongst themselves. *R. v. Gillespie* (1898), 1 Can. Cr. Cas. 551 (Que.).

*Locality of the offence*—The general jurisdiction of courts of criminal jurisdiction in any province includes crimes committed within that province if the accused is apprehended there. Code sec. 577.

But by sec. 888 of the Code, nothing in the Code authorizes any court in one province of Canada to try any person for any offence committed entirely in another province; provided that every proprietor, publisher, editor or other person charged with the publication in a newspaper of any "defamatory libel," shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed. There is no similar exception as regards promoters, directors, etc., publishing false statements by mailing them in one province to persons in other provinces. Jurisdiction will attach to the courts of the province to an address in which the prospectus, financial statement, etc., has been mailed by the accused and where it was received by the person intended to be deceived thereby, if the accused is apprehended in that province. *R. v. Gillespie* (No. 2), 2 Can. Cr. Cas. 309 (Que.).

*"Manager"*—A manager *de facto* is included, although not formally appointed. *R. v. Lawson* [1905] 1 K.B. 541, 74 L.J.K.B. 296, 69 J.P.

122; and probably, although he called himself only "secretary" of the company. *Gibson v. Barton*, L.R. 10 Q.B. 329 (under Companies Act, 1862, Imp., secs. 26, 27).

*With intent to induce, etc., or with intent to deceive or defraud*—The intent may be inferred from the knowledge of the falsity of the statement, etc., and that it was intended that the statement was to be acted upon for any of the purposes indicated. *R. v. Birt* (1899), 63 J.P. 328.

*Obtaining credit on false pretenses*—Code sec. 405A; *R. v. Cohen* (1915), 33 O.L.R. 340, 24 Can. Cr. Cas. 238.

*Knowingly making false statement in writing for intent*—Code sec. 407A; *R. v. Cohen* (1915), 33 O.L.R. 340, 24 Can. Cr. Cas. 238.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

#### **Falsification of accounts by clerk, etc.—Making false entry.**

**415.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being or acting in the capacity of an officer, clerk, or servant, with intent to defraud,—

- (a) destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or document which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or concurs in the same being done; or,
- (b) makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from or in, any such book, paper, writing, valuable security or document.

*Origin*—Sec. 366, Code of 1892; Falsification of Accounts Act, 1875, 38-39 Vict., Imp., ch. 24, sec. 1.

*With intent to defraud*—The fraudulent intent is a question for the jury. *R. v. Drewett* (1905), 69 J.P. 37, 21 Times L.R. 164.

*"Valuable security"*—Code sec. 2, sub-sec. (40).

*"Writing"*—Code sec. 2, sub-sec. (42).

*Destroying or falsifying book, security, etc.*—Compare sec. 413, dealing with the like offence by directors, managers, and company officers.

*"Makes or concurs in making any false entry" in employer's books*—If a book entry as of a "balance in hand" is contained in an account of the employer's receipts on account of a third person, filled in by

the employee with the correct balance which would have been on hand but for the latter's embezzlement, it is not a false entry by the embezzling employee. *R. v. Williams* (1899), 79 L.T. 739, 43 Sol. J. 201, 15 Times L.R. 158, 63 J.P. 103. But had a similar entry been made in a book kept for showing the balances held by the employee for his employer in respect of the third party's money it would then have been a "false entry." *R. v. Williams*, *supra*.

*Falsification by omission in accounts by employee*—In charging a clerk or servant with criminally fraudulent omission to enter particulars in the books of account, care must be taken to state that the omitted particulars were "material particulars." *R. v. Wilson* (1913), 5 W.W.R. 620, 22 Can. Cr. Cas. 162, 26 W.L.R. 148, (Sask.). The omission of the word "material" from the indictment will vitiate it, as that is an essential averment, and a ground for quashing the indictment. *R. v. Wilson*, *supra*.

Sec. 415 may be applied to a fraudulent omission to register a fare in an automatic registering machine. *R. v. Solomons* [1909] 2 K.B. 980 (a taxicab case); Code sec. 2, sub-sec. (42) defining the term "writing."

An unauthorized agreement made by the employee to set off his own indebtedness against the account due his employer is not included in the punishable omissions under sub-sec. (b), because the servant could not bind his employer by such an agreement in the absence of express authorization. *Rex v. Wilson*, *supra*.

*Extra-territorial or partly extra-territorial offences*—It has been held that the English courts have jurisdiction in a case in which a British subject sent abroad to manage a branch of an English business omitted an entry in his returns to his employers knowing that the result would be a corresponding omission in his employers' books kept in England. He was held rightfully convicted in England, on the ground that by his mailing the false returns from abroad which were received and acted upon in England, he had completed in England an offence begun abroad. *R. v. Oliphant* [1905] 2 K.B. 67, 74 L.J.K.B. 591, 21 Times L.R. 416. But English courts have a general jurisdiction over extra-territorial offences committed by British subjects which is lacking in colonial courts; and it may be doubted whether Canadian courts would have had jurisdiction under similar circumstances had the head office of the business been in Canada and the branch in a foreign country. Compare *re Bigamy* sections of the Code, 27 S.O.R. 461, 1 Can. Cr. Cas. 172; *R. v. Jameson* [1896] 2 Q.B. 425, 18 Cox C.C. 392, (under the Foreign Enlistment Act, Imp.); *McLeod v. Attorney-General of N.S.W.* [1891] A.C. 455; *R. v. Russell* [1901] A.C. 446, 20 Cox C.C. 51, 70 L.J.K.B. 998; *Jefferys v. Boosey*, 4 H.L.C. 815.

*Formal charge in lieu of indictment*—In Alberta and Saskatchewan the formal charge may include this offence although the preliminary enquiry on which the committal was based was for theft only. *R. v.*

Wilson (1913), 5 W.W.R. 620, 22 Can. Cr. Cas. 162, 26 W.L.R. 148 (Sask.); *re* Criminal Code, 43 S.C.R. 434.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

**False return by public officer.**

**416.** Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine not exceeding five hundred dollars, who, being an officer, collector or receiver, entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes any false statement, or return of any sum of money collected by him or entrusted to his care, or of any balance of money in his hands or under his control.

*Origin*—Sec. 367, Code of 1892.

*Second offences*—See secs. 465, 963 and 964.

*False returns under the Bank Act*—See The Bank Act, Can., and amendments; *R. v. Weir*, 3 Can. Cr. Cas. 102, 8 Que. Q.B. 521; *R. v. Weir*, 3 Can. Cr. Cas. 262; 521; *R. v. Hincks* (1879), 24 L.C. Jurist, 116; *R. v. Newbitt*, 28 O.L.R. 91, 4 O.W.N. 747, 21 Can. Cr. Cas. 351; *R. v. Lovitt*, 41 N.S.R. 240, 13 Can. Cr. Cas. 15; *R. v. Browne*, 14 Can. Cr. Cas. 247; *re O'Neill*, 19 Can. Cr. Cas. 410.

**Disposal of property, etc., with intent to defraud creditors.—**

**Receiving property with intent.—Being a trader fails to keep accounts.**

**417.** Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,—

- (a) with intent to defraud his creditors, or any of them,
  - (i) makes, or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or,
  - (ii) removes, conceals or disposes of any of his property; or,
- (b) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property; or,

- (c) being a trader and indebted to an amount exceeding one thousand dollars, is unable to pay his creditors in full and has not kept such books of account as, according to the usual course of trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he is able to account for his losses to the satisfaction of the court or judge and to show that the absence of such books was not intended to defraud his creditors, but no person shall be prosecuted under the provisions of this paragraph by reason only of his having failed to keep such books of account at a period of more than five years before the date of such inability to pay his creditors.

*Origin*—1917 Can., ch. 14, sec. 4; 4 Edw. VII, ch. 7, sec. 1; sec. 368, Code of 1892; R.S.C. 1886, ch. 173, sec. 28; 22 Vict., Can., ch. 96, sec. 21.

A conclusion of fraud depends upon the absence or presence of an honest belief. If a belief is honestly entertained, the fact that it resulted from a want of skill or incompetence, or lacks reasonable grounds, does not warrant a conclusion of fraud. *Clement v. The King*, (1914) 6 W.W.R. 414 (Can.), per Anglin, J., citing *Glasier v. Rolla*, 42 Ch. D. 436.

*Transfer with intent to defraud*—It is not essential that the debt of the creditor should, at the time of the sale, etc., be actually due. *R. v. Henry*, 21 O.R. 113; *Macdonald v. McCall*, 12 A.R. (Ont.) 393.

An assignment to a trustee for creditors even with preferences, where the property has been handed over to the trustee in accordance therewith, is not a violation of criminal law even if made by the debtor in breach of prior agreements to prefer other creditors. *R. v. Shaw*, 31 N.S.B., 534.

The preferences may be subject to attack in civil proceedings because of their infringing a provincial law dealing with the distribution of insolvent's effects in the absence of any federal bankruptcy law applicable thereto.

It is properly left to the jury to say whether the defendant put the property out of his hands, transferred or disposed of it for the purpose of defrauding his creditors, although in the course of that transaction he satisfied a debt due to the creditor to whom the property was assigned. *R. v. Potter*, (1860), 10 U.C.C.P. 39.

In a case where the nature of the proceedings and the evidence clearly showed that criminal process issued against S. was used only



for the purpose of getting S. to Montreal to enable his creditors there to put pressure on him, in order to get their claims paid or secured, a transfer made by S's father of all his property for the benefit of the Montreal creditors was set aside as founded on an abuse of the criminal process of the court. *Shorey v. Jones* (1888), 15 Can. S.C.R. 398, affirming 20 N.S.R. 378.

As to the sufficiency of the evidence to support the charge, see *R. v. Ayoup*, 39 N.B.R. 598, 16 Can. Cr. Cas. 375, *R. v. Shaw*, 31 N.S.R. 534; *R. v. Van Meter*, 11 Can. Cr. Cas. 207; *R. v. Porter*, 35 O.L.R. 339, 9 O.W.N. 378, 26 Can. Cr. Cas. 39.

*Concealing property with fraudulent intent*—See *Bryce v. Wilks*, 11 Que. Q.B. 464, 5 Can. Cr. Cas. 445 (under a Quebec statute); *Baxter v. Gordon*, 13 O.L.R. 598.

Evidence of two other concealments a few days prior to that being tried would be admissible, not in proof of the charge, but as evidence of intent to defraud and of guilty knowledge. *Re Goodman*, 10 W.W.R. 781, 786; *R. v. Shellaker*, [1914] 1 K.B. 414, 83 L.J.K.B. 413; *R. v. Ball*, [1911] A.C. 47 and *Reg. v. Ollis*, [1900] 2 K.B. 758, 781, 69 L.J.Q.B. 918.

*Failure of trader to keep books*—In *R. v. Porter*, 35 O.L.R. 339, 26 Can. Cr. Cas. 39, an indictment under sub-sec. (c) was held bad for failure to allege any time for which the failure to keep books had continued.

Since the decision in *R. v. Porter*, 35 O.L.R. 339, sub-sec. (c) has been amended (1917) by deleting the words "for five years next before such in ability" which formerly preceded the words "kept such books of account" in sub-sec. (c), and the words commencing as follows: "but no person shall be prosecuted, etc." (to the end of sub-sec. (c)) in its present form were then added. This alteration is evidently intended to make it clear that a person who has been a "trader" for less than five years is amenable to sub-sec. (c) as well as the person who has been in business for a longer time.

It would seem to be necessary to prove that the accused was "a trader," a term which is left undefined by the Code, but is commonly used in bankruptcy laws. See the repealed Insolvent Act of 1875, Can.; *Creighton v. Chittick*, 7 S.C.R. 348.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

*Criminal offence against bankruptcy law*—Sec. 417 is in effect a bankruptcy law for the purposes of the Extradition Convention of 1907 with the U.S.A. *R. v. Stone* (1911), 17 Can. Cr. Cas. 377, and see *R. v. Stone*, 17 Can. Cr. Cas. 249; *re Goodman*, 10 W.W.R. 781 and 1178, 26 Can. Cr. Cas. 84 and 254, 26 Man. R. 537; *re Webber*, 20 Can. Cr. Cas. 1 and 6.

**Destroying or falsifying books to defraud creditors.**

**418.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document.

*Origin*—Sec. 369, Code of 1892; B.S.C. 1886, ch. 173, sec. 27.

*"Destroying or falsifying"*—Compare secs. 413, 415.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

**Vendor concealing deeds or encumbrances or falsifying pedigrees.**

**419.** Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who, being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor or agent of any such seller or mortgagor (and having been served with a written demand of an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage) conceals any settlement, deed, will or other instrument material to the title, or any incumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him.

*Origin*—Sec. 370, Code of 1892; B.S.C. 1886, ch. 164, sec. 91.

*Preliminary*—The leave of the Attorney-General is essential to a prosecution for an offence under sec. 419. Code sec. 597. An indictment is not objectionable for failure to state in it that such consent has been obtained; Code sec. 855 (h); but it must appear at the trial that the prosecution is by leave or the case will be dismissed.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; and see secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

**Fraudulent registration of titles.**

**420.** Every one is guilty of an indictable offence and liable to three years' imprisonment who, acting either as principal

or agent, in any proceeding, to obtain the registration of any title to land or otherwise, or in any transaction relating to land which is, or is proposed to be, put on the register, knowingly and with intent to deceive makes or assists or joins in, or is privy to the making of, any material false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from, any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information.

*Origin*—Sec. 371, Code of 1892; R.S.C. 1886, ch. 164, secs. 96, 97.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

#### **Fraudulent sales of real property.**

**421.** Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof.

*Origin*—Sec. 372, Code of 1892; R.S.C. 1886, ch. 164, secs. 92, 93.

*Sales in fraud of unregistered title*—Where the owner of land conveyed to the accused by a deed absolute in form, but intended by both parties to be held only as a security for a loan, and after default in payment of the loan, the accused made and registered a conveyance also absolute in form to a brother who already had notice of the terms of the original conveyance, for the same expressed consideration as was stated in the original conveyance, but the brother did not accept the deed or pay the money, a conviction of the accused under sec. 421 for fraudulently selling with the intention of defeating the unregistered equity of redemption of the original owner was set aside on the ground that the acts stated did not constitute an offence under that section. *R. v. McDevitt* (1910), 17 Can. Cr. Cas. 331, 22 O.L.R. 490.

Referring to sec. 421, Magee, J.A., said, in *R. v. McDevitt*, 22 O.L.R. 490, 17 Can. Cr. Cas. 331, at 341:—"It was argued that to be unregistered within the meaning of the section there must be something in writing, something which could be registered, and also that an equity of redemption did not come within its wording. I am not at present prepared to assent to either of these propositions, though much may

be said in support of the latter at least. But it is not, I think, necessary to consider them. The case can and should be disposed of on the short ground that, at the time this prosecution was instituted, there had not in fact been any sale."

*Hypothec*—This term is used in the laws of the province of Quebec.

*"Privilege"*—In this connection the word "privilege" refers to the legal right so termed under the Quebec Civil Code.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also see secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

#### **Fraudulent hypothecation of real property.—Burden of proof.**

**422.** Every one who pretends to hypothecate, mortgage, or otherwise charge any real property to which he knows he has no legal or equitable title is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one hundred dollars.

2. The proof of the ownership of the real estate rests with the person so pretending to deal with the same.

*Origin*—Sec. 373, Code of 1892; R.S.C. 1886, ch. 164, secs. 92, 94.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also see secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

#### **Fraudulent seizures of land under execution.**

**423.** Every one is guilty of an indictable offence and liable to one year's imprisonment who, in the province of Quebec, wilfully causes or procures to be seized and taken in execution any lands and tenements, or other real property, not being at the time of such seizure, to the knowledge of the person causing the same to be taken in execution, the *bona fide* property of the person or persons against whom, or whose estate, the execution is issued.

*Origin*—Sec. 374, Code of 1892; R.S.C. 1886, ch. 164, secs. 92, 95.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also see secs. 853, 855, 859, 860, as to stating the offences and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

**Holder of lease of gold or silver mine defrauding owner.—Unlawful sale of mined gold or silver.—Unlawful purchase of rock, ore or quartz containing gold or silver or unsmelted gold or silver.**

**424.** Every one is guilty of an indictable offence and liable to two years' imprisonment, who,—

- (a) being the holder of any lease or license issued under the provisions of any Act relating to gold or silver mining, or by any persons owning land supposed to contain any gold or silver, by fraudulent device or contrivance, ~~defrauds or attempts to defraud His Majesty, or any person, of any gold, silver or money payable or reserved by such lease, or, with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him; or,~~
- (b) not being the owner or agent of the owner of mining claims then being worked, and not being thereunto authorized in writing by the proper officer in that behalf named in any Act relating to mines in force in the province in which the offence is alleged to have been committed, sells or purchases, except to or from such owner or authorized person, any rock, ore, mineral, stone, quartz or other substance containing gold or silver ~~or any unsmelted, or untreated, or unmanufactured or partly smelted, partly treated or partly manufactured gold or silver; or,~~
- (c) purchases any rock, ore, mineral, stone, quartz or other substance containing gold or silver, or any unsmelted, or untreated, or unmanufactured, or partly smelted, partly treated, or partly manufactured gold or silver, except from such owner or authorized person, and does not, at the same time, execute in triplicate an instrument in writing, stating the place and time of purchase, and the quantity, quality and value of gold or silver so purchased, and the name or names of the person or persons from whom the same was purchased, and within ten days

file the same with the clerk of the county or district court of the county or district in which the purchase was made, or with the officer with whom in the said county or district bills of sale or mortgages of personal property are filed or deposited.

(d) The two next preceding subsections (b) and (c) shall not extend or apply to the Yukon Territory.

*Origin*—Sec. 375, Code of 1892; R.S.C. 1886, ch. 164, secs. 27, 28, 29; Canada Statutes, 1909, 8-9 Edw. VII, ch. 9.

*Sale of crude gold or silver ore by unauthorized person*—In order to constitute a sale it is not necessary that the price should be fixed by the contract; it is sufficient that it be left to be fixed in the manner thereby agreed. The maxim "*id certum est quod certum reddi potest*" applies. *R. v. Barber* (Ont.), 17 Can. Cr. Cas. 236.

Where unsmelted ore is turned over to a smelter proprietor by a person having no mine owner's authority under sec. 424, upon an agreement to pay for the silver realized on smelting, the transaction is not a sale merely of the refined silver but of the crude ore, and is an offence under sec. 424. *R. v. Barber* (Ont.), 17 Can. Cr. Cas. 236.

*Laying property in His Majesty or in mining licensee*—See secs. 866, 893.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; and see secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

*Search warrant for mined gold or silver unlawfully possessed*—See sec. 637, 750 (d).

*Unlawful possession of crude gold or silver ore*—See sec. 424A, 637, 750 (d).

*Theft from mines*—See secs. 353, 378, 424, 424A, 637, 750 (d), 866, 893.

**Unlawful possession of rock, ore, or quartz containing gold or silver.—Determination of value.—Limitation of proceedings.**

**424A.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, having in his possession, or upon his premises, with his knowledge, any rock, ore, mineral, stone, or quartz of a value of not less than twenty-five cents per pound, or in the case of mica of a value of not less than seven cents per pound, or any partly melted, partly treated or partly manufactured gold or silver which there is reasonable ground to suspect has been stolen or has been dealt with contrary to the

provisions of paragraph (b) or (c) of section 424, is unable or refuses to account satisfactorily for or prove his right to the possession of the same.

2. If in any proceeding under this section any question arises as to the value of any rock, ore, mineral, stone or quartz, the judge, magistrate, justice or other officer before whom the proceeding is pending may order such assay or assays, test or tests, to be made as may be deemed requisite for determining such value.

3. No action or prosecution for a violation of this section shall be commenced or undertaken in any part of Canada unless or until an order has been passed by the Governor in Council declaring this section to be in force in such part of Canada. Any such order may be amended, revoked or renewed from time to time in whole or in part by any subsequent order in council.

4. No prosecution shall be had under this section unless it had been initiated on the information or complaint of a manager or director of a mining company or on the information or complaint of some one thereunto authorized by a mining company or a manager or director thereof, or by or with the authority of the attorney general of the province in which the offence is alleged to have been committed, or by the owner or part owner of a mine who deposes under oath that he believes that rock, ore, or other substance similar to some of those mentioned in this section has been stolen or wrongfully taken from the mine.

*Origin*—Can. Statutes, 1910, 9-10 Edw. VII, ch. 12.

*Order bringing into force*—See Proclamation bringing into force in Ontario and Quebec, 17 May, 1910, 43 *Can. Gazette*, 3592.

This section is operative only in such districts as may be named in the Order-in-Council under sub-sec. (3), and the proclamation for any district may be revoked in like manner.

*Search warrant for mined gold or silver unlawfully possessed*—See sec 637, 750 (d).

*How property in ores may be laid*—Secs. 866 and 893, which deal specifically with offences under secs. 378 and 424, probably do not apply to sec. 424A, which was added as a distinct section of the Code.

*Being unable or refusing to account*—A person who is unable or refuses to account satisfactorily for, or to prove his right to the possession of, the ore specified, before a conviction is liable under sec. 424A. *R. v. Karp*, 41 O.L.R. 540, 30 Can. Cr. Cas. 115, 13 O.W.N. 435.

So it would be no answer to a charge that the accused had not been first asked and given opportunity before arrest to account satisfactorily for the gold or silver ore he was carrying concealed on his person. *R. v. Karp*, *supra*. The intention of sec. 424A is to put upon persons under reasonable grounds of suspicion of having stolen any of the valuable metals mentioned in the section, or of having dealt with them contrary to the provisions of sec. 424, sub-secs (b) or (c), the onus of proof such as the latter part of sec. 424A requires. *R. v. Karp*, *supra*, per Meredith, C.J.C.P.

*Second offences*—See secs. 465, 963 and 964.

**Warehouseman, etc., delivering receipt for goods without receiving them.—Accepting, etc., false receipt.**

**425.** Every one is guilty of an indictable offence and liable to three years' imprisonment, who,—

- (a) being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbour or other place for storing timber, deals, staves, boards, or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgment of, any goods or other property as having been received into his warehouse, vessel, cove, wharf, or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed, before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person, although such person is then unknown to him; or
- (b) knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing.

*Origin*—Sec. 376, Code of 1892; B.S.C. 1886, ch. 164, sec. 73.

*"Knowingly and wilfully"*—Compare Code sec. 509, and see *R. v. Hayes*, 6 Can. Cr. Cas. 357; *R. v. Macdougall*, 15 Can. Cr. Cas. 466. *R. v. Beaver*, 9 O.L.R. 418, 9 Can.-Cr. Cas 415. *Ex parte O'Shaughnessy*,



8 Can. Cr. Cas. 136, 13 Que. K.B. 178; R. v. Tupper, 11 Can. Cr. Cas. 199; R. v. Bridges, 13 B.C.R. 67, 12 Can. Cr. Cas. 548; R. v. Barre, 15 Man. L.R. 420, 11 Can. Cr. Cas. 1; McGillivray v. Muir, 6 O.L.R. 154, 7 Can. Cr. Cas. 360.

*Second offences*—See secs. 465, 963 and 964.

*Acts of partners*—See sec. 428.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

**Fraudulent disposal of merchandise as to which money has been advanced or security given by consignee.—Aiding in disposal.—Exception.**

**426.** Every one is guilty of an indictable offence and liable to three years' imprisonment, who,

- (a) having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise upon which the consignee has advanced any money or given any valuable security, afterwards, with intent to deceive, defraud or injure such consignee, in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time when or before such money was so advanced or such security given; or,
- (b) knowingly and wilfully aids and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee.

2. No person commits an offence under this section who, before making such disposition of such merchandise, pays or tenders to the consignee the full amount of any advance made thereon.

*Origin*—Sec. 377, Code of 1892; R.S.C. 1886, ch. 164, sec. 74.

*Acts of partners*—See sec. 428.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See secs. 465, 963 and 964.

**Fraudulent receipts under the Bank Act.—Fraudulently alienating property covered by receipt.**

**427.** Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

- (a) wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any of the purposes mentioned in the Bank Act; or,
- (b) having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property, or having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards; and without the consent of the holder or endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned.

*Origin*].—Sec. 378, Code of 1892; R.S.C. 1886, ch. 164, sec. 75.

*Acts of partners*].—See sec. 428.

*Details of false pretence or fraud not essential to indictment*].—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*].—See secs. 465, 963 and 964.

*Transfers in fraud of Bank on security under the Bank Act*].—See the Bank Act, Can., 1913, ch. 9 and amendments, 1916, ch. 1, and 1916, ch. 10.

Under the Bank Act it is an offence for a Bank to acquire, except in accordance with that Act, any warehouse receipt, bill of lading or other security provided for by secs. 86-90 of the Bank Act, 1913. 3-4 Geo. V, Can., ch. 9, sec. 141. Any person having knowledge of the holding by a bank of a warehouse receipt, bill of lading, or security by receipt specially provided for under the Bank Act is liable to imprisonment for a term not exceeding three years if he transfers or withholds the goods covered thereby in fraud of the Bank. Bank Act, 1913, Can.,

ch. 9, sec. 144. As to frauds by consignees, see Code sec. 116. Banking corporations in Canada must be authorized by the Treasury Board, a branch of the Government, before commencing a banking business. And any person is guilty of an offence against the Bank Act if he uses the word "bank" or the words "savings bank," "banking company," "banking house," "banking association," or "banking institution" (or any word or words of import equivalent thereto in any foreign language) in any sign or in an advertisement or in a title to represent or describe his business or any part of his business without being authorized so to do by the Bank Act or by some other statute. Bank Act, 1913, Can., ch. 9, sec. 156. But it is to be noted that the selection of inhibited terms does not include the word banker. A private banking business may, it seems, be conducted under an individual name with the word "banker" added, but not the word "bank" or any of the other inhibited words. Exceptional facilities for taking security from their wholesale and manufacturing customers are provided by the Bank Act for the benefit of banks having Canadian incorporation or charter or British or other banks who have obtained the necessary license from the Canadian Treasury Board to operate a banking business in Canada. This security is evidenced by a statutory form of receipt provided by the Bank Act, which does not require registration as a chattel mortgage would, except as to security given by a farmer on his live stock under the amendment made to the Bank Act in 1916, by 6-7 Geo. V, Can., ch. 10. Its operation as a security is limited to the cases for which the Bank Act provides.

A bank may also lend money to the owner, tenant or occupier of land for the purchase of seed grain upon the security of any crop to be grown from such seed grain. The security may be taken in the form set forth in schedule G. to the Bank Act, or in a form to the like effect. The bank by virtue of such security acquires a first and preferential lien and claim for the sum secured and interest thereon upon the seed grain purchased and the crop covered by the security, as well before as after the severance of the crop from the soil, and upon the grain threshed therefrom, and acquires the same rights and powers in respect of such seed grain and of the grain so threshed as if it had acquired such rights and powers by virtue of a warehouse receipt. The bank has the right, through its servants or agents in case of neglect to care for and harvest the crop, or in case of any attempt to dispose of the crop without the consent of the bank or in case of the seizure of the crop under process of law, to enter upon the land upon which the crop is grown, to take possession of, care for and harvest the crop and thresh the grain. 5 Geo. V, 1915, Can., ch. 1.

A bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or any wholesale purchaser or shipper of or dealer in live stock or dead stock or the products thereof, upon the

security of such products, or of such live stock (defined by 6-7 Geo. V, Can. (1916), ch. 10), or dead stock or the products thereof; and to a farmer upon the security of his threshed grain grown upon the farm; and to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise, upon the security of the goods, wares and merchandise manufactured by him, or procured for such manufacture. If, with the consent of the bank, the products, goods, wares and merchandise, live stock or dead stock or the products thereof, upon the security of which money has been so loaned are removed and other products, goods, wares and merchandise, live stock and dead stock, or the products thereof of substantially the same character, are respectively substituted therefor, then to the extent of the value of the products, goods, wares and merchandise or live stock or dead stock or the products thereof so removed, the products, goods, wares and merchandise, live stock or dead stock or the products thereof so substituted are covered by such security as if originally covered thereby; but failure to obtain the consent of the bank to any such substitution does not affect the validity of the security either as respects any products, goods, wares and merchandise, or live stock or dead stock or the products thereof actually substituted as aforesaid or in any other particular. Any such security may be given by the owner of the said products, goods, wares and merchandise, stock or products thereof, or grain. The security may be taken in the form set forth in schedule C. to the Act, ~~or to the like effect: (The Bank Act, 3-4 Geo. V, (1913), ch. 9, sec. 68.~~

The bank acquires the same rights and powers in respect of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby as if it had acquired the same by virtue of a warehouse receipt; provided, however, that the wages, salaries or other remuneration of persons employed by any wholesale purchaser, shipper or dealer, by any wholesale manufacturer, or by any farmer in connection with any of the several wholesale businesses referred to, or in connection with the farm, owing in respect of a period not exceeding three months, shall be a charge upon the property covered by the said security in priority to the claim of the bank thereunder, and such wages, salaries or other remuneration shall be paid by the bank if the bank takes possession or in any way disposes of the said security or of the products, goods, wares and merchandise, stock or products thereof, or grain covered thereby. The Bank Act, 3-4 Geo. V, (1913), ch. 9, sec. 88.

Goods purchased from the wholesale manufacturer thereof in the ordinary course of business without notice that he has given security thereon to a bank under secs. 86 to 88 of the Act, will become the property of the purchaser free from any claim of the bank under the security. *Bank of Montreal v. Tudhope, Anderson & Co.*, 21 Man. R. 380; *National Mercantile Bank v. Hampson*, 5 Q.B.D. 177.

**Exception as to innocent partners.—Offences under secs. 425-427.**

**428.** If any offence mentioned in any of the three sections last preceding is committed by the doing of anything in the name of any firm, company or copartnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is alone guilty of the offence.

*Origin*—Sec. 379, Code of 1892; R.S.C. 1886, ch. 164, sec. 76.

*Innocent partners*—Sec. 428 declares an exception to secs. 425, 426, 427 as regards innocent partners.

**Selling vessel or wreck without title.**

**429.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, not having lawful title thereto, sells any vessel or wreck found within the limits of Canada.

*Origin*—Sec. 380, Code of 1892; R.S.C. 1886, ch. 81, sec. 36 (d).

*"Wreck"*—See definition in sec. 2 (41).

*Second offences*—See secs. 465, 963 and 964.

**Secreting wreck, etc.—Receiving wreck.—Other dealings with wreck.—Boarding wrecked vessel.**

**430.** Every one who,—

- (a) secretes any wreck, or defaces or obliterates the marks thereon, or uses means to disguise the fact that it is wreck, or in any manner conceals the character thereof, or the fact that the same is wreck, from any person entitled to inquire into the same; or,
- (b) receives any wreck, knowing the same to be wreck, from any person other than the owner thereof or the receiver of wrecks, and does not within forty-eight hours inform the receiver thereof; or,
- (c) offers for sale or otherwise deals with any wreck, knowing it to be a wreck, not having a lawful title to sell or deal with the same; or,
- (d) keeps in his possession any wreck, knowing it to be wreck, without a lawful title so to keep the same, for any time longer than the time reasonably necessary for the delivery of the same to the receiver; or,

(e) boards any vessel which is wrecked, stranded or in distress against the will of the master, unless the person so boarding is, or acts by command of the receiver; is guilty of an offence punishable on indictment with two years' imprisonment, and on summary conviction before two justices with a penalty of four hundred dollars or six months' imprisonment with or without hard labour.

*Origin*—Sec. 381, Code of 1892; R.S.C. 1886, ch. 81, sec. 37.

*"Wreck"*—The word "wreck" as here used includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons, (Code sec. 2, sub-sec. (41) ), including any person belonging to, on board of, or having quitted any vessel wrecked, stranded or in distress at any place in Canada. Code sec. 2, sub-sec. (33).

*Second offences*—See secs. 465, 963 and 964.

*First offence on summary conviction*—See sec. 729.

*Joint offenders on summary conviction*—See sec. 728.

**Purchasing old marine stores from person under sixteen.—Receiving old marine stores.—Having in possession.**

**431.** Every person dealing in old marine stores of any description, including anchors, cables, sails, junk, iron, copper, brass, lead or other marine stores, who, by himself or his agent, purchases any old marine stores from any person under the age of sixteen years, is guilty of an offence and liable, on summary conviction, to a penalty of four dollars for the first offence and of six dollars for every subsequent offence.

2. Every such person who, by himself or his agent, purchases or receives any old marine stores into his shop, premises or place of deposit, except in the daytime between sunrise and sunset, is guilty of an offence and liable, on summary conviction, to a penalty of five dollars for the first offence and of seven dollars for every subsequent offence.

3. Every person, purporting to be a dealer in old marine stores, on whose premises any such stores which have been stolen are found secreted, is guilty of an indictable offence and liable to five years' imprisonment.

*Origin*—Sec. 382, Code of 1892; R.S.C. 1886, ch. 81, sec. 35; Merchant Shipping Act, 1894, (Imp.), sec. 540.

*First offence on summary conviction*—See sec. 729.

*Joint offenders on summary conviction*—See sec. 728.

**Marks to be used on public stores.**

**432.** The marks specified in this section in that behalf may be applied in or on any public stores to denote His Majesty's property in such stores, or to denote any inspection or approval of any public stores by any officer or person acting for His Majesty, whether such inspection or approval is made or given during the course of the manufacture, production or delivery of such stores for or to His Majesty, or prior to or after the delivery or acceptance of such stores to or by His Majesty.

[The words following "such stores" in the third line were added by Order in Council, Feb. 24, 1917, under the War Measures Act, 1914; see Can. Stat., 1918, xxxiv.]

*Marks appropriated for His Majesty's use in or on Naval, Military, Ordnance, Barrack, Hospital and Victualling Stores.*

STORES.	MARKS.
Hempen cordage and wire rope.	White, black or coloured threads laid up with the yarns and the wire, respectively.
Canvas, fearnought, hammocks and seamen's bags.	A blue line in a serpentine form.
Bunting.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick, or wicks of red cotton.
Timber, metal and other stores not before enumerated.	The broad arrow, with or without the letters W.D.

*Marks appropriated for use on stores, the property of His Majesty in the right of his Government of Canada.*

STORES	MARKS.
Public stores.	The name of any public department, or the word 'Canada,' either alone or in combination with a Crown or the Royal Arms.
Militia stores.	The broad arrow within the letter "C."

The Governor in Council may also prescribe, by notice published in *The Canada Gazette*, what additional or other marks are appropriated for his Majesty's use in or on naval, military, militia or other stores and property, whether such stores or property belong to His Majesty in the right of his Government

of Canada, or in the right of any other of His Majesty's Dominions.

2. It shall be lawful for any public department, and the contractors, officers and workmen of such department, to apply such marks, or any of them, in or on any such stores.

*Origin*—Sec. 384, Code of 1892; 6 and 7 Edw. VII, ch. 7; 3 and 4 Geo. V, ch. 13, sec. 17; Order-in-Council, Can., Feb. 24, 1917; Public Stores Act, 1875 (Imp.), 38-39 Vict., ch. 25.

*Unlawful application of Government mark*—See R. v. Currie, 13 O.W.N. 198.

*Offences to public stores*—See secs. 2, sub-sec. (28), 432-437, 636, 991.

#### **Unlawfully applying Government marks.**

**433.** Every one is guilty of an indictable offence and liable to two years' imprisonment, who, without lawful authority the proof of which shall lie on him, applies any of the said marks in or on any public stores.

*Origin*—Sec. 385, Code of 1892; 50-51 Vict., Can., ch. 45, sec. 4.

*Evidence of enlistment*—See sec. 991 (1).

*Second offences*—See secs. 465, 963 and 964.

#### **Obliterating marks from public stores.**

**434.** Every one is guilty of an indictable offence and liable to two years' imprisonment, who, with intent to conceal His Majesty's property in any public stores, takes out, destroys or obliterates, wholly or in part, any of the said marks.

*Origin*—Sec. 386, Code of 1892; 50-51 Vict., Can., ch. 45, sec. 5.

*Evidence of enlistment*—See sec. 991.

*Second offences*—See secs. 465, 963 and 964.

#### **Unlawful possession, sale, etc., of public stores.**

**435.** Every one who, without lawful authority the proof of which lies on him, receives, possesses, keeps, sells or delivers any public stores bearing any such mark as aforesaid, knowing them to bear such mark, is guilty of an offence punishable on indictment or on summary conviction, and liable, on conviction on indictment, to one year's imprisonment, and, if the value



thereof does not exceed twenty-five dollars, on summary conviction before two justices, to a fine of one hundred dollars or to six months' imprisonment with or without hard labour.

*Origin*—Sec. 387, Code of 1892; 50-51 Vict., Can., ch. 48, secs. 6 and 8.

*"Public stores"*—For definition, see sec. 2, sub-secs (28) and (34).

*"Knowing them to bear such mark"*—These words give statutory confirmation to the interpretation laid down in *Reg. v. Sleep*, 8 Cox C.C. 472. The prisoner had possession of government stores some of which were marked with the broad arrow. He was indicted under a statute which made it a criminal offence for any person to have stores or goods so marked in his "custody, possession or keeping." The jury in answer to a question whether the prisoner knew that the copper or any part of it was marked, answered, "We have not sufficient evidence before us to show that he knew it." Held, that it was necessary for the prosecution to show affirmatively a possession by defendant with knowledge that the stores were marked with the broad arrow. Cockburn, C.J., said:—"The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case and must be imported into this statute. It is true that the statute says nothing about knowledge, but this must be imported into the statute." But see sec. 991, sub-sec. 2, as to presumption of this knowledge in certain cases where junk dealers are concerned.

*First offence on summary conviction*—See sec. 729.

*Second offences*—See secs. 465, 757, 963, 964, 982.

*Joint offenders on summary conviction*—See sec. 728.

*Evidence of enlistment*—See sec. 991 (1).

**Being in possession without being able to justify.—Summoning former possessors.—Every unlawful possessor liable.**

**436.** Every one, not being in His Majesty's service, or a dealer in marine stores or a dealer in old metals, in whose possession any public stores bearing any such mark are found who, when taken or summoned before two justices, does not satisfy such justices that he came lawfully by such stores, is guilty of an offence and liable, on summary conviction, to a fine of twenty-five dollars.

2. If any such person satisfies such justices that he came lawfully by the stores so found, the justices, in their discretion, as the evidence given or the circumstances of the case require, may summon before them every person through whose hands such stores appear to have passed.

3. Every one who has had possession thereof, who does not satisfy such justices that he came lawfully by the same, is liable, on summary conviction, of having had possession thereof, to a fine of twenty-five dollars, and in default of payment to three months' imprisonment with or without hard labour.

*Origin*—Sec. 388, Code of 1892; 50-51 Vict., Can., ch. 45, sec. 9.

*"Public stores"*—See definition in sec. 2, sub-secs. (28) and (34).

*Search for public stores by peace officer*—See sec. 636.

*Evidence of enlistment*—See sec. 991.

*First offence on summary conviction*—See sec. 729.

*Joint offenders on summary conviction*—See sec. 728.

**Fraud, etc., in connection with sale, etc., of military stores.**

**436A.** Every person is guilty of an indictable offence and liable to imprisonment for two years, or to a fine not exceeding five thousand dollars, or to both imprisonment and fine, who knowingly sells or delivers, or causes to be sold or delivered, to His Majesty or to any officer or servant of His Majesty, any defective military, militia or naval stores of any kind or description, whether such stores are for His Majesty in the right of His Government of Canada, or in the right of any other of His Majesty's dominions, or who in any way commits any act of dishonesty, fraud, or deception upon His Majesty or any of His Majesty's officers or servants in connection with the sale or lease or purchase or delivery or manufacture of such military, militia or naval stores.

2. If any offence referred to in this section is committed by a body corporate, every director, officer, agent and employee of such body corporate who has knowingly taken any part or share in such fraud, dishonesty or deception, or who knows or had reason to suspect that such fraud, dishonesty or deception would be or was being committed, or knows or had reason to suspect that such fraud, dishonesty or deception has been committed, and does not at once inform His Majesty thereof, shall be liable as well as the body corporate to the penalties imposed by this section in all respects as if such offence was committed by said director or other person, and every such body corporate, director or other person convicted of such offence shall be thereafter incapable of contracting with His Majesty or with any of His

Majesty's officers or servants or of holding any contract or office with, from or under Him or them, or of receiving any benefit under any contract so made.

*Origin*—Canada Statutes, 1915, 5 Geo. V, ch. 12.

*Officer or servant of His Majesty*—As to evidence of enlistment or enrolment, see sec. 991.

*"Stores"*—See definition in sec. 2 (34), taken from sec. 383 of the Code of 1892.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Second offences*—See sec. 465, 757, 963, 964, 982.

**Searching for stores near His Majesty's vessels, wharfs or docks.**

**437.** Every one who, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, creeps, sweeps, dredges, or otherwise searches for stores in the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to His Majesty or in His Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to His Majesty, or from any of His Majesty's wharfs or docks, or victualling or steam factory yards, is guilty of an offence and liable, on summary conviction before two justices, to a fine of twenty-five dollars, or to three months' imprisonment, with or without hard labour.

*Origin*—Sec. 389, Code of 1892; 50-51 Vict., Can., ch. 45, secs. 11 and 12.

*"Admiralty"*—See definition in sec. 335 (b) and see Code sec. 8.

*"Stores"*—See definition in sec. 2 (34).

*Search for public stores by peace officer*—See sec. 636.

*Evidence of enlistment*—See sec. 991.

*Joint offenders on summary conviction*—See sec. 728.

*First offence on summary conviction*—See sec. 729.

**Receiving clothing or furniture from soldiers or deserters.**

**Changing the colour.—Receiving provisions from soldier.**

**438.** Every one who,—

- (a) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to His Majesty, or any

such articles belonging to any soldier, militiaman or deserter as are generally deemed regimental necessities according to the custom of the army; or,

(b) causes the colour of such clothing or articles to be changed; or,

(c) exchanges, buys or receives from any soldier or militiaman, any provisions, without leave in writing from the officer commanding the regiment or detachment to which such soldier belongs;

is guilty of an offence punishable on indictment or on summary conviction and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices to a penalty not exceeding forty dollars, and not less than twenty dollars and costs, and, in default of payment, to six months' imprisonment with or without hard labour.

*Origin*].—Sec. 390, Code of 1892; R.S.C. 1886, ch. 169, secs. 2 and 4; Army Act, 1881, Imp., sec. 156.

*Prosecutor's share of fine*].—See sec. 1042.

*Joint offenders on summary conviction*].—See sec. 728.

*First offence on summary conviction*].—See sec. 729.

*Second offences*].—See secs. 465, 757, 963, 964, 982.

*Soldier making away with equipment*].—For making away with his arms, ammunition, equipments, instruments, clothing, regimental necessities or any horse of which he has charge, a soldier is liable under military law to suffer imprisonment on conviction by court martial. Army Act, Imp., sec. 24; Militia Act, Can. It is also a military offence for the soldier to lose by his culpable neglect any of the things mentioned, or to wilfully injure them. Army Act, Imp., sec. 24, sub-sec. (2) and sub-sec. (4).

*Buying or taking in pawn from soldier his military decorations, medals, etc.*].—See the Army Act, 44-45 Vict., Imp., ch. 58, sec. 156, 168, 169, 190 (18), 190 (23); R. v. Brine, 8 Can. Cr. Cas. 54; Laws v. Read, 63 L.J.Q.B. 683; Code sec. 8.

It is a military offence punishable on court martial for a soldier to pawn, sell, destroy or otherwise make away with any military decoration granted to him. Army Act, Imp., sec. 24, sub-sec. (3).

#### **Receiving necessities from seamen or marines.**

**439.** Every one who buys, exchanges, or detains, or otherwise receives from any seaman or marine, upon any account whatsoever, or has in his possession any arms or clothing, or

any articles, belonging to any seaman, marine or deserter, as are generally deemed necessities according to the custom of the navy, is guilty of an offence punishable on indictment or on summary conviction and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices to a penalty not exceeding one hundred and twenty dollars, and not less than twenty dollars and costs, and in default of payment to six months' imprisonment.

*Origin*—Sec. 391, Code of 1892; R.S.C. 1886, ch. 169, sec. 3 and 4; Seamen's Clothing Act, 1869, 32-33 Vict., Imp., ch. 57.

*"Seaman"*—See definition in sec. 335 (q).

*First offence on summary conviction*—See sec. 729.

*Second offences*—See secs. 465, 757, 963, 964, 982.

*Joint offenders on summary conviction*—See sec. 728.

*Prosecutor's share of fine*—See sec. 1042.

**Receiving seaman's property unless in ignorance or on sale by authority.**

**440.** Every one who detains, buys, exchanges, takes on pawn or receives from any seaman or any person acting for a seaman, any seaman's property, or solicits or entices any seaman, or is employed by any seaman to sell, exchange or pawn any seaman's property, unless he acts in ignorance of the same being a seaman's property, or of the person with whom he deals being or acting for a seaman, or unless the same is sold by the order of the Admiralty or commander in chief, is guilty of an offence punishable on indictment or on summary conviction and liable on conviction on indictment to five years' imprisonment, and on summary conviction for a first offence to a penalty not exceeding one hundred dollars; and on summary conviction for a second offence, to the same penalty, or in the discretion of the justice, six months' imprisonment, with or without hard labour.

*Origin*—Sec. 392, Code of 1892; R.S.C. 1886, ch. 171, secs. 1 and 2; Seamen's Clothing Act, 1869, 32-33 Vict., Imp., ch. 57.

*"Seaman" and "seaman's property" defined*—See sec. 335, subsecs. (q) and (r).

*First offence on summary conviction*—See sec. 729.

*Second offences*—See secs. 465, 757, 963, 964, 982.

*Joint offenders on summary conviction*—See sec. 728.

**Not justifying possession of same.**

**441.** Every one in whose possession any seaman's property is found who does not satisfy the justice before whom he is taken or summoned that he came by such property lawfully is liable, on summary conviction, to a fine of twenty-five dollars.

*Origin*—Sec. 393, Code of 1892; R.S.C. 1886, ch. 171, sec. 3; Seamen's Clothing Act, 1869, 32-33 Vict., Imp., ch. 57.

"Seaman" and "Seaman's property"—See definitions in sec. 335, sub-secs. (q) and (r).

*First offence on summary conviction*—See sec. 729.

*Joint offenders on summary conviction*—See sec. 728.

*Search for public stores by peace officer*—See sec. 636.

**Cheating at play.**

**442.** Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud any person, cheats in playing at any game or in holding the stakes, or in betting on any event.

*Origin*—Sec. 395, Code of 1892; R.S.C. 1886, ch. 164, sec. 80; Gaming Act, 1845, 8-9 Vict., Imp., ch. 109, sec. 17.

*Cheating in card game, etc.*—If the jury are satisfied that the accused acted in the *bona fide* belief, even though mistaken, that he had been swindled out of his money by cheating in the game, and that he was entitled to recover it, and committed the assault and retook the money in that sole and *bona fide* belief, then they would be justified in acquitting the accused of the charge of robbery, though it was open to them on the facts to convict on a charge of assault, aggravated or common, according to the view they took. *R. v. Ford* (1907), 13 B.C.R. 109, 12 Can. Cr. Cas. 555.

On a charge of cheating in a game there may be a good conviction for an attempt to cheat. Code sec. 949; *R. v. Weiss & Williams* (No. 1) (1913), 4 W.W.R. 1358, 1360, 6 Alta. L.R. 264, per Beck, J. And a conviction for the completed offence would be a defence to a charge for the attempt. Code sec. 907; *R. v. Weiss & Williams* (1913), 4 W.W.R. 1358, 1360.

*Details of false pretence or fraud not essential to indictment*—See secs. 863 and 864; also secs. 853, 855, 859, 860, as to stating the offence and the ordering of particulars.

*Amending the indictment*—A charge of cheating could not properly be amended by the court to one of conspiracy to cheat under the powers conferred by Code sec. 889. *R. v. Weiss and Williams* (No 1) (1913), 4 W.W.R. 1358, 1360, 6 Alta. L.R. 264, dealing with Code sec. 907 (plea of *autrefois*).

*Second offences*—See secs. 465, 757, 963, 964, 982.

*Intent to defraud*—Compare sec. 405 as to false pretenses.

*Gambling in public conveyances*—See sec. 234.

*Conspiracy to defraud*—See sec. 444.

### **Pretending to practise witchcraft, etc.**

**443.** Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

*Origin*—Sec. 396, Code of 1892; the Vagrancy Act, 1824, 5 Geo. IV, Imp., ch. 83, sec. 4; 9 Geo. II. Imp., ch. 5.

*Intent to deceive*—The first part of sec. 443 is derived from the English Vagrancy Act of 1824, but with some variance in language. The English Act was directed to the punishment of "every person pretending or professing to tell fortunes or using any subtle craft, means or device by palmistry or otherwise to deceive or impose upon any of His Majesty's subjects." So, under the English Act, it was clear that there must be (1) a pretending or professing of the character indicated, and (2) an intent to deceive.

Under the Code, the clause as to intent to deceive does not appear; and the words "or professing" as an alternative to "pretending" are also omitted. The variance in language has not simplified the interpretation. The English Act indicates as essentials of the offence under it, the two elements of (1) fraud by the intent to deceive or impose upon some one; and (2) the acts designated as fortune-telling, palmistry, etc. As to fortune-telling, the legislative authority, by the form of the law itself, implies that no one really could tell fortunes, so that ingredient of the offence is referred to as "pretending or professing to tell fortunes." Moreover, the description of the offence as "pretending to tell fortunes" imports that deception is practised by doing so. *Monck v. Hilton* (1877), 46 L.J.M.C. 63, 2 Ex. Div. 268; *Penny v. Hanson* (1887), 56 L.J.M.C. 41, 18 Q.B.D. 478; *R. v. Entwistle* [1899] 1 Q.B. 846, 68 L.J.Q.B. 580; *Davis v. Curry* (1918), 87 L.J.K.B. 292. These cases in effect hold that while there must be in the offence an intention to deceive, that a general intent to deceive is implied by the language of the English Act apart from the words "with intent to deceive or impose on any of His Majesty's subjects." The dropping of the words quoted, in the framing of the Code would thus make little difference in its interpretation. It might be necessary at a trial under the English Act to prove that there was an intent to deceive a particular person or

persons (any of His Majesty's subjects); but under the Code it seems a charge might be supported on proof of an intent to deceive the public generally or such of them as might be induced to consult the pretender. There must have been the intent to deceive, but no more specific allegation of the intention is required than that contained in the words "did pretend and profess to tell fortunes." *R. v. Entwistle* [1899] 1 Q.B. 846, 68 L.J.Q.B. 580; *Davis v. Curry* (1918) 87 L.J.K.B. 292. There may even be an innocent pretense of pretending to tell fortunes, as was illustrated by Avory, J., in his dissenting judgment in *Davis v. Curry*, *supra*, where he said (87 L.J.K.B. 292, at 295):—"If a person should say, 'I am not a professional fortune-teller, but I will, to amuse you, pretend to tell your fortune', that would not be such a professing as is intended by the statute; and it would be a sufficient defence to plead that there was no intention to deceive, as the intention was to amuse. In that case the magistrate would be justified in saying that the person was not pretending to tell fortunes, but was practising a joke." The magistrate trying the case must not, however, reject the evidence of defendant's witnesses in support of the defence theory that the defendant believed that she believed in her professed supernormal powers as a spiritualistic medium and clairvoyante, for such evidence is relevant though not conclusive on the question of intent to deceive. *Davis v. Curry*, *supra*. Before making a conviction the magistrate is to decide whether there was that intent and it is not correct to say that the telling of fortunes, even for gain, is prohibited irrespective of the intent; *Davis v. Curry*, *supra*; nor is a magistrate justified in refusing to accept evidence of the *bona fides* of accused in stating her belief in her supernormal powers although the magistrate has concluded that such proof would not alter his view of the case. The dissent of Mr. Justice Avory in the *Davis* case was on this question of relevancy. His view of the case brought against a professed spiritualistic medium and clairvoyante was that it would be unfortunate if the time of a magistrate should be wasted in enquiring whether any human being "believes in such nonsense as the appellant talked in this case." Sankey and Darling, J.J., remitted the case to the magistrate on the ground that the magistrate was wrong in not hearing the evidence of defence witnesses tendered to substantiate that the accused was a *bona fide* believer in her professions. Sankey, J., said it was quite open to the magistrate to find that the defendant professed or pretended to tell fortunes with intent to deceive. Darling, J., (87 L.J.K.B. 292, at 295, 296) explained the judgment in the prior case of *R. v. Entwistle* [1899] 1 Q.B. 846, as limited merely to the point that where there was undoubtedly evidence of intention to deceive or impose upon by pretending or professing to tell fortunes, it was unnecessary to state it in the charge. As to the *Davis* case then in hand, he added that it would be open to the magistrate, after hearing the evidence offered to convict if he were of opinion that the accused cannot have believed in



the fortunes she was pretending to tell the three women who interviewed her (as to fictitious relatives) because all the statements were false, since she (the accused) gave a history of people who did not exist.

An intent to deceive has been held to be essential to the offence of fortune-telling under Code sec. 443, but it is not necessary that the attempted deception should have been successful; a conviction may be supported, although the accused had taken from the persons whose fortunes were told a writing to the effect that they understood that what was being done was merely an examination of the lines of their hands and giving information in respect thereof in accordance with books on the subject of palmistry, if it be found that the taking of such writing was a mere sham and intended to evade the law. *R. v. Monsell* (1916), 26 Can. Cr. Cas. 1, 35 O.L.R. 336, distinguishing *R. v. Chilcott*, 6 Can. Cr. Cas. 27.

The word "undertakes," as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others, the offence aimed at by the enactment is complete. *R. v. Marcott* (1901), 4 Can. Cr. Cas. 437, 2 O.L.R. 105, per Armour, C.J.O.

A conviction obtained upon the evidence of a person who was a decoy, but not a dupe or a victim, was affirmed. *R. v. Milford* (1890), 20 Ont. R. 306.

Offering by advertisement in newspapers to cast nativities and answer astrological questions, and pretending by circular letter, in return for certain remuneration, to give a description of the person, liability to disease, occupation most suitable, marriage, etc., by the position of the planets at the nativity, was ample evidence that appellant had pretended to tell fortunes, without proof that he had actually told anybody anything. *Penny v. Hanson*, 18 Q.B.D. 478, 56 L.J.M.C. 41, 56 L.T. 235, 16 Cox C.C. 173.

*Second offences*—See sec. 465, 757, 963, 964, 982.

#### Conspiracy to defraud.

**444.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise, or anything else publicly sold, whether such deceit or falsehood

or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.

*Origin*—Sec. 394, Code of 1892.

*Offence committed in pursuance of the common design*—If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose. Sec. 69 (2). It is not essential to the offence of conspiracy to defraud that the fraud should have actually been carried out; but some overt act towards that end must be shown. *Horsman v. The Queen*, 16 U.C.Q.B. 543.

*Conspiracy to commit indictable offence*—Sec. 573 makes it an indictable offence to conspire to commit any indictable offence where the Code does not make other provision for such conspiracy. Treasonable conspiracies are dealt with by secs. 74 and 75; conspiracy to intimidate a legislature by sec. 79; conspiracy to murder by sec. 266; conspiracy to defile by sec. 218; conspiracy to bring a false accusation by sec. 178; conspiracies in restraint of trade by secs. 496-504, 581, 590 and 1012. Sec. 444 deals with conspiracies to defraud. These various sections appear not to exhaust all the classes of conspiracies, and a conspiracy may, it seems, still be laid at common law in cases to which the common law extends which are not covered by the Code. See notes to secs. 15 and 16.

*Conspiracy to defraud by deceit, etc.*—In *R. v. Sinclair*, 12 Can. Cr. Cas. 20 at 27, Wetmore, J., said:—"The question was raised whether the several counts of the charge are valid in form, in so far as the first two counts are concerned, because it is not alleged that the conspiracy was made by deceit, falsehood, 'or other fraudulent means'; I do not feel called upon to express a decided opinion upon this question. In *Regina v. Skelton*, 4 Can. Cr. Cas. 467, 3 Terr. L.R. 58, a charge was laid under sec. 147 of the Code (now sec. 175) for making a false solemn declaration; the charge omitted to allege that the false declaration was made 'with intent to mislead': it was held that the omission of that allegation did not vitiate the charge. I have always had doubts whether that case was correctly decided in the respect mentioned, and if I am not bound by that decision, I think I would be inclined to hold the charges in this case bad in form."

An agreement made with a fraudulent mind to do that which, if done, would give to the prosecutor a right of action founded on fraud is a criminal conspiracy. *R. v. Aspinall*, 2 Q.B.D. 48, at 59, per Brett, J.A.

Where one of two partners combines, during the continuance of the partnership, with a third party to assist the one partner to cheat

the other with regard to the division of the partnership property on a contemplated dissolution of the partnership, this combination is a criminal conspiracy. *R. v. Warburton*, L.R. 1 C.C.R. 274, 40 L.J.M.C. 22, 11 Cox C.C. 684, 23 L.T. 473.

On a charge of conspiracy to defraud by setting fire to defendant's own store building and contents so as to obtain the proceeds of an excessive insurance, where it appears that the insurance has been largely increased during the month preceding the fire, the defendant's signed statements of assets and liabilities submitted from time to time for the purpose of obtaining advances from a bank within a period of three months before the fire are properly admissible for the purpose of showing intent by the acts of the accused with respect to his financial affairs at a time not too remote to be connected with the offence. *R. v. Wilson* (1911), 1 W.W.R. 272, 21 Can. Cr. Cas. 105 (Alta.); *R. v. Clark*, 2 B.C.B. 191. See as to fraudulent use of street car transfers. *R. v. Bythell* (1915), 24 Can. Cr. Cas. 276 (Ont.).

The words, "other fraudulent means," are to be restricted in their meaning by the particular words which precede them, to other fraudulent means in the nature of deceit and falsehood; *R. v. Sinclair*, 12 Can. Cr. Cas. 20 at 28, per Newlands, J.; and a conspiracy to use unlawful devices at an election has been held not to be included. *Ibid.* But a conspiracy to obtain a passport by false representations has been held indictable in England as tending to bring about a public mischief. *R. v. Brailsford* [1905] 2 K.B. 730, 75 L.J.K.B. 64, 69 J.P. 370, 93 L.T. 401.

Both the *Sinclair* case and that of *Brailsford et al.*, supra, appear to fall within the class of cases in which an act involving public mischief agreed to be done between more persons than one, is held to be the subject of conspiracy at common law. In this view, the decision in *R. v. Sinclair*, supra, is to be strictly limited to an interpretation of sec. 444 under which the indictment was laid, without regard to what might have been held upon the same facts had there been an indictment framed for the common law offence indicated in the following extract from Stephen's Digest of Criminal Law, article 160:—

"Acts deemed to be injurious to the public have, in some instances, been held to be misdemeanors, because it appeared to the court before which they were tried that there was an analogy between such acts and other acts which had been held to be misdemeanors, although such first-mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them. This has been done especially in the case of agreements between more persons than one to carry out purposes which the judge regarded as injurious to the public, in which case such acts have been held to amount to the offence of conspiracy; or when they have been done by a public officer in relation to his official duty; or when they tended in any way to pervert the administration of justice, or to disturb the public peace; or when the proceed-

ing has been by parliamentary impeachment." Compare *R. v. Fellowes*, 19 U.C.Q.B. 48; *R. v. Bunting*, 7 Ont. R. 524; *R. v. Defries*, 1 Can. Cr. Cas. 207. See also, as to the introduction of English criminal law in the Canadian provinces, Code secs. 10-12.

An agreement to fraudulently represent a corporation to be in a sound financial condition when the conspirators know it to be insolvent has been held a conspiracy to defraud. *R. v. Esdaile*, 1 F. & F. 213; so also an agreement to induce a false belief among investors that there is a *bona fide* market for certain shares or to fraudulently procure shares to be given a quotation not justified in fact upon a stock exchange and thereby give them a fictitious value in fraud of the public. *R. v. Aspinall* (1876), 13 Cox C.C. 573, 2 Q.B.D. 48; *Scott v. Brown* [1892] 2 Q.B. 724.

It is a conspiracy to defraud to form an agreement to falsely ante-date a conveyance of property for the purpose of defrauding an execution creditor; *R. v. Cox*, 14 Q.B.D. 153; or to agree to make false representations so as to collect by legal process money not owing; *R. v. Taylor*, 15 Cox C.C. 265; or to agree to falsely represent a proposed purchaser of goods to be solvent so as to enable him to get the goods on credit without any intention of paying for them. *R. v. Orman*, 14 Cox C.C. 381. The holding of sham auctions with sham bidders, so as to sell goods at grossly excessive prices, by inducing the public to consider the false bids as genuine offers by persons conversant with values, may sustain an indictment; *R. v. Lewis*, 11 Cox C.C. 404, distinguishing *R. v. Levine* (1867), 10 Cox C.C. 374; and as to fraudulent sales of other person's goods at undervalue, see *Levi v. Levi*, 6 C. & P. 239.

As to conspiracy to defraud a railway by collusion with its employees, see *R. v. Carlin*, 6 Can. Cr. Cas. 507, 12 Que. K.B. 483, *R. v. Defries*, 25 Ont. R. 645, 1 Can. Cr. Cas. 207.

It will be assumed that a conspiracy alleged in an indictment (or charge) to have taken place within two counties some distance apart is not identical with a conspiracy proved to have been wholly carried on in only one of the counties named, where the local jurisdiction of the county tribunal to entertain the case is displaced because the conspiracy was entirely in the other county. *R. v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113.

*Particulars*].—An information laid in general terms, charging that the accused did in specified years "conspire with others whose names are unknown, by deceit, falsehood and other fraudulent means to defraud the public" sufficiently states the offence under sec. 444 to give jurisdiction to hold the preliminary enquiry. *R. v. Phillips*, 11 Can. Cr. Cas. 89, 11 O.L.R. 478, 7 O.W.R. 418. The magistrate has, by sec. 679 (e), the power to regulate the course of the enquiry, and this presumably

would authorize a direction for particulars if the circumstances demanded it; and in any case the court before which the trial itself is to take place may order particulars under secs. 859 and 860.

Every count in an indictment is to contain so much detail of the circumstances of the offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to; Code sec. 853; but the lack of such details will not be a ground for quashing but only for a motion for particulars under secs. 859 and 860, unless an essential ingredient of the offence is omitted or is not stated with sufficient certainty so that the indictment does not show an indictable offence. *R. v. Weir*, 3 Can. Cr. Cas. 102, 8 Que. Q.B. 521; *R. v. Goodfellow*, 10 Can. Cr. Cas. 424, 11 O.L.R. 359; Code sec. 853 (1). Sec. 863 declares that a count for conspiracy by fraudulent means is not to be deemed insufficient because it does not set out "in detail" in what the fraudulent means consisted, but this is to be read along with sec. 852, which requires that it should state "in substance" some indictable offence, that is to say, some specific crime.

A conspiracy to commit a crime can readily be described and can be stated sufficiently without detail; but in a case of conspiracy to do that which is not a crime, or to do a wrong which is not well known as being the subject of a criminal conspiracy, the facts should be set out with such particularity that it may appear whether or not the conspiracy charged is really an indictable offence. *R. v. Goodfellow*, 11 O.L.R. 359, 10 Can. Cr. Cas. 424, at 428, per R. M. Meredith, J.A.

It is not necessary to set out in the indictment overt acts done in pursuance of the illegal agreement or conspiracy to defraud. *R. v. Hutchinson* (1904), 8 Can. Cr. Cas. 486, 11 B.C.R. 24. But see Code sec. 859, empowering the court to order particulars. The particulars served under order are entered in the record and the trial proceeds as if the indictment had been amended in conformity therewith. Code sec. 860.

The inclusion of a separate and distinct offence as a particular furnished under sec. 859 upon a charge of conspiracy will not authorize a conviction which would otherwise not be within the scope of the indictment. *R. v. Sinclair* (1909), 12 Can. Cr. Cas. 20.

An indictment charging that two parties named did conspire by false pretenses and subtle means and devices to obtain from F. divers large sums of money of the moneys of F., and to cheat and defraud him thereof was held good although the means of the alleged conspiracy were not stated in detail. *R. v. Kenrick* (1843), 5 Q.B. 49. Lord Denman, C.J., in that case, said: "There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice

from calling for a defence against so vague an accusation, and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place and the expedient now employed in practice of furnishing defendants with a particular of the acts charged upon them is probably effectual for preventing surprise and unfair advantages."

*Venue*—The venue may be laid either where the agreement was entered into or where any overt act was done in pursuance of the common design. *R. v. Connolly* (1894), 1 Can. Cr. Cas. 468, 25 Ont. R. 151.

And see *R. v. O'Gorman*, 18 O.L.R. 427, 15 Can. Cr. Cas. 173; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113.

*Identity of person*—If there is any evidence to submit to a jury on a question of disputed identity of one of the persons accused, the verdict will be affirmed although the complainant who had given positive evidence of identity at the preliminary enquiry had, at the trial, been shaken in his opinion by the production of another person having a strong personal resemblance to the prisoner whose identity is in question, particularly where such other person is shown to have been elsewhere when the overt acts were committed with which the persons accused are connected by the evidence. *R. v. Harvey* (1918), 42 O.L.R. 187, 13 O.W.N. 455.

*Explanation of act or declaration of accused*—As, in trials for conspiracy, whatever the accused may have done or said at any meeting alleged to have been held in pursuance of the conspiracy may be given in evidence against him on the part of the prosecution, so, on the other hand, any other part of his conduct at the same meeting will be allowed to be proved in his behalf: for his intention and design at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single isolated act or declaration. Archbold's Crim. Evid., 1905, ed., 338; *Queen Caroline's case*, 2 B. & B. 284, 1 St. Trials, N.S. 1348; *R. v. Clewes*, 4 C. & P. 221; *R. v. Whitehead*, 1 C. & P. 67.

Representations made by a defendant after the commission of the fraud are admissible in evidence to connect him with the conspiracy. *R. v. Stenson*, 36 J.P. 532, 12 Cox 111, 25 L.T. 666.

*Acts and statements of co-conspirators as evidence against the others*—*Boyd, C.*, in *Regina v. Connolly* (1894), 25 O.R. 151, 1 Can. Cr. Cas. 468, at p. 480, said: "There is no unvarying rule that the agreement to conspire must first be established before particular acts of the individuals implicated are admissible. The charge of Coleridge, J., in *Regina v. Murphy*, 8 C. & P. 310, conveniently summarizes the usual method of proving a charge of conspiracy: 'although the common design is the root of the charge, it is not necessary to prove that the parties came together and actually agreed in terms to have this common design and to pursue it by common means and to carry it into execution. This is not necessary because in many cases of the most clearly

established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved."

This statement was quoted with approval in *R. v. Wilson* (1911), 21 Can. Cr. Cas. 105, 1 W.W.R. 272 (Alta.).

But there should be some preliminary proof to show an acting together in the matter before the evidence of a co-conspirator's act is given, although falling short of proving the accused to be a conspirator as charged. *R. v. Hutchinson* (1904), 11 B.C.R. 24, 8 Can. Cr. Cas. 486; *R. v. Murphy*, 17 Que. L.R. 305.

A letter mentioning a third party may be evidence against the latter on his trial in the sense that the onus is on him of explaining it, if other evidence has raised a presumption connecting him with the contents of the document. *R. v. Whitaker* (1914), 10 Cr. App. R. 245; *Phipson on Evidence*, 5th ed., 78-79 and 86-88.

On a charge under Code sec. 444 of conspiracy to defraud the public, if there is no direct proof of the existence of the unlawful agreement between the defendants and the acts proved are not such as to show from their very nature that they are parts of a common scheme, the jury must separately consider the case of each defendant and determine from his conduct whether there is evidence of the conspiracy alleged; it is only after the conspiracy has been proved that the acts of the one become evidence against the other. *Rex v. McCutcheon* (1916), 25 Can. Cr. Cas. 310 (Ont.).

A statement by one conspirator when in conference with a third person, or when he does that himself which is not necessary for carrying out the object of the conspiracy, is not admissible for the purpose of affecting any of the other parties charged. *R. v. Blake*, 6 Q.B. 126; 8 J.P. 372, 8 Jur. 666.

The statement of an alleged co-conspirator is evidence against another accused person, only where it is made in furtherance of the common design. *R. v. Desmond*, 11 Cox 146. It will not cover a mere confession of guilt by one of them on his arrest. *R. v. Shakespeare* (1899), 34 L.J.N. 116; *R. v. Wark* (1898), 33 L.J.N. 615.

The charge to the jury should not entirely omit the question of conspiracy and only deal with the case of each defendant separately, where conspiracy to defraud is charged. *R. v. Bailey* (1913), 9 Cr. App. R. 94.

It is a rule of practice and not one of strict law to charge the jury that they should not convict upon the uncorroborated testimony of an accomplice. See note to Code sec. 1002; *R. v. Ah Jim* (1905), 10 Can. Cr. Cas. 126; *re Meunier* [1894] 2 Q.B. 415, 18 Cox C.C. 15.

On a charge of conspiracy to defraud, the evidence of the accomplice may be sufficiently corroborated by entries found in a memorandum book found upon the prisoner. *R. v. St. Pierre* (1911) 19 Can. Cr. Cas. 82 (Que.).

*Indictment of one or more conspirators*—One conspirator may be indicted and convicted without joining the others although they are

living and within the jurisdiction. *R. v. Frawley* (1894), 1 Can. Cr. Cas. 1227, 25 Ont. R. 431.

Where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted. *Regina v. Manning* (1883), 12 Q.B.D. 241; *Bex v. Plummer* [1902] 2 K.B. 339; unless they are also charged with conspiring with persons unknown, in which case the conspiracy must be alleged to be with a certain person (or persons) to the jurors unknown; 3 Chitty's Criminal Law, p. 1141; *R. v. Nerlich* (1915), 24 Can. Cr. Cas. 256, 34 O.L.B. 298.

A conspiracy should only be laid as being with persons unknown, when neither the Crown officers nor the private prosecutor had definite information of the identity of the alleged co-conspirators; and when the name of one of the alleged co-conspirators is for the first time disclosed in the testimony of a Crown witness at the trial that information may then be added to the indictment or the particulars. *R. v. Johnston* (1902), 6 Can. Cr. Cas. 232.

*Conspiracy at common law*—A conspiracy, at common law, is an agreement of two or more parties to do an unlawful act, or to do a lawful act by unlawful means. See per Tindal, C.J., in *O'Connell v. The Queen*, 11 Cl. & F. 213; *Mulcahy v. The Queen*, L.R. 3 H.L. 306.

It is more fully defined by Mr. Justice Fitzgerald in his charge to the jury in the case of *The Queen v. Parnell*, 14 Cox C.C. 505, 513, where he says:—"Conspiracy has been aptly defined as divisible under three heads—where the end to be attained is in itself a crime; where the object is lawful but the means to be resorted to are unlawful; and where the object is to do an injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime."

The last head of the definition is well illustrated by a quotation from the part of the same charge which immediately precedes the above quoted definition: "If, for instance, a tenant withholds his rent, that is a violation of the right of his landlord to receive it, but it would not be a criminal act in the tenant, though it would be the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is by the law of the land an offence."

Another illustration is given by *Quinn v. Leatham* [1901] A.C. 495, where the defendants were held liable in damages for conspiring to violate a legal right by interfering with contractual relations between the plaintiff and his employees, for the direct purpose of doing the plaintiff an injury in his business. *R. v. Gage* (No. 2), 18 Man. L.R. 175, 13 Can. Cr. Cas. 428, at 438; *R. v. Defries*, 25 Ont. R. 645, 1 Can. Cr. Cas. 207; and see *Williams v. Local Union*, [1919] 1 W.W.R. 217; *Pratt v. British Medical Association*, 35 Times L.R. 14; *Allen v. Flood*, [1898] A.C. 1; *Perrault v. Gauthier*, 28 S.C.R. 241; *Krug Furniture Co. v. Berlin Union*, 5 O.L.B. 463; *Taff Vale Ry. Co. v. Amalgamated Socy.*, [1901] A.C. 426, 70 L.J.K.B. 905.



Wherever the tort is a fraudulent or corrupt act on the part of the persons agreeing, then it becomes a misdemeanour at common law. *R. v. Warburton*, L.R. 1 C.C. 274; 40 L.J.M.C. 22; 23 L.T. 473; 19 W.R. 165; 11 Cox C.C. 584, cited in *Reg. v. Aspinall*, 2 Q.B.D. 48; 46 L.J.M.C. 145; 36 L.T. 297; 25 W.R. 283; 13 Cox C.C. 563; *R. v. Whitaker* (1914), 10 App. R. 245, 254; *R. v. Roy*, 11 L.C.J. 93.

*Second offences*—See secs. 465, 963 and 964.

*Extradition laws*—The offence or crime of conspiracy to defraud is not an extraditable crime under the Extradition Treaty between Canada and the United States.

*United States v. Browne*; *Ex parte Browne*, 16 Que. K.B. 10, 11 Can. Cr. Cas. 161; *United States v. Gaynor, re Gaynor & Greene* (No. 3), 9 Can. Cr. Cas. 205 [1905] A.C. 128. But if in addition to the conspiracy charge, there is a charge of participation in some indictable offence, *ex. gr.* larceny, extradition will lie for the latter although laid as in pursuance of the common design. *Ibid.*; *R. v. Kelly* [1917] 1 W.W.R. 46 and 463, 54 Can. S.C.R. 220.

Frauds by trustees and agents (*inter alia*) are extraditable if made criminal by the laws of both countries; and "participation" in such fraud is likewise extraditable if such participation is punishable by the laws of both countries.

### *Robbery and Extortion.*

#### **Robbery defined.**

**445.** Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen or to prevent or overcome resistance to its being stolen.

*Origin*—Sec. 397, Code of 1892.

*Possession in robbery cases*—Where the thing taken was not on the body or in the immediate possession of a person, and violence or threats were used for the purpose of extorting it from him, the offence was not robbery at common law. The offence of robbery was the theft of something on the body or in the immediate possession of the person from whom it was taken by violence or threats of injury. *Re Burley*, 1 C.L.J. 20. The question so frequently raised in respect of the common law crime as to whether the possession of goods not on the person was sufficiently connected to constitute "immediate" possession, seems to be no longer important in view of the omission from this statutory definition of any limitation of that kind such as prevailed at common law.

*Ingredients of "theft"*—Robbery is defined to be "theft" accompanied with violence, etc., used to extort the property. "Theft" has a special statutory meaning under the Code, see definition in sec. 347,

which is more extensive in its scope than the term "larceny" had at common law. Theft from the person is punishable under sec. 379.

*Violence or threats of violence*—The violence may be to either person or property, and so also with threats of violence. In either case there must be a completed "theft" and the violence or threats of violence must have been used to "extort" the property stolen or to prevent or overcome resistance to its being stolen. A mere demand of goods with menaces and with intent to steal them is indictable under sec. 452, although the goods may not have been obtained. As to written demands with menaces, see secs. 451, 453, 454, and as to extortion by accusation of crime, secs. 453, 454.

*Assault with intent to rob*—See secs. 446 (c) and 448.

*Other attempts to rob*—See secs. 570, 949.

*Punishment for robbery*—See secs. 446 and 447, the former section providing a more onerous punishment where two or more persons have joined in the robbery, or where the robber is armed, or where the offence is accompanied by wounding or other personal violence.

*Burglary and housebreaking with intent to rob*—See secs. 455-464.

*Accusing of crime with intent to extort*—See secs. 453 and 454.

**Robbery with violence.—Joint robbery.—Robbery while armed.**

**446.** Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who,—

- (a) robs any person and at the time of, or immediately before or immediately after, such robbery, wounds, beats, strikes, or uses any personal violence to, such person; or,
- (b) being together with any other person or persons robs, or assaults with intent to rob, any person; or,
- (c) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person.

*Origin*—Sec. 398, Code of 1892; R.S.C. 1886, ch. 164, sec. 32.

*Directing jury as to lesser offence which might be found on the indictment*—On the trial of an indictment charging robbery with violence and stealing from the person, if there is evidence on which the jury might find simple theft, a new trial must be ordered if the trial judge in effect directed the jury that the accused must be acquitted unless they found not only that the accused stole the money, but that he stole it from the person of the prosecutor. Where a crime of less degree than that charged in the indictment and for which lesser crime a verdict might be given under Code sec. 951, is presented on the evidence, the jury must be instructed regarding such lesser crime as well as the greater crime stated in the indictment. While the accused by

reason of such misdirection derived a chance of acquittal to which the law did not entitle him, the jury may have been led to convict of "theft from the person" through unwillingness to wholly acquit the prisoner, while they might, if properly instructed, have convicted of simple theft only. Where there is a prejudicial misdirection by the trial judge, the accused is not deprived of his right to a new trial because of his failure to complain of the misdirection at the time. *R. v. Daley*, 16 Can. Cr. Cas. 168, 39 N.B.R. 411; *R. v. Edmonstone*, 15 O.L.R. 325, 13 Can. Cr. Cas. 125.

*Restitution order for stolen property*—Code sec. 1050.

*Compensation from money found on prisoner*—Code sec. 1048.

*Robbery by two or more together*—On a joint indictment for robbery with two sets of evidentiary facts presented at the same time and easily liable to confusion, it is the duty of the presiding judge to see, in case the trials have not been separated in fact, that at least they are clearly separated in the minds of the jury whom it is his duty to instruct fully upon all points of law involved in the case. *R. v. Murray and Mahoney* [1917] 2 W.W.R. 805, 816, 11 Alta. L.R. 502, 28 Can. Cr. Cas. 247, per Stuart, J.

*Attempt at joint robbery*—See secs. 570, 949, 950, and 72.

*Punishment of whipping*—See secs. 80, 204, 216, 276, 292, 293, 301, 302, 446, 457, 1060.

#### **Penalty for robbery.**

**447.** Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment.

*Origin*—Sec. 399, Code of 1892; R.S.C. 1886, ch. 164, sec. 32.

*Attempt to rob*—See secs. 570, 949.

*Assault with intent*—See secs. 448 and 446 (c).

*Restitution of stolen property*—See sec. 1050.

*Ordering compensation for loss of property*—See secs. 1048 and 1049.

*Added punishment where previous conviction charged and proved*—See secs. 1053, 963, 964, 982.

*Stealing from the person of another*—See sec. 379.

*Extortion by threatening to charge with crime*—See secs. 453, 454.

*Demanding property with menaces*—See secs. 451, 452.

#### **Assault with intent to rob.**

**448.** Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment.

*Origin*—Sec. 400, Code of 1892; R.S.C. 1886, ch. 164, sec. 33.

*Assault with intent to rob with another or while armed*—See sec. 446, sub-sec. (b) and (c).

*Attempts to assault with intent*—See secs. 72, 571, 949, 950, 951; and as to the circumstances under which attempting or threatening to apply force is in itself an "assault," see the definition of the latter term in sec. 290.

*Conviction for lesser offence*—See secs. 949, 951.

*Second offences*—See secs. 465, 963, 964, 982.

**Stopping the mail with intent to rob.**

**449.** Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than five years, who stops a mail with intent to rob or search the same.

*Origin*—Sec. 401, Code of 1892; R.S.C. 1886, ch. 45, sec. 81.

*"Mail"*—See the Post Office Act, R.S.C. 1906, ch. 66, sec. 2 (f); Code sec. 6.

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510b, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

**Compelling execution of document by force with intent to defraud.**

**450.** Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud or injure, by unlawful violence to, or restraint of the person of another, or by the threat that either the offender or any other person will employ such violence or restraint, unlawfully compels any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security.

*Origin*—Sec. 402, Code of 1892; Larceny Act, Can. 32-33 Vict., ch. 21, sec. 47; 24-25 Vict., Imp., ch. 96, sec. 48.

*"Valuable security"*—See sec. 2, sub-sec. (40), and sec. 4.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 478, 748.

**Letters demanding property with menaces.**

**451.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person

with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing.

*Origin*—Sec. 403, Code of 1892; 24-25 Vict., Imp., ch. 96, sec. 44; 7-8 Geo. IV, Imp., ch. 29, sec. 8.

*Demand with menaces*—See note to sec. 452. It is a question of law whether the writing is or is not a demand with menaces. *R. v. Gibbons*, 12 Man. B. 154, 1 Can. Cr. Cas. 340.

*"Without reasonable or probable cause"*—This phrase applies to the demand for the money or property. *R. v. Mason*, 24 U.C.C.P. 58; *R. v. Richards*, 11 Cox C.C. 43; *R. v. Gardner*, 1 C. & P. 479; *R. v. Hamilton*, 1 C. & K. 212; *R. v. Miard*, 1 Cox C.C. 22; *R. v. Chalmers*, 10 Cox C.C. 450. The onus of proof is upon the prosecution to show the want of reasonable and probable cause. *R. v. Collins*, 33 N.B.R. 429, 1 Can. Cr. Cas. 48.

*"Knowing the contents thereof"*—A person other than the writer of the letter may be charged, in which case knowledge of the contents of the letter is an essential ingredient of the offence. *R. v. Girdwood*, 1 Leach C.C. 142; *R. v. Carruthers*, 1 Cox C.C. 138; *R. v. Grimwade*, 1 Den. C.C. 30, 1 Cox C.C. 85.

*"Any property"*—See sec. 2, sub-sec. (32).

*"Valuable security"*—See sec. 2, sub-sec. (40).

*Blackmail, threats and intimidation*—See secs. 216 (A), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510b, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

#### **Demanding with intent to steal.**

**452.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it.

*Origin*—Sec. 404, Code of 1892; Larceny Act, 1861, Imp., 24-25 Vict., ch. 96, sec. 45. For the previous English statutes, see 4 Geo. IV, ch. 54, sec. 5; 7 and 8 Geo. IV, ch. 29, sec. 6; 7 Will. IV and 1 Vict. (1837), ch. 87, sec. 7.

*Demand with menaces*—The degree of fear or alarm which a threat may be calculated to produce upon the mind of the person on whom it is intended to operate may vary in different cases and in different circumstances. A threat to injure a man's property may be more serious to him and have a greater effect upon his mind than a threat of physical violence. When there is evidence of such a threat as is calculated to

operate upon the mind of a person of ordinary firm mind, and the jury have been properly directed, it is for them to determine whether in fact the conduct of the accused has brought him within the section, and whether in the particular case the "menace" is established. If the threat was of such a character that it is not calculated to deprive any person of reasonably sound or ordinarily firm mind of the free and voluntary action of his mind, it would not be a "menace" within the meaning of the section. *R. v. Boyle* [1914] 3 K.B. 339, 10 Cr. App. B. 180, at 191, 83 L.J.K.B. 1801; *R. v. Gibbons*, 12 Man. R. 154, 1 Can. Cr. Cas. 340; *R. v. Smith*, 19 L.J.M.C. 80; *R. v. Tomlinson* [1895] 1 Q.B. 706.

When a man with intent to steal, threatens either to do violence to the person of another or to commit acts calculated to injure the property or character of another, it may constitute a "menace" within the meaning of this section. *R. v. Boyle* [1914] 3 K.B. 339, 10 Cr. App. B. 180, at 191, 83 L.J.K.B. 1801. *R. v. Gibbons*, 12 Man. R. 154, 1 Can. Cr. Cas. 340, doubting *R. v. McDonald*, 8 Man. R. 493 (as to a threat of prosecution under a liquor law). It was held in *R. v. Walton* (1863), 1 L. & C. C.C. 288, that a threat to execute a distress warrant made by a party with no authority to do so is not *per se* a menace, but the tendency of the later cases is to include as a "menace" threats of acts calculated to injure the property of another, as well as threats of personal violence or to injure the character of another. *R. v. Boyle* [1914] 3 K.B. 339, 10 Cr. App. B. 180; *R. v. Gibbons*, 12 Man. R. 154, 1 Can. Cr. Cas. 340.

To constitute the offence of demanding money with menaces with intent to steal, the language used may be only a request; it need not necessarily be an explicit demand. A request imposing conditions may be evidence of a demand. *Rex v. Studer*, 85 L.J.K.B. 1017; 11 Cr. App. B. 307, 114 L.T. 424.

*Intent to steal*—The question of intent is one entirely for the jury. It may be deduced from the acts and conduct of the accused proved in evidence. *R. v. Gibbons*, 12 Man. R. 154, 1 Can. Cr. Cas. 340. A demand of money as a consideration for not prosecuting under a liquor law may come within sec. 452 as being made with intent to steal the money demanded. *R. v. Gibbons*, *supra*. But an unjustified demand to have goods delivered up to be held as security for a debt actually due has been held insufficient evidence of an intent to steal although accompanied by a threat of the debtor's arrest made without any honest belief that the debtor was liable to arrest. *R. v. Lyon*, 29 Ont. R. 497, 2 Can. Cr. Cas. 242, and see *R. v. Johnson*, 14 U.C.Q.B. 569. But if the threat were not merely of arrest, which might under certain circumstances be made in a civil proceeding, but of arrest for a criminal offence the case might be brought under secs. 453 or 454. And if the demand had been in writing, the charge might have been brought under sec. 451.

*Capable of being stolen*—See secs. 344-346, 347.

*Second offences*—See secs. 465, 963 and 964.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

*Stealing in dwelling-house and by menace putting in bodily fear*—Code sec. 380.

*Extortion by threats*—Code secs. 453 and 454.

**Extortion by accusation or threats to accuse of certain class of crime.**

**453.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person,—

- (a) accuses or threatens to accuse either that person or any other person, whether the person accused or threatened with accusation is guilty or not, of
  - (i) any offence punishable by law with death or imprisonment for seven years or more,
  - (ii) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, or any indecent assault,
  - (iii) carnally knowing or attempting to know any child so as to be punishable under this Act,
  - (iv) any infamous offence, that is to say, buggery, an attempt or assault with intent to commit buggery, or any unnatural practice, or incest,
  - (v) counselling or procuring any person to commit any such infamous offence; or,
- (b) threatens that any person shall be so accused by any other person; or,
- (c) causes any person to receive a document containing such accusation or threat, knowing the contents, thereof;

or who by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security.

*Origin*—Sec. 405, Code of 1892; 24-25 Vict., Imp., ch. 96, secs. 46 and 47; 32-33 Vict., Can., ch. 21, sec. 45; R.S.C. 1886, ch. 173, sec. 3.

*Written threats to accuse*].—Declarations made by the accused when spoken to about the letter and as to what he meant by it, are admissible to prove what the crime was of which he hinted in ambiguous or equivocal language in the letter. *R. v. Tucker*, 1 Moore C.C. 134, and the accused may give evidence in explanation of ambiguous terms he had used. *R. v. Odell*, 22 Can. Cr. Cas. 39 (Que.); *R. v. Hendy*, 4 Cox C.C. 244.

*"Accuses"*].—The accusation here referred to may be one made to a judicial tribunal or to a private individual. *R. v. Robinson*, 2 Moore & R. 14; *R. v. Kempel*, 31 Ont. R. 631, 3 Can. Cr. Cas. 481.

*"Whether the person accused or threatened with accusation is guilty or not"*].—Notwithstanding this provision the prosecutor if called as a witness may be cross-examined as to his guilt of the imputed offence for the purpose of shaking his credit. *R. v. Odell*, 22 Can. Cr. Cas. 39, applying *R. v. Cracknell*, 10 Cox C.C. 408; and guilt or innocence of such imputed crime may also be material on the question of intent to extort. *R. v. Richards*, 11 Cox C.C. 43; *R. v. Gardner*, 1 C. & P. 479; *R. v. Johnson*, 14 U.C.Q.B. 569. The person charged with an offence under sec. 453 or 454 is not entitled to adduce evidence for the sole purpose of proving that the complainant was guilty of the offence which he had imputed to him. *R. v. Wilson*, 6 Can. Cr. Cas. 131; *R. v. Odell*, 22 Can. Cr. Cas. 39 (Que.), distinguishing *R. v. Johnson*, 14 U.C.Q.B. 569. No evidence can be given even in cross-examination of another witness to prove that the prosecutor was guilty. *R. v. Odell*, supra.

*Imprisonment "for seven years or more"*].—Whether this phrase in the first paragraph of sub-sec. (a) refers to the maximum or the minimum penalty is a matter of doubt. The language of the section differs from that of the Larceny Act, R.S.C. 1886, ch. 173, sec. 3, where the corresponding section read "for a term not less than seven years" and so excluded cases for which the law prescribed no minimum term. *R. v. Popplewell*, 20 Ont. R. 303. Compare sec. 1081 (2) as to suspended sentence "where the offence is punishable with more than two years' imprisonment," which seems to imply a reference to the maximum and not to the minimum penalty.

*"Valuable security"*].—See sec. 2, sub-sec. (40).

*Extortion by libel*].—See sec. 332.

*Intimidation*].—See sec. 501.

*Blackmail, threats and intimidation*].—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

#### **Extortion by accusation or threats to accuse of other offence.**

**454.** Every one is guilty of an indictable offence and liable to imprisonment for seven years who,—

- (a) with intent to extort or gain anything from any person accuses or threatens to accuse either that person or



any other person of any offence other than those specified in the last section, whether the person accused or threatened with accusation is guilty or not of that offence; or,

(b) with such intent as aforesaid, threatens that any person shall be so accused by any person; or,

(c) causes any person to receive a document containing such accusation or threat, knowing the contents thereof;

or who by any of the means aforesaid, compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into, or used or dealt with as a valuable security.

*Origin*—Sec. 406, Code of 1892.

*Of any offence other than those specified in sec. 453*—Sec. 454 is an extension to lesser offences, of the provisions of sec. 453, and it would therefore seem that the word "offence" in sub-sec. (a) should be limited to offences under federal jurisdiction. But the contrary has been held in *R. v. Dixon*, 28 N.S.R. 82, 2 Can. Cr. Cas. 589, where an accusation of an offence under a provincial liquor law was held to come within this section. Demands of money with a menace of prosecution under a provincial law may fall within sec. 451 or 452, under certain circumstances; see notes to those sections and *R. v. Gibbons*, 12 Man. R. 154; *R. v. McDonald*, 8 Man. R. 491. It is a well-recognized rule of interpretation that statutes are to be construed as relating to matters over which the legislature passing them has legislative authority. *Plested v. McLeod*, 3 Sask. L.R. 374, 384; *R. v. Wason*, 17 A.R. (Ont.), 221, 233; *Ex parte Duncan*, 2 Cartwright 297; and compare with sec. 35 as to arrest without warrant of persons found committing "any offence."

*Extortion by peace officer in making pretended settlement of charge*—It was held in *R. v. Lapham*, 21 Can. Cr. Cas. 79, 24 O.W.R. 111, that a constable entrusted with a warrant of arrest on a criminal charge may so intervene by making himself the agent of the private prosecutor to settle the case as to make himself liable under sec. 454 of accusing the person against whom the warrant issued of the offence therein stated, with "intent to extort." A peace officer should not use his office and his duty to arrest under process as a means of extortion. *R. v. Lapham*, supra; and it may be extortion under sec. 454 for the constable to collect under stress of the warrant in a dog-stealing case brought under Code sec. 370, a sum which the complainant is willing to accept as the value of the dog and the expenses added. *R. v. Lapham*, supra. *Mal-*

feasance of office by any officer of justice is a common law misdemeanour; Roscoe's Cr. Evidence, 11th ed., 783; and a constable who corruptly accepts money to protect from punishment any person who has committed any crime is subject to the penalties of sec. 157.

"*Document containing such accusation or threat*"—This phrase in sub-sec. (c) refers to an accusation or threat to accuse of any offence other than those specified in the preceding section (Code sec. 453). Presumably it is limited to accusations made with intent to extort or gain (sub-secs. (a) and (b)) and guilty knowledge as to the purpose of the accusation would be material. Compare sec. 453, and the Larceny Act, 32-33 Viet., Can., sec. 45. A summons issued by a justice to answer a criminal charge is one form of "document containing an accusation" (sub-sec. (c),) and although the informant did not have it issued with intent to extort, it is an offence for a third person to use it for purposes of extortion. *R. v. Cornell*, 6 Terr. L.R. 101, 8 Can. Cr. Cas. 416.

*Second offences*—See sec. 465, 963 and 964.

*Written threats of accusation*—Proof may be made by comparison of hand-writing. Canada Evidence Act, R.S.C. ch. 145, sec. 8; *R. v. Dixon*, 29 N.S.R. 462, 3 Can. Cr. Cas. 220; but, like all expert evidence, it requires the exercise of great care with respect to the degree of credit to be attached to it. *Banque Nationale v. Tremblay*, 46 Que. S.C. 304; *Deschênes v. Langlois*, 15 Que. K.B. 389; *Paquin v. Turcotte*, 35 Que. S.C. 266; *R. v. Henderson*, 18 Can. Cr. Cas. 245; *Crawford v. City of Montreal*, 30 S.C.R. 406; *re Gammell*, 19 N.S.R. 265; *R. v. Ranger*, (1917) 30 Can. Cr. Cas. 65 (Que.); and see *Rohoel v. Darwish*, (1918) 1 W.W.R. 627 (Alta.); *Thompson v. Thompson*, 4 O.L.R. 442, 1 O.W.R. 431.

*Extortion by libel*—See sec. 332.

*Blackmail, threats and intimidation*—See secs. 216 (h); 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

### *Burglary and Housebreaking.*

#### **Breaking place of worship and committing offence.**

**455.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who breaks and enters any place of public worship and commits any indictable offence therein, or who, having committed any indictable offence therein, breaks out of such place.

*Origin*—Sec. 408, Code of 1892; R.S. 1886, ch. 164, sec. 35.

"*Breaks and enters*"—See definitions in secs. 335 (c) and 340, and see note to sec. 457.

*Being found in possession by night of burglar's tools*—Code sec. 464.

**Breaking with intent to commit offence.**

**456.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who breaks and enters any place of public worship, with intent to commit any indictable offence therein.

*Origin*—Sec. 409, Code of 1892; R.S.C. 1886, ch. 164, sec. 42.

*"Breaks and enters"*—See definitions in secs. 335 (c) and 340, and see note to sec. 457.

*Place of public worship*—Generally where an official act has been done which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that those preliminary acts have also been done. *Reg. v. Creaswell*, 13 Cox C.C. 178. There, the charge was bigamy, and the proof of the marriage was that it had taken place in a building some distance from a church. The law prohibited marriages except in a licensed church. But there was proof of the clergyman acting as such, and there was proof that in the hall the service had been several times performed. Lord Coleridge, C.J., said:—"We are of opinion that the marriage service having been performed in a place where divine service was several times performed, the rule '*omnia prae-sumuntur rite esse acta*' applies, and that we must assume that the place was properly licensed, and that the clergyman performing the service was not guilty of the grave offence of marrying persons in an unlicensed place. The facts of the marriage and other church services being performed there by a clergyman are abundant evidence from which the Court and a jury might assume that the place was properly licensed."

In *R. v. Brown*, 13 Can. Cr. Cas. 133, at 157, Graham, E. J., said:—"This law is not peculiar to the proof of marriage. *Rugg v. Kingsmill*, L.R. 1 Ad. & Ec. 343. In looking over the Criminal Code, it will be seen that there are crimes in respect to churches, highways, railway stations, public works, and so on, and in most cases there is a writing, a deed of dedication, expropriation proceedings, order in council, or some other thing in writing which indicates their character; but I think it will make it very burdensome to the administration of justice if it is held that in such cases the writing only will suffice to prove that character."

*Second offences*—See secs. 465, 851, 963, 964, 982.

**Breaking dwelling by night.—Breaking out of dwelling by night.—Committing the offence when armed.—Burglary.—Being found armed after the offence.**

**457.** Every one is guilty of an indictable offence and liable to imprisonment for life who,—

- (a) breaks and enters a dwelling-house by night with intent to commit any indictable offence therein; or,

- (b) breaks out of any dwelling-house by night, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein.

2. Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped.

*Origin*].—Code Amendment 1900, ch. 46, sec. 3; Sec. 410, Code of 1892; R.S.C. 1886, ch. 164, sec. 37; 7-8 Geo. IV, Imp., ch. 29.

*"Breaks and enters"*].—To break into a dwelling-house means to break any part, internal or external, of a building, or to open by any means whatever any door, window, shutter, cellar-flap or other thing intended to cover openings to a building, or to give passage from one part of it to another. Code sec. 335 (c). The means of opening, here referred to, includes lifting in the case of things kept in their places by their own weight. Code sec. 335 (c).

A person "enters" a dwelling-house, as regards the offence of burglary, by breaking and entering at night with intent, as soon as any part of the body of the person making the entrance is within the building, or as soon as any part of any instrument used by him (to break into or to assist him in entering the building) is within the building. Code sec. 340. A person who enters any chimney or other aperture of the building *permanently* left open for any necessary purpose is to be deemed to have broken and entered that building. Code sec. 340. A temporary aperture would not be included if entrance could be obtained without further opening. Sub-sec. (c) appears to include the further lifting of a partially opened window as a breaking, and in that respect to extend the common law which did not make it a breaking unless the door or window by which entrance was effected happened to be closed. But it has been held in a Nova Scotia case that where a window had been opened a few inches for purposes of ventilation, and the person entering had lifted it in order to get in, it is not burglary. *R. v. Burns* (1903), 36 N.S.R. 257, 7 Can. Cr. Cas. 95. A person who obtains entrance into a dwelling-house by any threats or artifice used for that purpose is to be deemed to have broken and entered that building; *R. v. Swallow*, 1 Russell, 793; and so is the person who obtains entrance by collusion with any person in the building. Code sec. 340; *Le Mott's case*, Kelyng 42; *Cassy's case*, Kelyng 62; *Hawkins' case*, 2 East P.C. 485; *Cornwall's case*, 2 Strange R. 881.

*Entry by collusion with an inmate*]

The entry by collusion with a person in the building must be the

result of real and not pretended collusion, it being held that where a servant pretended to agree with a robber and opened the door and let him in for the real purpose of apprehending him, there was no breaking and entering for the door was lawfully open. *R. v. Johnson* (1841), Car. & M. 218. But going into a house with intent to steal and getting access by means of duplicate keys fraudulently obtained by the accused through a servant of the owner, constitutes a breaking and entering, because the key was knowingly used without lawful authority; and such is the result although the servant had only pretended to become an accomplice with the accused and had arranged with the police to be in the house to arrest the accused which was done before he had time to steal anything. *R. v. Chandler*, 8 Cr. App. R. 82 L.J.K.B. 106, [1913] 1 K.B. 125.

*Dwelling-house*—See definition in sec. 335 (e) and as to outbuildings, sec. 339.

*"By night"*—'By night' as regards burglary means between 9 p.m. and 6 a.m. Code sec. 2, sub-sec. 23.

*Sub-sec. (2)—Possession of "offensive weapon"*—See definition of 'offensive weapon' in sec. 2, sub-sec. (24).

*Term of imprisonment may be shortened*—Code sec. 1054.

*Recent possession as evidence on charge of burglary and theft*—The burglary was committed on the 18th or 19th December, 1903, and the prisoner was arrested on the 16th February, 1904, with one of the articles stolen upon his person; it was held that the judge could not properly have ruled, in all the circumstances of the case, that the lapse of time was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary: and that the possession of the article and other circumstances warranted the jury in drawing an inference of guilt. *R. v. Burdell*, 11 O.L.R. 440, 10 Can. Cr. Cas. 365.

*Punishment of whipping*—See secs. 80, 204, 216, 276, 292, 293, 301, 302, 446, 457, 1060.

*Housebreaking with intent to ravish*—See *R. v. Rodley* [1913] 3 K.B. 468, 82 L.J.K.B. 1070; *R. v. Burns* (1903), 36 N.S.R. 257, 7 Can. Cr. Cas. 95.

On the trial of an indictment for burglary with intent to rape, evidence of his immoral conduct on the same night but subsequent to the attempt alleged, is not admissible against the accused. *B. v. Bodley* [1913] 3 K.B. 468, 9 Cr. App. R. 69, 82 L.J.K.B. 1070; *R. v. Fisher* [1919] 1 K.B. 149, 26 Times L.R. 122, 79 L.J.K.B. 187; and see *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478 (H.L.); *Makin v. Attorney-General of N.S.W.* [1894] A.C. 57, 63 L.J.P.C. 41.

*Possession of burglar's tools by night*—Code sec. 464.

**Breaking dwelling by day.—Breaking out of dwelling by day.**

**458.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) breaks and enters any dwelling-house by day and commits any indictable offence therein; or,
- (b) breaks out of any dwelling-house by day after having committed any indictable offence therein.

*Origin*—Sec. 411, Code of 1892; R.S.C. 1886, ch. 164, sec. 40.

*"Breaks and enters"; "breaks out"*—Code secs. 335 (c); 340.

*Housebreaking and theft*—If the indictable offence committed be theft, and the charge laid is consequently housebreaking and theft, there cannot be a conviction for receiving on that count; R. v. Lamoreaux, 10 Que. Q.B. 15, 4 Can. Cr. Cas. 101. The essential elements of the offence of receiving are not included in the charge of housebreaking and theft; and secs. 949 and 951 do not authorize a conviction for another offence unless it is included in the offence charged as described in the enactment creating it or as charged in the count, or unless for an attempt of the offence charged or an attempt of the lesser offence so included.

**Breaking with intent to commit offence.**

**459.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by day, breaks and enters any dwelling-house with intent to commit any indictable offence therein.

*Origin*—Sec. 412, Code of 1892; R.S.C. 1886, ch. 164, sec. 42.

*"Dwelling house"*—Code sec. 335, sub-sec. (c).

*Housebreaking with intent*—As to this offence there is no specification that the offence shall be by night as in sec. 457 (burglary) or by day in the offence of housebreaking combined with theft or some other indictable offence by day for which sec. 458 provides a more onerous penalty than does sec. 459. There may be a conviction on a charge laid under sec. 459, although the evidence proves the offence of burglary; R. v. Robinson, Russ. & R. 321; or proves an offence under sec. 458.

*Second offences*—Sec. secs. 465, 757, 851, 963, 964, 982.

**Breaking shop, etc., and committing indictable offence.**

**460.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, either by day or night, breaks and enters and commits any indictable offence in a school-house, shop, warehouse or counting-house, or any building with-

in the curtilage of a dwelling-house, but not so connected therewith as to form part of it under the provisions hereinbefore contained, or in any pen, cage, den or enclosure in which fur-bearing animals wild by nature are kept in captivity for breeding or commercial purposes.

*Origin*—Sec. 413, Code of 1892; Code Amendment Act, 1913, ch. 13; R.S.C. 1886, ch. 164, sec. 41.

*"Breaks and enters"*—Code sec. 335 (c) 340; and see note to sec. 457; R. v. Chandler [1913] 1 K.B. 125, 82 L.J.K.B. 106, 8 Cr. App. R. 82 (entry by key supplied by pretended accomplice).

*"Or in any pen, cage," etc.*—These words were added to the section by the amendment of 1913. As to theft of wild animals kept in cages, etc., see Code secs. 345, 347, 350, 370, 381 (by false keys).

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

#### **Breaking shop, etc., with intent.**

**461.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings, or any pen, cage, den or enclosure mentioned in the last preceding section with intent to commit any indictable offence therein.

*Origin*—Sec. 414, Code of 1892; 1913 Can. Stat., ch. 13; R.S.C. 1886, ch. 164, sec. 42.

*"Breaks and enters"*—See secs. 335 (c), 340, and note to sec. 457. A clandestine opening of a door even during business hours may be a breaking and entering under sec. 461, if done with intent to steal or to commit some other indictable offence. R. v. Smith, 17 Man. R. 282, 13 Can. Cr. Cas. 326.

*"Pen, cage, den or enclosure"*—These words were inserted by the Code amendment of 1913.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

#### **Being found in dwelling-house at night.**

**462.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit any indictable offence therein.

*Origin*—Sec. 415, Code of 1892; R.S.C. 1886, ch. 164, sec. 39.

*"By night"*—See definition in sec. 2 (23).

*"Unlawfully being in a dwelling-house by night with intent"*—As regards the offence of unlawfully being in the house, as distinguished

from that of unlawfully entering, the intent may have been formed after the entry. *R. v. Higgins*, 38 N.S.R. 328, 10 Can. Cr. Cas. 456.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

**Being found armed with intent to break by day.—With intent to break by night.**

**463.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who is found,—

- (a) armed with any dangerous or offensive weapon or instrument by day, with intent to break or enter into any dwelling-house, and to commit any indictable offence therein; or,
- (b) armed as aforesaid by night, with intent to break into any building and to commit any indictable offence therein.

*Origin*—Sec. 416, Code of 1892; R.S.C. 1886, ch. 164, sec. 43.

*"Offensive weapon" defined*—Code sec. 2, sub-sec. (24).

*"By day"; "by night"*—Code sec. 2, sub-sec. (23).

*"Intent to break or enter"; "intent to break into"*—Code secs. 335, sub-sec. (c), 340.

*"Dwelling-house"*—Code sec. 335, sub-sec. (e).

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

**Having housebreaking instruments by night.—By day.—Being disguised by night.—Disguised by day.**

**464.** Every one is guilty of an indictable offence and liable to five years' imprisonment who is found,—

- (a) having in his possession by night, without lawful excuse, the proof of which lie upon him, any instrument of housebreaking; or,
- (b) having in his possession by day any such instrument with intent to commit any indictable offence; or,
- (c) having his face masked or blackened, or being otherwise disguised, by night, without lawful excuse, the proof whereof shall lie on him; or,
- (d) having his face masked or blackened, or being otherwise disguised by day, with intent to commit any indictable offence.

*Origin*—Sec. 417, Code of 1892; R.S.C. 1886, ch. 164, sec. 43; *Larceny Act*, 1861, Imp., sec. 58.



"By day"; "by night"]—See definition in sec. 2 (23).

*Instrument of housebreaking*—This phrase means an instrument capable of being used for the purpose and intended to be so used. *R. v. Oldham*, 2 Den. C.C. 472, 3 C. & K. 250; *R. v. Thompson*, 11 Cox C.C. 362; *R. v. Seckree* (1915), 11 Cr. App. R. 245; *R. v. Ward* [1915] 3 K.B. 698, 11 Cr. App. R. 245.

The onus of proof as to lawful excuse is discharged by an accused person, if he prove that the alleged implement of house-breaking, though capable of being used for that purpose, is a tool used by him in his trade or calling. *Rex v. Ward* [1915] 3 K.B. 696, 11 Cr. App. R. 245. If a bricklayer is found with the tools of his trade, which are his own property, upon him, that is *prima facie* a sufficient excuse in answer to a charge of being in possession of housebreaking implements by night founded on the possibility of their being so used. But the case may go to the jury on a direction that they must consider the other circumstances. *R. v. Seckree* (1915), 11 Cr. App. R. 245; *R. v. Oldham* (1852), 2 Den. C.C. 472.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

#### **Punishment after previous conviction in certain cases.**

**465.** Every one who, after a previous conviction for any indictable offence, is convicted of an indictable offence specified in this Part for which the punishment on a first conviction is less than fourteen years' imprisonment is liable to fourteen years' imprisonment.

*Origin*—Sec. 418, Code of 1892; R.S.C. 1886, ch. 164, sec. 44.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 851, 963, 982, 1053, 1081.

*Second offences under Part VII*—See secs. 465, 757, 851, 963, 964, 982.

#### *Forgery and Preparation Therefor.*

**Definition of forgery.—Making false document.—When forgery complete.—False document may be incomplete.**

**466.** Forgery is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one whether within Canada or not, or that some person should be induced by the belief that it is genuine, to do or refrain from doing anything, whether within Canada or not.

2. Making a false document includes altering a genuine

document in any material part, or making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or making any material alteration in it, either by erasure, obliteration, removal or otherwise.

3. Forgery is complete as soon as the document is made with such knowledge and intent as aforesaid, though the offender may not have intended that any particular person should use or act upon it as genuine, or be induced, by the belief that it is genuine, to do or refrain from doing anything.

4. Forgery is complete although the false document may be incomplete, or may not purport to be such a document as would be binding in law, if it be so made and is such as to indicate that it was intended to be acted on as genuine.

*Origin*—Sec. 422, Code of 1892.

*Punishment for forgery*—Code secs. 468, 469, 470.

*Punishment for uttering forged instrument*—Code sec. 467.

*Possession or use of instruments of forgery*—Code sec. 471.

*Forgery of trade-marks*—Code secs. 486-495.

*Offences resembling forgery*—Code secs. 472-485.

*False document defined*—'False document' means (i) a document, the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the person who purports to make it, is falsely dated as to time or place of making, where either is material, or (ii) a document, the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist, or (iii) a document which is made in the name of an existing person, either by that person or by his authority, with the fraudulent intention that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it. Code sec. 335, sub-sec. (j).

The definition of a false document given in the Code makes no change in the law but merely defines in statutory form what had by judicial construction in the courts been held to constitute a false document, the making of which with the knowledge and intent mentioned in the statute is declared to be forgery, and the uttering of which with like knowledge by one who uses, deals with, or acts upon it as if it were genuine, is made an indictable offence punishable in like manner as forgery. Per Burton, J.A., in *re Murphy* (1895), 2 Can. Cr. Cas. 562, 578, 583, 26 Ont. R. 163, 22 A.R. 386 (Ont.).

An instrument may be the subject of forgery although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to

be good and valid as to the purposes for which it was intended to be made. *R. v. Sterling* (1773), 1 Leach 996; *R. v. Portis* (1876), 40 U.C.Q.B. 214 (Ont.); *R. v. McDonald*, 12 U.C.Q.B. 543 (Ont.); *R. v. Brown*, 3 Allen 13 (N.B.). And where the date of a deed is so material that the document could only be effective for the purposes which it indicates, if signed before a certain date, the antedating for the fraudulent purpose of making it so appear will be forgery if the result is to make the deed purport to be something quite different from what it really is. *R. v. Ritson* (1869), L.R. 1 C.C.R. 200; *Ex parte Windsor*, 34 L.J.M.C. 163.

*Forgery of incomplete document*—Under the Code forgery is complete although the false document may be incomplete, and this must be borne in mind in considering the English cases on forgery of promissory notes. *Ead v. The King* (1908), 13 Can. Cr. Cas. 360 (N.S.), per Drysdale, J. It has been doubted whether the false duplication of tickets is forgery if the signature appearing in the originals is left out. *R. v. Magnolo*, 22 B.C.R. 359, 26 Can. Cr. Cas. 419.

*False document not purporting to be such a document as would be binding in law*—If the other elements of forgery exist, the forgery is complete, although the document does not purport to be such a document as would be valid. So the making of a forged paper purporting on the face of it to be a bank note is forgery, although there is no bank of the name given. *R. v. McDonald*, 12 U.C.Q.B. 543 (Ont.); *R. v. Brown*, 3 Allen, 13 (N.B.).

*Filling in cheque signed in blank*—If a cheque is given to a person with a certain authority, the agent is confined strictly within the limits of that authority, and if he choose to alter it, the crime of forgery is committed. If a blank cheque be delivered to him with a limited authority to complete it, and he fill it up with an amount different from the one he was directed to insert, and if, after the authority was at end, he fill it up with any amount whatever, that too would be clearly forgery. *R. v. Bateman* (1845), 1 Cox C.C. 186; *R. v. Hart* (1836), 7 C. & P. 652, 1 Moody C.C. 486; *R. v. Wilson* (1847), 1 Den. C.C. 284.

Filling in the body of a blank cheque to which a signature is attached, without any authority, is a forgery. The prisoners were indicted for uttering a forged cheque, and it appeared that one Townsend was in the habit of signing blank cheques and leaving them with his clerk when business called him away from home; one of these cheques fell into the hands of the prisoners, who filled up the blank with the words "one hundred pounds," and dated it; it was objected that the signature being genuine, it could not be said that the prisoner had uttered a forged instrument; but Bailey, J., held that it was a forgery of the cheque. By filling in the body and dating it, it was made a perfect instrument, which it previously was not, and although it was not in point of fact made entirely by the prisoners, yet it had been held that the doing that which is necessary to make an imperfect instrument a perfect one, is a

forgery of the whole. The learned judge was also of opinion that if the bankers had paid the cheque they might have recovered the amount from the prosecutor, as he was in the habit of leaving blank cheques out, with his name written at the bottom. *Wright's case*, 1 Lewin, C.C. 135.

*Fictitious name*].—The result of the cases is, that where a fictitious name is assumed for the purposes of a fraud, the offence of forgery may be proved, but not where the credit is given solely to the person without any regard to the name, as in *R. v. Martin* (1880), 5 Q.B.D. 34; per Hagarty, C.J.O. in *re Murphy* (1895), 2 Can. Cr. Cas. 578, 582; *R. v. Whyte* (1851), 5 Cox C.C. 290; *R. v. Wardell* (1862), 3 F. & F. 82.

Where a person passing under an assumed name falsely represents that he is in the employment of a certain firm, and that he is authorized to make a draft upon such firm, his signature in such assumed name to a draft upon the firm, and his fraudulent negotiation of it, constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone, without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud. *Re M. B. Lazier* (1899), 3 Can. Cr. Cas. 167 (Ont. C.A.).

In *R. v. Dunn* (1765), 1 Leach C.C. 68, the accused had represented herself to be the widow of John Wallace, a deceased seaman, and in that character applied to a prize agent for prize money due to him by the Government. She exhibited what purported to be the probated will of the deceased, and thereby induced the agent to advance money to her on a promissory note, signed by her in the name of the supposed widow, for which advances the agent was to reimburse himself out of the prize money, when obtained. A conviction on a charge of forgery was confirmed on a case reserved. Nine of the ten judges in that case agreed to the following (Leach C.C. 68), as the rules governing the case:

(1) In all forgeries, the instrument supposed to be forged must be a false instrument in itself;

(2) If a person gives a note *entirely as his own*, his subscribing it by a fictitious name will not make it forgery, the credit being there wholly given to *himself*, without any regard to the name, or without any relation to a third person;

(3) An instrument which is uttered as the act and instrument of another, and in that light obtains a superior credit, when in truth it is not the act of the person represented, is strictly and properly a false instrument, for in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of the third person, whose situation and circumstances import a superior security for the debt; and therefore, if in truth it is not the instrument of that third person, whose name and situation induced the credit, it is certainly a false instrument, and the intention fraudulent to the party imposed upon

by it, for he believed, when he accepted the security, that he had a remedy upon it against the third person in whose name it was given and on whom he relied when he advanced the money, but, this being false, he has no such remedy, and therefore is materially deceived;

(4) If an instrument be false in itself, and by its purporting to be the act of another a credit is obtained which would not otherwise have been given, it is forgery, though the name it is given in be really a non-entity;

(5) The case is very different if the person borrowing money upon his own note and assuming a fictitious name does so without any relation to a different person. In that case the whole credit is given to the party himself; the lender accepts the security as the security of that person only; he has no other remedy in view, but merely against the man he is dealing with, and the security is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has, therefore, a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded.

In *R. v. Whyte* (1851), 5 Cox C.C. 290, the prisoner had purchased goods of a warehouseman and represented that he was in business with one Whiffen, under the firm name of Whiffen & Co. Several bills for goods so purchased were met, but finally Whyte desired the warehouseman to draw on the firm for a certain bill of goods. This was done, and the bill was accepted by him in the name of the pretended firm. Talfourd, J., there said: "I think it will scarcely be sufficient to show that the name of Whiffen was assumed for the purpose of fraud generally; it must have been taken for the specific object of passing off this bill; the carrying on business in the false name might be for the purpose of creating a false impression with a view to obtain credit. That might support a charge of obtaining money or goods by false pretences, but not a charge of forgery."

To sustain a conviction, it should appear either that the prisoner had not gone by the fictitious name before the signing, or that he had assumed the name for the purpose of committing the fraud. *R. v. Bontien* (1813), *Rus. & Ry.* 260; *R. v. Peacock* (1814), *ibid.* 278; *R. v. Lockett* (1772), 1 *Leach C.C.* 94; *R. v. Sheppard* (1781), 1 *Leach C.C.* 226; *R. v. Francis* (1811), *Russ. & Ry.* 209; *Lascelles v. The State*, 90 *Ga.* 347.

If the assumption of a fictitious name in a petition to the legislature for an Act of incorporation were done with the intent that the legislature should be induced by the belief that it was genuine to grant the charter, there seems little reason to doubt that the signature in the fictitious name would be a forgery. The point was referred to, but not decided in *Marsil v. Lanctot*, 25 *Can. Cr. Cas.* 223, 20 *Rev. Leg.* 237 (Que).

Where a fraudulent conspiracy was entered into between two persons

in pursuance of which one of them opened an account in a bank in a fictitious name and gave to the other a cheque, for which the latter knew there were no funds, drawn in the fictitious name, and the same was negotiated by the payee in furtherance of such conspiracy, by obtaining another bank to cash the same on the faith of its being a genuine cheque, the cheque is a "false document" both by the Criminal Code and at common law. *Re Murphy* (1894), 26 Ont. R. 163, 2 Can. Cr. Cas. 562; in appeal (1895), 22 A.R. 386 (Ont.), 2 Can. Cr. Cas. 578.

*Altering genuine document*—Where the forgery consists of the alteration of the time of maturity of an endorsed note, the intent to prejudice some one or to defraud may be inferred if the facts warrant the conclusion that either the maker or the endorser might be defrauded, although it appears that the prisoner fully intended to retire the note. *R. v. Craig* (1858), 7 U.C.C.P. 241 (Ont.); *R. v. Hodgson*, 2 Jurist N.S. 453, as to the duty of the customer to his bank to guard against facilitating the raising of his cheques, see *London Joint Stock Bank v. Macmillan* (1919) 88 L.J.K.B. 55.

It would be forgery for the maker of a promissory note to add "with interest" after the amount of the note without the consent of his accommodation endorser who had already signed as such. *Hébert v. La Banque Nationale*, 40 S.C.R. 458, reversing 16 Que. K.B. 191.

*The criminal intent in forgery*—The gist of the offence of forgery is the signing with the knowledge that the document was false and with the intent that it should be accepted as genuine to some one's prejudice. As soon as that was done, the offence was complete. *United States v. Ford* (1916), 10 W.W.R. 1042, 1048, 26 Can. Cr. Cas. 430, 34 W.L.R. 912 (Man.), per Mathers, C.J.K.B.; *R. v. Dunlop* (1857), 15 U.C.Q.B. 118 (Ont.); *ex parte Cadby* (1886), 26 N.B.R. 452, 492; *R. v. Stewart* (1875), 25 U.C.C.P. 440 (Ont); *R. v. Gould* (1869), 20 U.C.C.P. 154 (Ont.).

It is not necessary to show that any person has actually been prejudiced. *United States v. Ford*, supra; *re Lazier*, 26 A.R. 260 (Ont.); *R. v. Ward*, Str. R. 747, 2 Ld. Raym. 1461.

A woman who signs a deed or mortgage as if she were the wife of her co-grantor, the owner of the lands, but knows at the same time that he has a lawful wife living and that her marriage contract with him is void, is guilty, along with him, of making a false document knowing it to be false, and may therefore be charged with forgery, if it is evident that the only interest she claimed in the lands was a dower interest as the pretended wife of her co-defendant. *United States v. Ford*, 10 W.W.R. 1042, 1047, supra. As she was not the real wife she had no dower interest, although she may have thought at the time of the foreign marriage contract that she then became her co-defendant's lawful wife. *Ibid.* The male defendant was under Code sec. 69 a principal in the offence committed by the female defendant who posed as his wife in the transaction, with his connivance. *United States v. Ford*, supra.

*Onus of proof*—There is a distinction between a civil and a criminal case when a question of forgery arises. In a civil case the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the onus of proving the forgery is cast upon the prosecutor to assert this, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted. *Doe [d.] Devine v. Wilson* (1855), 10 Moore P.C. 502, quoted with approval, in *R. v. Anderson* (1914), 5 W.W.R. 1052, at 1059, 7 Alta. L.R. 102, 26 W.L.R. 783, 22 Can. Cr. Cas. 455. If the facts in a civil case render it extremely probable that the writing denied is genuine and that the denial is a mere obstruction to proof, it is convenient that the judge may dispose of such a contest by applying the rule enabling him to compare the disputed writing with one admittedly genuine, and on being satisfied that the writing is the same to receive the document as sufficiently proved where there is no sworn denial. *Dominion Permanent Loan Co. v. Morgan* (1914), 7 W.W.R. 844, 863 (Can.), per Idington, J.

*Corroboration*—Forgery punishable under secs. 468-470, inclusive, requires corroboration under sec. 1002; *R. v. Ranger* (1917), 30 Can. Cr. Cas. 65 (Que.); *R. v. McBride*, 26 Ont. R. 639, 2 Can. Cr. Cas. 544; *R. v. Giles*, 6 U.C.C.P. 84 (Ont.); but sec. 1002 does not apply to the offence under sec. 467 of uttering or attempting to utter a forged document knowing it to be forged.

On a charge of forging promissory notes, the fact that at the time the accused sold the alleged forged notes, the original and true notes were in a bank and pledged by the accused is most material evidence implicating him. *R. v. Scheller* (1914), 6 W.W.R. 261, 7 Sask. L.R. 239, 27 W.L.R. 621, 23 Can. Cr. Cas. 1 (Sask.). There the accused endorsed and disposed of as genuine originals the copies of the notes which he obtained on request from the bank to which he had pledged the originals as collateral; and see *R. v. Daun*, 11 Can. Cr. Cas. 244, as to corroboration generally.

*Comparison of handwriting*—Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine may be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 8. That enactment originated with the English statute, 28-29 Vict., Imp., ch. 18, sec. 8, which has been generally adopted in provincial statutes as well by federal law. The Canada

Evidence Act applies to all criminal proceedings and to certain civil proceedings which come under the federal and not the provincial legislative powers. *Can. Evidence Act, R.S.C. 1906, ch. 145, sec. 2.*

Prior to the enactment now embodied in sec. 8 of the Canada Evidence Act, other writings had to be relevant in other respects or they were excluded; but now other writings may be produced and proved for the purposes of comparison, although not otherwise connected with the case. *Arbon v. Fussell*, 3 F. & F. 152. Prior to that enactment the rule had been laid down in England that the test of genuineness ought to be the resemblances, not to the formation of letters in some other specimen, but to the general character of the writing which is impressed on it as the involuntary and unconscious result of constitution, habit or other permanent causes, and is therefore in itself permanent; and that a knowledge of this character is best acquired by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence. *Doe v. Tuckermore* (1836), 5 A. & E. 705; *Tracy Peerage Case*, 10 Cl. & F. 161, 176. And many courts express a preference for the testimony of persons who have seen the accused write or have engaged in correspondence with him, rather than the expert opinions of persons who had not done so, but who base their opinions merely upon a study and critical examination made by them of the various writings produced. *Desroches v. Langlois*, 15 Que. K.B. 388; *R. v. Ranger* (1917), 30 Can. Cr. Cas. 65 (Que.); *Dominion Permanent Loan Co. v. Morgan* (1914), 7 W.W.R. 844.

But while the opinion alone of the expert who has never seen the person write, is frequently given little weight, his testimony may be of importance in pointing out the marks, indications and characters in the writings themselves upon which the opinion is based. *Re Gammell Estate* (1886), 19 N.S.B. 265, 279.

If the witness is in fact skilled in the comparison of handwriting, it is immaterial that he is not a professional expert and immaterial how he acquired his skill. *R. v. Silverlock*, [1894] 2 Q.B. 766.

While ordinarily a witness may be required to read or to write in the presence of the court, it has been held that a prisoner called as a witness on his own behalf cannot be compelled to furnish a specimen of his handwriting. *Rex v. Grinder*, 11 B.C.R. 370, 10 Can. Cr. Cas. 333.

The signature of a prisoner to the "statement of accused" where he makes a statement at the preliminary hearing, may be tendered as evidence against him at his trial on a charge of forgery, and be considered on a comparison of handwriting. *R. v. Golden*, 11 B.C.R. 349, 10 Can. Cr. Cas. 278; and see note to sec. 684.

The jury may without expert testimony compare the genuine writing with the disputed writing, but such a course is said to be hazardous; and such comparison alone should not be invoked to brand as a forgery



a document the genuineness of which is supported by the sworn testimony of those accused. *Dominion Permanent Loan Co. v. Morgan* (1914), 7 W.W.R. 844, 863, per Idington, J. (Can.).

*Method of comparison by handwriting experts*—

In vol. 3 *Journal of Criminal Law and Criminology*, 940, Dr. Davenport, of Boston, says: "A valid judgment of the authorship of any questioned writing may be well grounded upon the following axioms: Every one who has practised writing long enough to do it automatically, having the mind intent upon the subject matter and not at all upon the writing itself, has inevitably acquired certain writing habits. Some of these habits are common with many other writers. Some few are uncommon and, perchance, some particular habit may even be peculiar to the single individual. Many of the habits are voluntary and conscious ones. These are subject to more or less control at will. But there are some other habits which are wholly involuntary and quite unconscious; these, therefore, are not subject to any modification at will. They can only be gradually changed through the formation of other new habits which displace the former habits. Careful analysis of a sufficiently large number of samples of unquestionably genuine automatic writing of any person will disclose the several classes of habits manifested by that writer. Likewise what may appear to be the habits in any piece of questionable writing, upon a comparison of the two sets of habits, those which are alike as well as those that are different, may readily be seen. If there is found to be a persistent agreement on the one hand in the absence of such habits particularly as are common to many other writers, and, on the other hand, in the presence of like habits especially of such as are involuntary and unconscious, and these, too, in such numbers and sequence of combination as could by no reasonable chance be due to merely accidental coincidence, then there is from such cumulative evidence no other conclusion to be drawn by an expert except the opinion that, beyond any reasonable doubt, the two sets of writing must be due to one and the same cause, that is, by the very same writer. . . . In forming an opinion it should not be overlooked that single points of likeness and unlikeness may be of vastly different relative value. Any writing to be at all readable must have very many points of similarity to the conventional model type. No sample of genuine open handwriting of any person is ever an exact *facsimile* in all respects of any other sample; a careful examination can always differentiate between them, however much alike they may appear upon casual observation. One who seeks to assume the disguise of another, as in forging a writing, naturally attempts to affect, so far as may be, the general appearance characteristic of the other. He hopes to pass muster without exciting suspicion, well knowing that, if an inquiry is once instituted, the falsity is likely to be revealed. To be able to do his best with his writing instrument he must hold it in his own customary way which may be quite different from that of the

genuine writer whose writing he attempts to imitate. To get the correct forms of letters the forger may copy them in some mechanical way, make a freehand drawing of them or practise a running-hand copying until he has more or less acquired the new habit of similar formation of the letter. But his old unconscious habits of pen movements in the production of the new forms of letters still persist for he has not attempted to change these; his own unconscious habits of pen movements are unknown as well as those of the person imitated are unknown to the common forger. His aim is at general pictorial effect." 3 Journal of Criminal Law and Criminology, 940.

*Expert testimony; limitation of number of witnesses on opinion evidence*—Where, in any criminal trial or other proceeding, it is intended by the prosecution or the defence, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding. Can. Evidence Act, R.S.C. 1905, ch. 145, sec. 7.

Such leave shall be applied for before the examination of any of the experts who may be examined without such leave. Ibid., sec. 7 (2).

*Misspellings as indicia of forgery*—A habit in the supposed forger of misspelling as in the codicils in question was admitted in a will case as bearing on the genuineness of the codicils. *Cresswell v. Jackson* (1864), 4 F. & F. 1.

In the Parnell Commission proceedings (1888), Piggott's fabrication of the criminal letters alleged to have been written by Mr. Parnell was detected in part by his misspelling of a word, 3 Wigmore on Evidence, sec. 2024; and see *Brooks v. Tichborne*, 5 Exch. 929; *Hale's trial*, 17 How. St. Tr. 173; *Norman v. Morrell*, 4 Ves. 770.

*Aiding and abetting a forgery*—To make a person liable as an accessory before the fact (Code sec. 69), to an alleged forgery, there must be criminal intention, that it shall be used as genuine and to the prejudice of some one. *R. v. Pariseault* (1917), 28 Can. Cr. Cas. 112 (Que.). In that case it was pointed out that where there was no criminal intention and no one was prejudiced, the irregular signing of a government pay cheque issued to one person, but signed by another who had replaced him in the service and to whom presumably the money rightfully belonged, was not forgery. *R. v. Pariseault*, supra.

*Question of ratification or estoppel as to forged document*—A forgery as such, cannot be ratified, but if there be circumstances creating an estoppel against the person whose name was forged, he may be liable to the innocent holder because of his conduct. *Merchants Bank v. Lucas*, *Cameron's S.C. Cases* 275, 18 S.C.R. 704; *Ewing v. Dominion Bank*, 35 S.C.R. 133 (leave to appeal refused [1904] A.C. 806, 74 L.J.P.C. 21); *Brook v. Hook*, L.R. 6 Ex. 89; *Hébert v. La Banque Nationale*, 40 S.C.R. 458; *La Banque Jacques Cartier v. La Banque d'Epargne*, 13 A.O. 111; *London Joint Stock Bank v. Macmillan*, (1919) 88 L.J.K.B. 55.

A bank which has accepted a cheque cannot refuse payment of it although the drawer's credit had been obtained by forgery, if consideration was given by the holder and at the time the cheque was given to the payee neither he nor the subsequent holder was aware of the fraud. *Baker v. Merchants Bank*, 19 W.L.R. 641 (Alta.). A bank is bound to know the signature of its own customer; the bank upon which the cheque purports to be drawn cannot recover back the moneys paid by it to another bank and paid out by the latter bank to the forger before it, the receiving bank, had any notice or knowledge of the forgery of the signature to the cheque. See *Dominion Bank v. Union Bank*, 40 S.C.R. 366, referring to *Bank of Montreal v. The King*, 38 S.C.R. 258, in which leave to appeal to the Judicial Committee was refused. But a different rule applies to forgery in the writing in the body of a cheque, because the bank is not bound to know the handwriting in which the document is written. *Dominion Bank v. Union Bank*, supra, distinguishing *Bank of Montreal v. The King*, supra, affirming 17 Man. R. 68, 6 W.L.R. 417, which reversed 4 W.L.R. 407. Where the amount of a cheque is fraudulently raised after acceptance and the receiving bank pays the money to the forger and receives payment from the paying bank the latter can recover the amount from the receiving bank as having been paid to it under a mistake of fact. *Imperial Bank v. Bank of Hamilton* [1903] A.C. 49, 72 L.J.P.C. 1.

When a business concern receives from a bank a notice from which it becomes aware that a forgery and fraud is being practised upon the bank, in the unauthorized use of the name of the person, or persons notified, the latter are bound by every principle of justice and right dealing between man and man, and in accordance with the usage of trade, within reasonable time to give the bank notice of the fraud. *Ewing v. Dominion Bank*, 36 S.C.R. 133.

In considering the question of how far a person incurs a liability by refraining from answering letters written to him in relation to a business matter, attention must, of course, be given to the surrounding circumstances, to the relationship existing between the writer and the receiver of the letters, and also to the receiver's intelligence and experience, and his knowledge, actual or to be presumed, of the customs of business men in like situations. *Wincarls v. Hoey*, [1917] 2 W.W.R. 287.

Throughout the judgments in *Ewing v. Dominion Bank*, much stress is laid on the fact that *Ewing & Co.* were an experienced business firm, accustomed to banking and familiar with the customs of banks in discounting negotiable paper, and upon the further fact that, though they at once became aware that the signature to the note in question was a forgery and were told by their legal adviser that it was their duty to immediately notify the bank to that effect, they deliberately refrained from doing so, because they wished to screen the forger. *Wincarls v. Hoey*, [1917] 2 W.W.R. 287, (Man.), per Judge Cumberland.

*Extradition*—Forgery is an extraditable offence between Canada and the U.S.A. *Re McCartney*, 8 Man. B. 367; *re Lazier*, 30 Ont. B. 419, 3 Can. Cr. Cas. 167, 26 A.R. 260 (Ont.), 3 Can. Cr. Cas. 419, 29 S.C.B. 630; *re Garbutt*, 21 Ont. B. 465; *United States v. Ford* (1916), 10 W.W.R. 1042, 34 W.L.R. 912, 26 Can. Cr. Cas. 430; *re Hall*, 3 Ont. B. 331, 8 A.R. 31 (Ont.); *re Hall*, 32 U.C.C.P. 498 (Ont.); *re Hall*, 8 A.B. 135 (Ont.); *re Murphy*, 26 Ont. B. 163, 2 Can. Cr. Cas. 562, 22 A.R. 336, 2 Can. Cr. Cas. 588 (Ont.); *re Harsha*, 10 Can. Cr. Cas. 433, 11 Can. Cr. Cas. 62 (Ont.); *re Harsha*, 7 O.W.R. 97, 155, 293, 398, 471; *ex parte Cadby* (1886), 26 N.B.R. 452.

**Uttering forged documents.**

**467.** Every one is guilty of an indictable offence who, knowing a document to be forged, uses, deals with, or acts upon it, or attempts to use, deal with, or act upon it, or causes or attempts to cause any person to use, deal with, or act upon it, as if it were genuine, and is liable to the same punishment as if he had forged the document.

2. It is immaterial where the document was forged.

*Origin*—Sec. 424, Code of 1892; R.S.C. 1886, ch. 165, sec. 46; Forgery Act, 1861, Imp., sec. 26.

*"Document" defined*—Code sec. 335, sub-sec. (f).

A false letter of introduction uttered with knowledge of its falsity and with intent that it should be acted upon as genuine to the prejudice of another, is within sec. 467. *Re Abeel*, 8 Can. Cr. Cas. 189, 7 O.L.R. 327.

*Forged document*—Code secs. 335 (j) (false document), 466 (forgery).

*Uttering forged document*—The showing of a forged receipt to a person with whom the defendant is claiming credit on account of that receipt is an uttering, although the defendant never voluntarily parts with the possession of it. *R. v. Radford* (1844), 1 Den. C.C. 59, 1 Cox C.C. 168.

*Describing the forged document*—The forged document which is the subject of the uttering should be accurately described. *R. v. Cunningham* (1885), Cass. S.C. Dig. 2nd ed., 194; *Coutlee's S.C. Dig.* 402; varying *R. v. Cunningham*, 6 B. & G. 31 (N.S.).

Objections to apparent defects are to be made before pleading, and are then subject to amendment. Code sec. 898. The substance of the offence may be stated in popular language. Code sec. 852, and any lack of details is to be remedied by an order for particulars. Code secs. 853-859. *Ead v. The King*, 40 S.C.B. 272, 13 Can. Cr. Cas. 348. See note to sec. 468.

"*Knowing a document to be forged*"—The guilty knowledge is of the essence of the offence and should be specifically alleged in the indictment or charge. *R. v. Weir* (No. 5) (1900), 9 Que. Q.B. 253, 3 Can. Cr. Cas. 499.

*Evidence of similar criminal acts*—On a charge of feloniously uttering a forged deed, evidence of other forged deeds of a similar character, although of subsequent date, being found in the defendant's possession on his arrest is admissible to rebut a defence denying guilty knowledge. *Rex v. Mason*, 10 Cr. App. R. 169; 111 L.T. 336; 78 J.P. 389; and see *R. v. Fisher* [1910] 1 K.B. 149; *R. v. Doyle*, 26 Can. Cr. Cas. 197 (N.S.). But the jury should be instructed as to the limited purpose for which such evidence is given. *R. v. Lovitt*, 13 Can. Cr. Cas. 15. Compare *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478 (H.L.), affirming *R. v. Thompson*, 86 L.J.K.B. 1321 [1917] 2 K.B. 630.

*Proof of admissions made by accused*—If a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; *if there be either no other evidence in the case, or no other evidence incompatible with it*, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, for their consideration, precisely as in any other case, where one part of the evidence is contradictory of the others. *R. v. Jones*, 2 C. & P. 628; and see generally *Taylor on Evidence*, 10th ed., pars. 725 *et seq.* 870-1; *Wills on Cir. Ev.*, 6th ed., pp. 116 *et seq.*, *Phipson on Ev.*, 5th ed., pp. 218, 253; *Wigmore on Ev.*, pars. 2099 *et seq.* and 2113 *et seq.*

The accused is entitled as of right to have such a statement considered in its entirety so that the true meaning of his statement may be made manifest for it is but in accordance with the plain dictates of justice and common sense that his statement, if used against him, shall be used only in the true sense in which he made it. And not only is he so entitled, but, in order that the true sense of his statement may be ascertained, he is entitled to show the facts and circumstances surrounding the making of it to the like extent that in the case of a contract he is entitled to show them in order to assist in its interpretation. *R. v. Girvin* [1917] 1 W.W.R. 907, 27 Can. Cr. Cas. 265, 272, 10 Alta. L.R. 324. per Beck, J.

*Search warrants*—Code secs. 629-632.

#### **Forgery of certain documents.**

**468.** Every one who commits forgery of,—

- (a) any document having impressed thereon or affixed thereto any public seal of the United Kingdom or

any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty; or,

- (b) any document bearing the signature of the Governor General or of any administrator, or of any deputy of the Governor, or of any lieutenant governor or any one at any time administering the government of any province of Canada; or,
- (c) any document containing evidence of, or forming the title or any part of the title to, any land or hereditament, or to any interest in or to any charge upon any land or hereditament, or evidence of the creation, transfer or extinction of any such interest or charge; or,
- (d) any entry in any register or book, or any memorial or other document made, issued, kept or lodged under any Act for or relating to the registering of deeds or other instruments respecting or concerning the title to or any claim upon any land or the recording or declaring of titles to land; or,
- (e) any document required for the purpose of procuring the registering of any such deed or instrument or the recording or declaring of any such title; or
- (f) any document which is made, under any Act, evidence of the registering or recording or declaring of any such deed, instrument or title; or,
- (g) any document which is made by any Act evidence affecting the title to land; or,
- (h) any notarial act or document or authenticated copy, or any procès-verbal of a surveyor or authenticated copy thereof; or,
- (i) any register of births, baptisms, marriages, deaths or burials authorized or required by law to be kept, or any certified copy of any entry in or extract from any such register; or,
- (j) any copy of any such register required by law to be transmitted by or to any registrar or other officer; or,

- (k) any will, codicil or other testamentary document, either of a dead or living person, or any probate or letters of administration, whether with or without the will annexed; or,
- (l) any transfer or assignment of any share or interest in any stock, annuity or public fund of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty, or of any foreign state or country, or receipt or certificate for interest accruing thereon; or,
- (m) any transfer or assignment of any share or interest in the debt of any public body, company or society, British, Canadian or foreign, or of any share or interest in the capital stock of any such company or society, or receipt or certificate for interest accruing thereon; or,
- (n) any transfer or assignment of any share or interest in any claim to a grant of land from the Crown, or to any scrip or other payment or allowance in lieu of any such grant of land; or,
- (o) any power of attorney or other authority to transfer any interest or share hereinbefore mentioned, or to receive any dividend or money payable in respect of any such share or interest; or,
- (p) any entry in any book or register, or any certificate, coupon, share, warrant or other document which by any law or any recognized practice is evidence of the title of any person to any such stock, interest or share, or to any dividend or interest payable in respect thereof; or,
- (q) any exchequer bill or endorsement thereof or receipt or certificate for interest accruing thereon; or,
- (r) any bank note or bill of exchange, promissory note or cheque, or any acceptance, endorsement or assignment thereof; or,
- (s) any scrip in lieu of land; or.

- (t) any document which is evidence of title to any portion of the debt of any dominion, colony or possession of His Majesty, or of any foreign state, or any transfer or assignment thereof; or,
- (u) any deed, bond, debenture, or writing obligatory, or any warrant, order, or other security for money or payment of money, whether negotiable or not, or endorsement or assignment thereof; or,
- (v) any accountable receipt or acknowledgment of the deposit, receipt, or delivery of money or goods, or endorsement or assignment thereof; or,
- (w) any bill of lading, charter-party, policy of insurance, or any shipping document accompanying a bill of lading, or any endorsement or assignment thereof; or,
- (x) any warehouse receipt, dock warrant, dock-keeper's certificate, delivery order, or warrant for the delivery of goods, or of any valuable thing, or any endorsement or assignment thereof; or,
- (y) any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorizing, either on endorsement or delivery, the possessor of such document to transfer or receive any goods;

is guilty of an indictable offence and liable to imprisonment for life if the document forged purports to be, or was intended by the offender to be understood to be or to be used as genuine.

*Origin*—Sec. 423, Code of 1892; R.S.C. 1886, ch. 165, secs. 4-44.

*"Forgery"*—Code sec. 466.

*"Document"*—See definition in sec. 335 (f).

*"Bank note"*—See definition in sec. 2 (4).

*"Exchequer bill"*—See definition in sec. 335 (h).

*"Share-warrant"*—The punctuation of the statute is retained in sub-sec. (p) in the form in which it was enacted, but the comma after "share" seems to be an error. The context indicates that a "share-warrant" was intended to be referred to, a term better known in English company law than in Canadian law.

*Stating the offence*—The indictment will be good, if it contained so much detail of circumstances as was sufficient to give the accused



reasonable information as to the act to be proved against him. Code secs. 852, 853; *R. v. Illsley* (No. 2), 29 Can. Cr. Cas. 107 (N.S.).

A count may be laid in popular language and a statement that A had forged B's cheque would amount to a popular description of the offence of forging a document purporting to be B's cheque. *R. v. Illsley* (No. 2), 29 Can. Cr. Cas. 107, distinguishing *R. v. Carter*, 2 East P.C. 985; and see *U.S. v. Howell*, 11 Wallace, 436 (U.S.).

If a person is convicted on an indictment for forging a promissory note and the fact in evidence was an incomplete note form which, nevertheless, under Code sec. 466 might be the subject of forgery, strict accuracy would require that the indictment be amended by calling the document an "incomplete promissory note" and setting forth in it a detailed description of the document. But if no question is raised on the trial when an amendment could have been ordered (Code sec. 898), the conviction will stand where the defendant made no application for particulars under sec. 859 and was not misled by the discrepancy in calling the forged document a "promissory note." *Ead v. The King* (1908), 13 Can. Cr. Cas. 348, 360. Moreover, the accused might plead *autrefois convict* if again indicted for forging an "incomplete promissory note" if it were in fact the same document, as the subject-matter on which the accused was given in charge on the former trial would have been the same had "all proper amendments been made which might then have been made" (Code sec. 907). *Ead v. The King*, 13 Can. Cr. Cas. 348.

Where the contradictory or repugnant expressions do not enter into the substance of the offence and the indictment will be good without them, they may be rejected as surplusage; and where the repugnant matter is inconsistent with any preceding averment it may be rejected as superfluous. *R. v. Stevens*, 5 East 254, at 255; 1 Chitty Cr. Law 231; 1 Bishop Cr. Law, sec. 491; *R. v. Illsley* (No. 2), 29 Can. Cr. Cas. 107 (N.S.).

*Identity of person*—The signature of the accused to a bail bond or other document in the criminal proceedings may be used for the purpose of identification of the person on a charge of forgery. *United States v. Ford* (1916), 10 W.W.R. 1042, 34 W.L.R. 912, 26 Can. Cr. Cas. 430 (Man.); *R. v. Thos. Smith*, 3 Cr. App. R. 87.

*Corroboration*—See sec. 1002 (c); *R. v. Giles*, 6 U.C.C.P. 84; *R. v. Bannerman* (1878), 43 U.C.Q.B. 547 (Ont.); *R. v. McBride* (1895), 26 Ont. R. 639, 2 Can. Cr. Cas. 544; *R. v. Houle*, 12 Can. Cr. Cas. 56 (Que.).

*Search warrants*—Code secs. 629-632.

*Destruction of seized forged bank notes or bank note paper*—Code sec. 632.

*Extradition*—A commitment for extradition on a charge of forging admission tickets is improperly made where no genuine or forged ticket is in evidence on the extradition enquiry and no facts are shown to

legally excuse the non-production; *re* Harsha (No. 1), 10 Can. Cr. Cas. 433, 10 O.L.B. 457; *re* Johnston, 12 Can. Cr. Cas. 559; and *see re* Moore, 16 Can. Cr. Cas. 266.

**Forgery of personal property registration.—Public register.**

**469.** Every one who commits forgery of,—

- (a) any entry or document made, issued, kept or lodged under any Act for or relating to the registry of any instrument respecting or concerning the title to, or any claim upon, any personal property; or,
- (b) any public register or book not hereinbefore mentioned appointed by law to be made or kept, or any entry therein;

is guilty of an indictable offence and liable to fourteen years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as genuine.

*Origin*—Code of 1892, sec. 423; B.S.C. 1886, ch. 165, secs. 7 and 38.

*"Forgery"*—Code sec. 466.

*"Document" defined*—Code sec. 335, sub-sec. (f).

*Corroboration*—Sec. 1002 (c).

*Search warrants*—Code secs. 629-632.

**Forgery of documentary evidence.**

**470.** Every one who commits forgery of,—

- (a) any record of any court of justice, or any document whatever belonging to or issuing from any court of justice or being or forming part of any proceeding therein; or,
- (b) any certificate, office copy, or certified copy or other document which, by any statute in force for the time being, is admissible in evidence; or,
- (c) any document made or issued by any judge, officer or clerk of any court of justice, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act; or,
- (d) any document which any magistrate is authorized or required by law to make or issue; or,

- (e) any entry in any register or book kept, under the provisions of any law, in or under the authority of any court of justice or magistrate acting as such; or,
- (f) any copy of any letters patent, or of the enrolment or enregistration of letters patent, or of any certificates thereof; or,
- (g) any license or certificate for or of marriage; or,
- (h) any contract or document which, either by itself or with others, amounts to a contract, or is evidence of a contract; or,
- (i) any power or letter of attorney or mandate; or,
- (j) any authority or request for the payment of money, or for the delivery of goods, or of any note, bill or valuable security; or,
- (k) any acquittance or discharge, or any voucher of having received any goods, money, note, bill or valuable security, or any instrument which is evidence of any such receipt; or,
- (l) any document to be given in evidence as a genuine document in any judicial proceeding; or,
- (m) any ticket or order for a free or paid passage on any carriage, tramway or railway, or any steam or other vessel; or,
- (n) any document not mentioned in this or the two last preceding sections;

is guilty of an indictable offence and liable to seven years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as genuine.

*Origin*—Code of 1892, sec. 423; R.S.C. 1886, ch. 165, secs. 6, 29, 33, 42 and 76.

*Any "document"*—See definition in sec. 335 (f).

*Corroboration*—Sec. 1002 (c).

A conviction for forgery will be quashed if there is not the corroboration which sec. 1002 requires. *R. v. Magnolo*, 22 B.C.R. 359, 26 Can. Cr. Cas. 419.

*Comparison of handwriting*—See note to sec. 466.

*Jurisdiction of courts*—While a provincial legislature may establish a provincial court of the name and class which under federal law would have jurisdiction to try cases of forgery, it cannot extend the jurisdiction beyond that by pretending to confer such authority to a tribunal other than a superior court of criminal jurisdiction or a court which when established by the province becomes qualified, under the Criminal Code or other federal law dealing with the practice and procedure in criminal matters. *R. v. Toland*, 22 Ont. R. 505; *R. v. Levinger*, 22 Ont. R. 690. And independently of provincial legislation the federal parliament may impose upon existing criminal courts or tribunals constituted by the province the duty of administering any designated branch of the criminal law. *Re Vancini*, 34 S.C.R. 61, 8 Can. Cr. Cas. 228.

*Search warrants*—Code secs. 629-632.

*Second offences*—See secs. 465, 963 and 964.

*Extradition with the U.S.A.*—On the question of the necessity for actual proof that the crime is an extradition crime as well by the laws of the demanding State as of our own, the cases of *In re Murphy*, 26 O.R. 163, 22 A.R. 386, 2 Can. Cr. Cas. 578, and *Rex v. Governor of Holloway Prison, ex parte Siletti* (1902), 87 L.T.R. 332, may be referred to. In the present state of the authorities in Canada, an extradition judge will act with prudence who requires it and does not rest upon presumptions. *Osler, J.A., in re Harsha* (No. 1), 10 Can. Cr. Cas. 433, at 442.

**Machinery, etc., for making exchequer bill paper.—Engraving for bill or note, etc.**

**471.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse, the proof whereof shall lie on him,—

- (a) makes, begins to make, uses or knowingly has in his possession, any machinery or instrument or material for making exchequer bill paper, revenue paper or paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking; or,
- (b) engraves or makes upon any plate or material anything purporting to be, or apparently intended to resemble, the whole or any part of any exchequer bill or bank note; or,
- (c) uses any such plate or material for printing any part of any such exchequer bill or bank note; or,

- (d) knowingly has in his possession any such plate or material as aforesaid; or,
- (e) makes, uses or knowingly has in his possession any exchequer bill paper, revenue paper, or any paper intended to resemble any bill paper of any firm, body corporate, company or person, carrying on the business of banking, or any paper upon which is written or printed the whole or any part of any exchequer bill, or any bank note; or,
- (f) engraves or makes upon any plate or material anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money used by any dominion, colony or possession of His Majesty, or by any foreign prince or state, or by any body corporate or other body of the like nature, whether within His Majesty's dominions or without; or,
- (g) uses any such plate or other material for printing the whole or any part of such bond or undertaking; or,
- (h) knowingly offers, disposes of or has in his possession any paper upon which such bond or undertaking, or any part thereof, has been printed.

*Origin*].—Sec. 434, Code of 1892; R.S.C. 1886, ch. 165, secs. 14-25; 24-25 Vict., Imp., ch. 98.

*Exchequer bill paper*].—See definition in sec. 335 (i).

*Revenue paper*].—Code sec. 335 (p).

*Search warrants*].—Code secs. 629-632.

*Destruction of forged bank notes and bank note paper*].—Code sec. 632.

### *Offences resembling Forgery.*

#### **Counterfeiting government seals.**

**472.** Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully makes or who counterfeits any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion,

possession or colony of His Majesty, or the impression of any such seal, or uses any such seal or impression knowing the same to be so unlawfully made or counterfeited.

*Origin*—Sec. 425, Code of 1892; R.S.C. 1886, ch. 165, sec. 4

*Search warrants*—Code secs. 629-632.

**Counterfeiting seals of courts or registry or burial boards.**

**473.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully makes or who counterfeits any seal of a court of justice, or any seal of or belonging to any registry office or burial board, or the impression of any such seal, or uses any such seal or impression knowing the same to be so unlawfully made or counterfeited.

*Origin*—Sec. 426, Code of 1892; R.S.C. 1886, ch. 165, secs. 35, 38, 43.

**Unlawfully printing counterfeit proclamation.—Tendering same in evidence.**

**474.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who prints any proclamation, order, regulation or appointment, or notice thereof, and causes the same falsely to purport to have been printed by the King's Printer for Canada, or the Government printer for any province of Canada, as the case may be, or tenders in evidence any copy of any proclamation, order, regulation or appointment which falsely purports to have been printed as aforesaid, knowing that the same was not so printed.

*Origin*—Sec. 427, Code of 1892; R.S.C. 1886, ch. 165, sec. 37.

*Second offences*—See secs. 465, 963 and 964.

**Sending telegrams in false names.**

**475.** Every one is guilty of an indictable offence who, with intent to defraud, causes or procures any telegram to be sent or delivered as being sent by the authority of any person knowing that it is not sent by such authority, with intent that such telegram should be acted on as being sent by that person's authority, and is liable, upon conviction thereof, to the same

punishment as if he had forged a document to the same effect as that of the telegram.

*Origin*—Sec. 428, Code of 1892.

*“Telegram”*—The word “telegram” as a derivative of the word “telegraph” is not to be deemed to include the word “telephone” or its derivatives. R.S.C. 1906, ch. 1, sec. 36.

In a civil action it has been held that before the received copy of a telegram can be put in evidence it must be proved that the original dispatched copy was lost or destroyed. *Adamson v. Vachon*, 3 W.W.R. 227, 22 W.L.R. 494. The production of the received copy alone is not legal proof that the person in whose name it purports to have been sent did sign or send the telegram, where the telegraph agent is called and deposes that he had no recollection of the original, but if it ever existed it would have been destroyed in the customary way after a short period. *Adamson v. Vachon*, supra.

*Locality of the offence*—The courts of the province from which the telegram is dispatched have jurisdiction; *R. v. Galloway*, 2 Alta. L.R. 258, 15 Can. Cr. Cas. 317. And it seems that the courts of the province in which the telegram was caused to be delivered by the defendant's act elsewhere would likewise have jurisdiction in case the defendant were afterwards found and apprehended there. See Code sec. 388, and *R. v. Galloway*, 2 Alta. L.R. 258, 15 Can. Cr. Cas. 317.

*With intent to defraud*—The word “defraud” as used in sec. 475, Code, implies something to the prejudice of the financial or proprietary rights of the party defrauded. *R. v. Galloway*, 2 Alta. L.R. 258, 15 Can. Cr. Cas. 317.

In that case the prisoner sent from Banff, Alberta, to Maizie McGregor (not the informant), at Prince Albert, Sask., the following telegram: “Get letter at Clayton Hotel, Regina. Come immediately. Ernest thrown from horse this morning. Not serious. Have to stay here a week. (Signed), A. H. Matheson.” It was shown that this telegram was signed without Matheson's authority. The statements in the telegram were true. Its purpose was to have the person to whom the telegram was sent meet the accused at Banff instead of at Regina. It was held that it would be impossible to establish an intent to defraud from the sending of the telegram, and as the intent to defraud is an essential element of offence alleged, the prisoner was discharged. *R. v. Galloway*, 2 Alta. L.R. 258, 15 Can. Cr. Cas. 317.

*Second offences*—See secs. 465, 963 and 964.

*Forgery*—As to forgery generally, see Code sec. 470, paragraph (\*), and as to records, official and commercial documents, see secs. 468 to 470 inclusive.

**Sending false telegrams or letters with intent to injure or alarm.**

**476.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to injure or alarm any person, sends, causes, or procures to be sent any telegram or letter or other message containing matter which he knows to be false.

*Origin*—Sec. 429, Code of 1892.

*"Or other message"*—Query whether a message not reduced to writing would be included under the *ejusdem generis* rule.

*Second offences*—See secs. 465, 963 and 964.

**Drawing document without authority.**

**477.** Every one is guilty of an indictable offence who, with intent to defraud and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, by procuration or otherwise, any document, or makes use of or utters any such document knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document.

*Origin*—Sec. 431, Code of 1892; R.S.C. 1886, ch. 165, sec. 30.

*Without lawful authority or excuse*—R. v. Weir (No. 2), 3 Can. Cr. Cas. 155; R. v. Weir (No. 5), 9 Que. Q.B. 253, 3 Can. Cr. Cas. 431; Morison v. London County & Westminster Bank [1914] 3 K.B. 356, 83 L.J.K.B. 1202.

*With intent to defraud*—The fraudulent intent must be alleged in the indictment or charge. R. v. Weir (No. 5), 9 Que. Q.B. 253, 3 Can. Cr. Cas. 431.

*Second offences*—See secs. 465, 963 and 964.

*Forgery*—As to forgery generally, see Code sec. 470, paragraph (n), and as to records, official and commercial documents, see secs. 468 to 470 inclusive.

**Obtaining anything by forged instrument or by probate of forged will.—Attempt.**

**478.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) demands, receives, or obtains anything, or causes or procures anything to be delivered or paid to any person, under, upon, or by virtue of any forged



instrument, knowing the same to be forged, or under, upon, or by virtue of any probate or letters of administration, knowing the will, codicil or testamentary writing on which such probate or letters of administration were obtained to be forged, or knowing the probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, or

(b) attempts to do any such thing as aforesaid.

*Origin*—Sec. 432, Code of 1892; R.S.C. 1886, ch. 165, sec. 45; 24-25 Vict., Imp., ch. 98, sec. 38.

*Obtaining something by forged instrument with knowledge of the forgery*—In an English case the prisoner was indicted under sec. 7 of the Forgery Act, Imp., 1913, for obtaining certain money by means of "a certain forged instrument, to wit, a forged request for the payment of one pound." The document in question was a letter purporting to come from, and to be signed by a man employed by, the prosecutor to whom it was addressed. The letter requested the prosecutor to hand to the bearer the sum of 1l. which the letter stated was required for the purpose of hiring a machine with which to clear out a drain on premises belonging to the prosecutor. It was held that the letter was an "instrument" within the meaning of sec. 7 of that statute. *Rex v. Cade* [1914] 2 K.B. 209; 83 L.J.K.B. 796; 10 Cr. App. B. 23; *R. v. Riley* [1896] 1 Q.B. 309, followed.

**Counterfeiting stamp.**—*Making, etc., die for same.*

**479.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) fraudulently counterfeits any stamp, whether impressed or adhesive, used for the purposes of revenue by the Government of the United Kingdom or of Canada, or by the government of any province of Canada, or of any possession or colony of His Majesty, or by any foreign prince or state; or,
- (b) knowingly sells or exposes for sale, or utters or uses any such counterfeit stamp; or,
- (c) without lawful excuse, the proof whereof shall lie on him, makes, or has knowingly in his possession, any die or instrument capable of making the impression of any such stamp as aforesaid, or any part thereof; or,

- (d) fraudulently cuts, tears or in any way removes from any material any such stamp, with intent that any use should be made of such stamp or of any part thereof; or,
- (e) fraudulently mutilates any such stamp with intent that any use should be made of any part of such stamp; or,
- (f) fraudulently fixes or places upon any material, or upon any stamp aforesaid, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any other way removed from any other material or out of or from any other stamp; or,
- (g) fraudulently erases, or otherwise, either really or apparently, removes, from any stamped material any name, sum, date, or other matter or thing thereon written, with the intent that any use should be made of the stamp upon such material; or,
- (h) knowingly and without lawful excuse, the proof whereof shall lie upon him, has in his possession any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise, either really or apparently, removed; or,
- (i) without lawful authority makes or counterfeits any mark or brand used by the Government of the United Kingdom of Great Britain and Ireland, the Government of Canada, or the Government of any province of Canada, or by any department or officer of any such Government for any purpose in connection with the service or business of such Government, or the impression of any such mark or brand, or sells or exposes for sale or has in his possession any goods having thereon a counterfeit of any such mark or brand knowing the same to be

a counterfeit, or affixes any such mark or brand to any goods required by law to be marked or branded other than those to which such mark or brand was originally affixed.

*Origin*—Sec. 435, Code of 1892; R.S.C. 1886, ch. 165, sec. 17; Stamp Duties Act 1891, Imp., 54-55 Vict., ch. 38; Stamp Act, 1891, Imp., 54-55 Vict., ch. 39; Post Office Protection Act, 1884, Imp., sec. 7.

*Stamp forgeries*—Forged cancelled stamps were held to be included in the penal clauses of the Stamp Duties Management Act, 1891 (Imp.), in a case where supposed cancelled one-pound postage stamps were sold for stamp collections, and both the stamps and the obliteration were forged. *R. v. Lowden* (1913), 9 Cr. App. R. 195.

On a prosecution under the Post Office Protection Act (Imp.), 1884, sec. 7 (c), for having in possession "without lawful excuse" a die for making a fictitious stamp, it appeared by the evidence that the defendant was the proprietor of a newspaper circulating among stamp collectors, and had caused a die to be made for him abroad, from which imitations of a current colonial postage stamp could be made. The only purpose for which he had actually used it was for making on an illustrated catalogue illustrations in black and white, and not in colors of the stamp in question. This catalogue was sold as part of his newspaper. On a case stated by a magistrate as to whether this evidence showed "a lawful excuse," *Grantham and Collins, JJ.*, were unanimous that it did not, and that the defendant was liable under the Act. *Dickins v. Gill* [1896] 2 Q.B. 310, 18 Cox 384.

*Search warrants*—Code secs. 629-632.

*Destruction of counterfeits illegally held in possession*—Code sec. 632.

**Injuring register of births and deaths.—Making false entry in same.**

**480.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) unlawfully destroys, defaces or injures any register of births, baptisms, marriages, deaths or burials required or authorized by law to be kept in Canada, or any part thereof, or any copy of such register, or any part thereof required by law to be transmitted to any registrar or other officer; or,
- (b) unlawfully inserts in any such register, or any such copy thereof, any entry, known by him to be false, of any matter relating to any birth, baptism, marriage, death or burial, or erases from any such register or document any material part thereof.

*Origin*—Sec. 436, Code of 1892; R.S.C. 1886, ch. 165, secs. 43, 44.

*Defacing or injuring registers of births, marriages or deaths*—A register is none the less defaced or injured because when produced in court the torn part has been pasted in and is as legible as before the offence. *R. v. Bowen* (1844), 1 Cox C.C. 88, 1 Den. 22.

A person who knowing his name to be A. signs another name as a witness to a marriage in an authorized register, is guilty of the offence of inserting a false entry in the register although he so signs as a third witness and two only were required by law. *R. v. Asplin* (1873), 12 Cox C.C. 391.

Where the false entry is actually made on the information of and at the instance of the accused, he is guilty of the offence of inserting the entry in the register and not merely of making a false statement for that purpose. *R. v. Mason* (1848), 2 C. & K. 622; *R. v. Dewitt* (1849), 2 C. & K. 905.

The offence of making false statements as to births, marriages and deaths in the particulars required for registration is controlled by provincial law.

**False certificate of copy.—Fraudulently concealing register.—Permitting concealment.**

**481.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who,—

- (a) being a person authorized or required by law to give any certified copy of any entry in any register in the last preceding section mentioned, certifies any writing to be a true copy or extract, knowing it to be false, or knowingly utters any such certificate; or,
- (b) unlawfully and for any fraudulent purpose takes any such register or certified copy from its place of deposit or conceals it; or
- (c) being a person having the custody of any such register or certified copy, permits it to be so taken or concealed.

*Origin*—Sec. 437, Code of 1892; R.S.C. 1886, ch. 165, sec. 44.

*Second offences*—See secs. 465, 963 and 964.

**False certificate of entry.—Of particulars in register.—Uttering false copy of record.—False signature.**

**482.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who,—

- (a) being by law required to certify that any entry has

- been made in any such register makes such certificate knowing that such entry has not been made; or,
- (b) being by law required to make a certificate or declaration concerning any particular required for the purpose of making entries in such register, knowingly makes such certificate or declaration containing a falsehood; or,
  - (c) being an officer having custody of the records of any court, or being the deputy of any such officer, wilfully utters a false copy or certificate of any record: or,
  - (d) not being such officer or deputy fraudulently signs or certifies any copy of certificate of any record, or any copy of any certificate, as if he were such officer or deputy.

*Origin*—Sec. 438, Code of 1892; R.S.C. 1886, ch. 165, secs. 35, 43.

*"Required for the purpose," etc.*—Under the English Perjury Act, 1911, which refers to the making of a false certificate under or for the purpose of any Act relating to the registration of births and deaths, a conviction was upheld where the false certificate purported to be made under the Act respecting registration and if valid could be used under that Act, but was not so used, the same being supplied directly to a life insurance company upon a claim under the policies. *R. v. Ryan* (1914), 10 Cr. App. B. 4.

*Second offences*—See secs. 465, 963 and 964.

**Knowingly certifying false copy by official.—False signature.**

**483.** Every one is guilty of an indictable offence and liable to two years' imprisonment who,—

- (a) being an officer required or authorized by law to make or issue any certified copy of any document or of any extract from any document, wilfully certifies, as a true copy of any document or of any extract from any such document, any writing which he knows to be untrue in any material particular; or,
- (b) not being such officer as aforesaid fraudulently signs or certifies any copy of any document, or of any extract from any document, as if he were such officer.

*Origin*—Sec. 439, Code of 1892.

*Second offences*—See secs. 465, 963 and 964.

**False entry in Government account books.—Transfer by person other than owner.**

**484.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to defraud,—

- (a) makes any untrue entry or any alteration in any book of account kept by the Government of Canada, or of any province of Canada, or by any bank for any such Government, in which books are kept the accounts of the owners of any stock, annuity or other public fund transferable for the time being in any such books, or who, in any manner, wilfully falsifies any of the said books; or,
- (b) makes any transfer of any share or interest of or in any stock, annuity or public fund, transferable for the time being at any of the said banks, in the name of any person other than the owner of such share or interest.

*Origin*—Sec. 440, Code of 1892; R.S.C. 1886, ch. 165, sec. 11.

**False dividend warrants.**

**485.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being in the employment of the Government of Canada, or of any province in Canada, or of any bank in which any books of account mentioned in the last preceding section are kept, with intent to defraud, makes out or delivers any dividend warrant, or any warrant for the payment of any annuity, interest or money payable at any of the said banks, for an amount greater or less than that to which the person on whose account such warrant is made out is entitled.

*Origin*—Sec. 441, Code of 1892; R.S.C. 1886, ch. 165, sec. 12.

*Second offences*—See secs. 465, 963 and 964.

*Forgery of Trade Marks and Fraudulent Marking of Merchandise.*

**Forgery of trade mark defined.**

**486.** Every one is deemed to forge a trade mark who either,—

- (a) without the assent of the proprietor of the trade mark

makes that trade mark or a mark so nearly resembling it as to be calculated to deceive; or,

(b) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

2. Any trade mark or mark so made or falsified is, in this Part, referred to as a forged trade mark.

*Origin*—Sec. 445, Code of 1892; 51 Vict., Can., ch. 41, sec. 3; 50-51 Vict., ch. 28.

*“Trade-mark” defined*—Code sec. 335, sub-sec. (s), declares that “‘trade mark’ means a trade mark or industrial design registered in accordance with the Trade Mark and Design Act, and the registration whereof is in force under the provisions of the said Act, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of sec. 103 of the Act of the United Kingdom, known as The Patents, Designs and Trade Marks Act, 1883, are, in accordance with the provisions of the said Act, for the time being applicable.”

A very similar definition contained in the Newfoundland statutes (Newfoundland Trade-Marks Act, C.S. 2nd series, ch. 112, sec. 2) came up for review by the Privy Council in *Imperial Tobacco Co. v. Duffy* (1918), 87 L.J.P.C. 50, and it was there held that the words “to which the provisions of sec. 103, etc.” referred back to the words “British possession or foreign state” (the last antecedent), and not to the word “trade-mark.” *Imperial Tobacco Co. v. Duffy* (1918), 87 L.J.P.C. 50 at 51.

A British Order-in-Council, passed in 1887 under the Imperial Act of 1883 (46-47, Vict. Imp. ch. 47, sec. 4), declared that the provisions of sec. 103 should be applicable to the United States. *Imperial Tobacco Co. v. Duffy*, *supra*.

*Punishment for forging a trade-mark*—Code sec. 488.

*Offence of falsely applying a trade-mark*—Code secs. 487, 488.

*Contesting validity of trade-mark*—It is well settled that in an action for infringement of a trade-mark it is open to the defendant to show by way of defence that the plaintiff has no legal title to the exclusive use of the trade-mark that he has registered. The defendant is not driven to an application to remove the trade-mark from or to rectify the register. This was decided by the Supreme Court of Canada in *Partlo v. Todd*, 17 S.C.R. 196, with reference to the Trade-Marks Act as it then stood, and by the Ontario Court in *Provident Chemical Works v. Canada Chemical Manufacturing Co.*, 4 O.L.R. 545, after subsequent amendments made to the statute. *R. v. Cruttenden*, 10 Can. Cr. Cas. 223 at 227; and see *Spilling v. O’Kelly*, 8 Can. Exch. R. 426.

The certificate of registration of a trade-mark under the Canadian Act is only *prima facie* evidence, and it was open to the defendant in

an infringement suit to show that the plaintiff was not the proprietor of a trade-mark when he registered, and that what he had registered was not capable of registration as a trade-mark for the exclusive use of the party registering. In other words, that mere registration did not create a trade-mark, but that before registration the party seeking to register must have acquired the proprietorship of the mark, name, brand, label, package or other business device which he procured to be registered for his exclusive use; and that the register or certificate of registration was not conclusive, and did not preclude a defendant from impeaching a plaintiff's right or title. *Partlo v. Todd*, 17 S.C.R. 196; *Partlo v. Todd*, 17 S.C.R. 196, 14 A.R. 444 (Ont.); *Provident Chemical Works v. Canada Chemical Co.*, 4 O.L.R. 545; *McCall v. Theal*, 28 Gr. 48 (Ont.).

The term "proprietor of a trade-mark" means a person who has appropriated and acquired a right to the exclusive use of the mark, and where a party has a trade-mark he can institute no proceedings to prevent its infringement until and unless such trade-mark is registered in pursuance of the Act; but this by no means implies that one man can copy and register a trade-mark belonging to another or a trade-mark in common use. *Partlo v. Todd*, 17 S.C.R. 196. Chief Justice Ritchie there cited with approval the following dictum of Lord Westbury in *McAndrew v. Bassett* (1864), 33 L.J. Ch. 567; 4 DeG. J. & S. 384: "The essential qualities for constituting that property (property in a trade-mark) probably would be found to be no other than these: First, that the mark has been applied by the plaintiffs properly (that is to say), that they have not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description."

It would be a valid defence to prove that the label constituting the trade-mark in question had been used by the defendant and others prior to the registration of the trade-mark by plaintiff. *Fafard v. Ferland*, 6 Que. P.R. 119.

The Canadian Trade-Mark Act provides that a mark adopted for use by any person in his trade for the purpose of distinguishing his goods may be registered for his exclusive use, and it is clear that one may adopt a mark without first using it. *Spilling Bros. v. Ryall*, 8 Can. Exch. R. 195. The registration must, of course, in such a case be followed by use, if the proprietor wishes to retain his right to the trade-mark. In that respect there is no difference between the law of Canada and the law of England. *Ibid.* Nor is it an objection to the validity of the registration of the plaintiffs' trade-mark that the application or declaration on which it was obtained was not signed by the plaintiffs personally, but by their attorneys or agents. *Spilling Bros. v. Ryall*, *supra*.



*Prior use outside of Canada*—A person may have a valid trade-mark in one country and yet be prohibited from extending its use into another country in which another person had obtained and used in good faith a valid registered trade-mark of a similar kind in ignorance of the use of the mark elsewhere. *Imperial Tobacco Co. v. Duffy* (1918), 87 L.J.P.C. 50; *Smith v. Fair*, 14 Ont. R. 729; and see *Spilling Bros. v. Ryall*, 8 Can. Exch. R. 195; *Berliner v. Knight*, 1883, W.N. 70 (Eng.).

If by laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for anyone to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. *Gorham Manufacturing Company v. Ellis*, 8 Can. Exch. R. 401.

Prior user by others outside of Canada and not extending to Canada will not disentitle the first person applying the mark in Canada as a trade-mark and registering same there, to the exclusive use of same in Canada. *Templeton v. Wallace*, 4 Terr. L.R. 340.

It has been held that acquiescence by the owner of a "fancy word" trade-mark in the United States in the use of a similar word there as applied to a different class of goods may be set up in answer to an infringement action brought in Canada for the similar use of same. *Lambert Pharmacal Co. v. Palmer*, 39 Que. S.C. 64, 21 Que. K.B. 451.

That was a case where the different class of goods belonged to the same line of trade. If the goods were in another line of trade, it seems clear that the use of a trade mark in one line of trade will not prevent its adoption by another person in another and entirely distinct trade. *Lambert Pharmacal Co. v. Palmer*, *supra*.

*Trade-mark so nearly resembling as to be "calculated to deceive"*—Where the plaintiffs show an actual copying of their registered trade-mark they are not required to go further. The Act gives them the exclusive right to use the trade-mark to designate the article manufactured or sold by them; and the defendants cannot, either knowingly or innocently, infringe upon that right. *Provident Chemical Works v. Canada Chemical Co.*, 4 O.L.R. 545; *Slater v. Ryan*, 17 Man. R. 89. Under the English Act the same rule prevails: *Edwards v. Dennis* (1885), 30 Ch. D. 454, at p. 471; *Lambert v. Goodbody* (1902), 18 Times L.R. 394.

The object of the legislation is to protect the owners of trade-marks so as to secure to them the benefit of the money and time which they have expended in building up a market for their own goods, and to do this the Legislature must protect them with respect not to the intelligent and wary purchaser, but to the unwary one. *R. v. Authier*, 6 Que. Q.B. 146; *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H.L.C.

p. 539; *Wotherspoon & Currie* (1872), L.R. 5 E. & I. App. 519. The magistrate trying a charge of selling goods falsely marked is entitled to examine the alleged infringement and form a conclusion as to whether the resemblance was sufficient between the two labels used in the way they were to justify a finding that the defendant's label is calculated to deceive. *R. v. Authier*, 6 Que. Q.B. 146.

In deciding whether a trade-mark so resembles another as to be calculated to deceive, visual resemblance is not necessarily the only thing to be considered; the possibility of confusion to the ear may also be an element. *Doran v. Hogadore*, 11 O.L.R. 321.

It may appear that there was a likelihood of deception from the general design and appearance although the prominent words of a label were different. *Anheuser Busch Brewery Association v. Edmonston B. & M. Co.*, 15 W.L.R. 421 (Alta.); *Re Gutta Percha Co.* [1909] 2 Ch. 10.

Corruptions of words merely descriptive of the goods are not the subject of exclusive use as trade-marks. *Kirstein v. Cohen*, 39 S.C.R. 286, affirming 13 O.L.R. 144, 11 O.L.R. 50.

There may be an infringement in the use by a company of an abbreviation of its own corporate name applied to their goods when such abbreviation is so like the registered trade-mark of a competitor as to be calculated to deceive. *Boston Rubber Shoe Co. v. Boston Rubber Co. of Montreal*, 32 S.C.R. 315.

If the trade-mark proposed to be registered under the Canadian Trade-Mark Act so resembles one already on the register that the owner of the latter is liable to be injured by the former being passed off as his, then a case is presented in which the proposed trade-mark is calculated to deceive or mislead the public. *Re Gutta Percha Co.* [1909] 2 Ch. 10. Whenever the resemblance between two trade-marks is such that one person's goods are sold as those of another, the result is that the latter is injured and some one of the public is misled. To prevent these things from happening, Parliament has given the Minister of Agriculture a discretion to refuse to register a trade-mark proposed for registration where it is identical with or resembles a trade-mark already registered. He may refer the question to the Exchequer Court of Canada, in which event that Court will exercise its discretion and determine the matter upon the same principles as should guide the Minister in the exercise of his discretion. *Re Melchers and De Kuyper* (1898), 6 Can. Exch. R. 82.

It does not follow that because the person objecting to the registration of a trade-mark could not get an injunction against the applicant the latter is entitled to put his trade-mark on the register. *Re Speer* (1887), 55 L.T. 880; in *re The Australian Wine Importers, Ltd.*, L.R. (1889), 41 Ch. Div. 278. With reference to the exercise by the Comptroller of the discretion given him by The Patents, Designs and Trade-Marks Act, 1883, Imp., to register or to refuse to register a

trade-mark, the House of Lords has held that he ought to refuse registration where it is not clear that deception may not result. *Eno v. Dunn* (1890), 15 App. Cas. 252; see also *In re Trade-mark of John Dewhurst & Sons, Lt.* [1896] 2 Ch. D. 137. And that should be followed in disposing of applications made under the Canadian Act. *Re Melchers and De Kuyper*, 6 Can. Exch. R. 82.

A trade word used as descriptive of goods may become so well known as to found a civil action for an injunction to restrain the passing off of goods so similarly marked as to be calculated to deceive, although the trade word may not constitute a valid trade-mark. *Vineberg v. Vineberg*, 23 Que. K.B. 256; and see *Standard Sanitary Mfg. Co. v. Standard Ideal Co.* [1911] A.C. 78; *Gramm v. Fisher Motor Co.*, 30 O.L.R. 1, 5 O.W.N. 449; *Anheuser Busch Brewery Asscn. v. Edmonton B. & M. Co.*, 15 W.L.R. 421 (Alta.).

A trade word, although afterwards registered as a trade-mark, does not lose the protection which it had previously acquired; so if the mark had already acquired a meaning referable only to the manufacturer's goods of a particular class, he may be entitled to restrain the use of that word in the advertising of competitive goods although not applied by the competitor to the goods themselves or to any package containing it (*Trade-Mark Act*, R.S.C. 1906, ch. 71, sec. 5). *United States Playing Card Co. v. Hurst* (1917), 39 O.L.R. 249.

For civil cases dealing with the words "calculated to deceive" see *Cording v. Cording* (1916), 85 L.J. Ch. 742, affirming *re Cording* [1916] 1 Ch. 422; *re Waide*, 33 R.P.C. 320; *Boord v. Bagots* [1916] 2 A.C. 382; *re Maeder* [1916] 1 Ch. 304; *re Roskill*, 85 L.J. Ch. 301; *Prest-O-Lite Co. v. People's Gas Supply Co.*, 55 S.C.R. 440; *Canadian Gossard Co. v. Dominion Corset Co.*, 14 O.W.N. 164; *Radam v. Shaw*, 28 Ont. R. 612, distinguishing *Davis v. Harbord*, 15 A.C. 316; *Davis v. Kennedy*, 13 Gr. 523 (Ont.); in *re Crook's trade-mark*, 31 R.P.C. 79, 30 Times L.R. 245; *re Texas Co.*, 31 R.P.C. 53, 32 R.P.C. 442; *re Dubonnet*, 31 R.P.C. 453; *re Sandow*, 31 R.P.C. 196, 30 Times L.R. 394; *Tokalon v. Davidson*, 32 R.P.C. 133; *re Imperial Tobacco Co.* [1915] 2 Ch. 27; *In re Hopkinson's Trade-Marks* [1892] 2 Ch. 120-2; *Powell v. Birmingham Vinegar Brewing Co.* [1896] 2 Ch. 54; *Reddaway v. Banham* [1896] A.C. 199; *Saxlehner v. Apollinaris Co.* [1897] 1 Ch. 893.

*General or specific trade-mark*—A trade-mark under the Canadian Trade-Mark and Design Act, R.S.C. 1906, ch. 71, is either general or specific. A general trade-mark is one applicable to all the articles of trade in which a person deals; a specific trade-mark is one limited to a particular class of goods. *Re Noelle*, 13 E.L.R. 366.

*What may be registered as a trade-mark*—In *Cellular Clothing Company v. Maxden* (1899), 68 L.J.P.C. 74, it was held that "a trader who selects an invented name for the purposes of distinguishing his goods from those of other traders is entitled to be protected in the use of the sign which he has chosen. In such a case the mere fact of

the use of the arbitrary sign by a rival trader raises presumption of a design to pass off his goods under false colours, which it is not easy to displace." This was quoted with approval in *Vive Camera Co. v. Hogg*, 18 Que. S.C. 1.

It has been held that the name of a comic section of a newspaper is not registrable as a trade-mark. *N.Y. Herald Co. v. Ottawa Citizen Co.*, 41 S.C.R. 229 (the "Buster Brown" case).

Corruptions of words descriptive of the goods are no more registrable than descriptive words. *Kirstein v. Cohen*, 39 S.C.R. 286.

An unregistered trade-mark is only entitled to protection where there is unfair or fraudulent competition, and damage is shown to have been caused to the proprietor of such mark. *Pabst Brewing Co. v. Ekers*, and *Canadian Breweries, Ltd.*, 21 Que. S.C. 545.

The Trade-Mark and Design Act, Can., has not the effect of giving to a person who has caused to be registered as a trade-mark under the said first-mentioned Act a word which, as a matter of fact, is not a name adopted by him for the purpose of distinguishing any manufactured product or article manufactured, produced, compounded, packed or offered for sale by him, but is a descriptive adjective applicable to and descriptive of all goods of a certain quality or character, an exclusive right to the use of said word in such manner as to prevent other manufacturers of, or dealers in, goods of a like quality or character from truthfully describing the goods so manufactured or dealt in by them as having the said quality or character, or of preventing such other manufacturers or vendors when sued for infringement of the trade-mark so registered from pleading in answer to and as a defence to said action that such word is such descriptive adjective and correctly described the goods manufactured or dealt in by them, and their right to use it as so describing said goods. *Partlo v. Todd* (1888), 17 S.C.R. 197; *Asbestos Co. v. Sclater*, 18 Que. S.C. 324, affirmed 10 Que. K.B. 165.

*Individual names as trade-marks*

The name of an individual may be registered as a specific trade-mark in Canada if it be established that there had been such long user, in all the principal countries of the world, of the name as applied to the manufacture of certain goods as to give it a distinctive or secondary meaning. *Re Elkington's Trade-mark*, 11 Can. Exch. R. 293; *re Wedgwood & Sons Trade-mark*, 12 Can. Exch. R. 417; *re Horlick*, 35 D.L.R. 516; *Palmer v. Palmer-McLellan Shoe Pack Co.*, 45 N.B.R. 8; *Russia Cement Co. v. LePage*, 14 B.C.R. 317; R.S.C. 1906, ch. 71, sec. 5.

Where a secondary meaning has been acquired by long user of a surname as a trade-mark, others of the same surname must distinguish their goods in marking competitive products. *Palmer v. Palmer-McLellan Co.*, *supra*; *Russia Cement Co. v. LePage*, 14 B.C.R. 317.

*Label as a trade-mark of combined features*

The Canadian Trade-Mark Act authorizes the registration of a label as a trade-mark. In such case it would appear requisite that the label

should, in analogy with the general law of trade-marks, have a distinctive character. It would be only thus that the person could be said to be proprietor of it. *De Kuyper v. Van Dulken*, 24 S.C.R. 114. In the case of a label registered as a trade-mark the trade-mark does not lie in each particular part of the label; per Lord Esher in *Pinto v. Badman* (1891), 8 Cutler Pat. Cas. 181; but in the combination of them all. *De Kuyper v. Van Dulken*, supra.

*Limitation of privilege to same general class to which mark is applied by owner]*

The protection of a trade-mark, if not limited to the particular class of goods to which it is applied by the holder, is limited to goods of the same general class; the holder would have no right to restrain the use of the same mark by another in an entirely distinct and non-competitive line of trade. *Lambert Pharmacal Co. v. Palmer*, 21 Que. K.B. 451.

In a Territories case it was said that it would be unreasonable to hold that because a certain person had acquired the right to use a certain name in connection with pills for the cure of a certain complaint, no other person could acquire the exclusive right to use that name in connection with pills for the cure of any other ailment. *Templeton v. Wallace* (1900), 4 Terr. L.R. 340, per Scott, J.

*Conflicting trade names]*

Persons who have properly used a surname as a trade name and have established it in their business may be entitled to an injunction restraining the competitive use of the name by others who cannot claim to justify on the ground of its being their personal name. *Gramm Motor Truck Co. v. Fisher Motor Co.* (1913), 30 O.L.R. 1; *Kingston v. Kingston* (1912), 29 R.P.C. 289; *Lloyd's v. Lloyd's* (1912), 29 R.P.C. 433; *Facsimile Letter Printing Co. v. Facsimile Typewriting Co.* (1912), 29 R.P.C. 557; *Mickelson v. Kill-Em-Quick Co.* [1918] 1 W.W.R. 781 (Man.); *Singer Mfg. Co. v. Charlebois*, 16 Que. S.C. 167; *Singer v. Loog*, 8 A.C. 15.

Descriptive words have never been recognized as appropriate for use as trade-marks. *Registrar v. Du Cros* [1913] A.C. 624, 83 L.J. Ch. 1; *Imperial Tobacco Co. v. De Pasquali* (1918), 87 L.J. Ch. 293, 300. In England names became registrable for the first time under the Trade-Marks Act, 1905, Imp., 5 Edw. VII, ch. 15, but only if distinctive, and they could not be deemed distinctive under that Act without an order of the Board of Trade or the Court. *Imperial Tobacco Co. v. De Pasquali*, supra. This restriction does not apply to marks consisting of a letter or combination of letters, but before such a mark can be accepted in England the Registrar of Trade-Marks or the Court has to be satisfied that it is adapted to distinguish the goods of the applicant from those of others. It need not necessarily be so adapted, and whether it is or is not so adapted appears to depend largely on whether other traders are or are not likely to desire in the ordinary course of

their business, to make use in connection with their goods of the particular letter or letters constituting the mark. *Registrar v. Du Cros*, 83 L.J. Ch. 1 [1913] A.C. 624, per Lord Parker; *Imperial Tobacco Co. v. De Pasquali* (1918), 87 L.J. Ch. 293, 300.

*Describing quality or ingredient]*

Ordinary words descriptive of quality only, and which therefore could not acquire a secondary meaning, do not constitute a valid trade-mark. *Bowker Fertilizer Co. v. Gunns, Limited*, 16 Can. Exch. R. 520; *Kops v. Dominion Corset Co.*, 15 Can. Exch. R. 18; *Gillett v. Lumsden*, 4 O.L.R. 300; *Gillett v. Lumsden* [1905] A.C. 601; *Partlo v. Todd*, 14 A.R. 444 (Ont.); *Partlo v. Todd*, 17 S.C.R. 196 (Can.); *Provident Chemical Works v. Canada Chemical Co.*, 2 O.L.R. 182; *Dominion Flour Mills Co. v. Morris*, 25 O.L.R. 561, 21 O.W.R. 540; *Cellular Clothing Co. v. Maxton* [1899] A.C. 326.

It would seem that it would not be an offence to name an actual ingredient as part of the mark on an article although long-continued user by another may have made the descriptive term distinctive, so long as there is no colourable imitation of the whole thing and the character and form of the label is completely distinguished. *Gillett v. Lumsden*, 4 O.L.R. 300; *Gillett v. Lumsden* [1905] A.C. 601; *re Smokeless Powder Co.* [1892] 1 Ch. 194; *Raggett v. Findlater*, L.R. 17 Eq. 29; *Turton v. Turton*, 42 Ch. D. 147.

*Geographical names with secondary meaning]*

A geographical description as applied to an article made or sold in a particular district, which may be applied truthfully by other makers or dealers, cannot usually be regarded as entitled to protection as a trade-mark. The reason of this rule is this, that a generic name is not to be used in reference to such an article, where every person residing within the particular place or district is equally entitled to its use, the design of the law being not to foster monopolies. *Rose v. McLean Publishing Co.*, 24 A.R. 240 (Ont.). In such cases it would be necessary as in the *Glenfield Starch Case* (*Wotherspoon v. Currie* (1872), L.R. 5 H.L. 508), to show that it had acquired a secondary meaning; that in connection with the particular manufacture, in other words, it had become the trade denomination of the article made; but where a name, though generic and geographical, does not indicate the composition or quality of the specific article to which it is applied, or the particular country or district where produced or manufactured, the rule does not apply. *Rose v. McLean Pub. Co.*, *supra*, per Burton, J. A.

A geographical name may by long user acquire a secondary meaning and so constitute a good trade-mark, and may in such event be registered under the Canadian Trade-Marks Act, R.S.C. 1906, ch. 71. *Canada Foundry Co. v. Bueyrus Co.*, 47 S.C.R. 484, affirming *Bueyrus v. Canada Foundry Co.*, 14 Can. Exch. R. 35; and see *re National Starch application* [1908] 2 Ch. 698; *Grand Hotel Co. v. Wilson* [1904] A.C. 103; *Montgomery v. Thompson* [1891] A. C. 217; *Wotherspoon v. Currie*, L.R. 5

H.L. 508. Where the mineral waters of the appellant derived from various Caledonia springs, so called from being in a township of that name, acquired in the market the name of "Caledonia Water;" and the respondents having discovered other springs in the same township, sold their goods as "from new springs at Caledonia;" it was held, in an action for an injunction, that the appellants had not, in those circumstances, a right to the exclusive use of the word "Caledonia." The respondents were entitled to indicate the local source of their waters, and had sufficiently distinguished their goods from those of the appellants. *Grand Hotel Co. v. Wilson* [1904] A.C. 103, affirming 5 O.L.R. 145.

*Assignability of trade-marks*—A trade-mark is assignable only in connection with the good-will of the business, general or specific, in which the trade-mark has been used. *Gegg v. Bassett*, 3 O.L.R. 405. It is not assignable in gross. *Ibid.*; and see *Robin v. Hart* (1891), 23 N.S.R. 316; *Rickart v. Britton Mfg. Co.*, 3 O.W.N. 1272, 22 O.W.R. 81. Ordinarily the sale of a business and the good-will will pass the right to use the trade-marks of that business. *Re Roger*, 12 R.P.C. 149; *Currie v. Currie*, 15 R.P.C. 339; *Robin v. Hart*, 23 N.S.R. 316; *Smith v. Fair*, 14 Ont. R. 729.

There may be circumstances under which a transfer by persons using in the United States a trade-mark in connection with their business there of the right to use the mark in Canada in which they had not established any trade may be viewed as a transfer of the good-will in the prospective Canadian trade, but apart from that the assignee would establish his right to use the mark if he could prove that it was not used by any person in Canada when he adopted it. *Smith v. Fair*, 14 Ont. R. 729.

*Onus of proof of license by proprietor*—By Code sec. 488, sub-sec. (2), on a prosecution for forging a trade-mark the burden of proof of the assent of the proprietor shall lie on the defendant.

*Selling goods which have a forged trade-mark*—Code sec. 489.

*Forgery of trade-marks and fraudulent marking of merchandise*—See secs. 335-337, 341, 342, 486-495, 635, 1039, 1040.

**What is applying a trade mark or trade description.**

**487.** Every one is deemed to apply a trade mark, or mark, or trade description to goods who,—

- (a) applies it to the goods themselves; or,
- (b) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade or manufacture; or,

- (c) places, incloses or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade or manufacture in, with or to any covering, label, reel, or other thing to which a trade mark or mark or trade description has been applied; or,
- (d) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description.

2. A trade mark or mark or trade description is deemed to be applied whether it is woven, impressed or otherwise worked into, or annexed or affixed to, the goods, or to any covering, label, reel, or other thing.

3. Every one is deemed to falsely apply to goods a trade mark or mark who, without the assent of the proprietor of the trade mark, applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive.

*Origin*—Sec. 446, Code of 1892; 51 Vict., Can., ch. 41, sec. 4; Merchandise Marks Act, 1887, Imp., sec. 4.

*Forging a trade-mark*—Code sec. 486.

*Applying false trade-mark*—Code sec. 488.

*Selling goods with false trade-mark*—Code sec. 489.

*Applying false trade description*—Code sec. 488.

*Selling goods with false trade description*—Code sec. 489.

*"Goods" defined*—Code sec. 335, sub-sec. (m).

*"Trade-mark" defined*—Code sec. 335, sub-sec. (s).

*Meaning of "trade description" and "false trade description"*—Code sec. 335, sub-secs. (l) and (t), secs. 336, 337, 341, 342.

*Exception of trade descriptions which were lawfully and generally applied prior to 1888*—Code sec. 342.

*Innocent application of false mark*—Code secs. 489, 494, 495.

*Limitation*—Offences relating to the fraudulent marking of merchandise under Part VII, are to be prosecuted within three years. Code 1140 (a).

**Forgery of trade mark.—Applying a false trade description.—Burden of proof.**

**488.** Every one is guilty of an indictable offence who, with intent to defraud,—

- (a) forges any trade mark; or,



- (b) falsely applies to any goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive; or,
- (c) makes any die, block, machine or other instrument, for the purpose of forging, or being used for forging, a trade mark; or,
- (d) applies any false trade description to goods; or,
- (e) disposes of, or has in his possession, any die, block, machine or other instrument, for the purpose of forging a trade mark; or,
- (f) causes any of such things to be done.

2. On any prosecution for forging a trade mark the burden of proof of the assent of the proprietor shall lie on the defendant.

*Origin*—Secs. 447 and 710, Code of 1892; 51 Vict., Can., ch. 41, sec. 6; Patents, Designs and Trade-Marks Act, 1883, Imp.; Merchandise Marks Act, 1887, Imp. Sub-sec. (2) of sec. 447 was sec. 710 of the 1892 Code.

*Punishment*—See secs. 491, 1035 (3), 1039, 1040.

*Forfeiture of article falsely marked*—Code sec. 491, sub-sec. (2), and sec. 1039.

*"Trade-mark" defined*—See sec. 335 (s).

*Definition of "applying" a false trade-mark*—Code sec. 487.

*Trade-mark offences generally*—See note to sec. 486.

*"False trade description" defined*—See secs. 335, sub-secs. (k), (l), and (t), 336, 337, 341.

*Definition of "applying" a false trade description*—Code secs. 487, 341, 342.

*Marks lawfully and generally applied prior to 1888*—An exception is stated in sec. 342 which provides, with some special qualifications as to wrongly naming the country of origin of the goods, that where a trade description was "lawfully and generally applied" to goods of a particular class or manufactured by a particular method, at the time the enactment first became law (1888), the provisions as to false trade descriptions shall not apply to such trade description. A similar exception is contained in the Merchandise Marks Act, 1887, Imp., 50-51 Vict., ch. 28, sec. 18.

At the time of the passing of the Act of 1887 there was a trade in England in the sale of small fish, prepared in oil and packed in tins, under the description of "Norwegian sardines." The persons engaged in the trade knew, but the purchasing public did not know, that the fish sold under the above description were not sardines, but were brisling, a Norwegian fish similar to the sprat. The respondents having sold brisling

prepared in the above manner under the description of "Norwegian sardines" were charged with an offence under the Act, and by way of defence relied on the exception. It was held that a trade description was not "lawfully" applied to goods, if its use, although not then involving the commission of a criminal offence, tended to mislead the public; a trade description was not "generally" applied, unless it was a conventional term in general use, not only by the persons engaged in the particular trade, but by the public at large; that the description "Norwegian sardines" was neither "lawfully" nor "generally" applied at the time of the passing of the Act of 1887 to brisling prepared in oil and sold in tins; and that the respondents were properly convicted. *Lemy v. Watson* [1915] 3 K.B. 731; 84 L.J.K.B. 1999; 32 R.P.C. 508.

*Innocent application of false mark*—Code secs. 489, 494, 495.

*Sub-sec. (2)—Onus of proof*—The onus of proving the assent of the proprietor is shifted to the defendant only upon a charge of "forging" a trade-mark, the offence referred to in sub-sec. (a) of sec. 488, and not to the offence of falsely applying under sub-sec. (b). *R. v. Howarth* (1898), 1 Can. Cr. Cas. 243 (Ont.).

*Contesting validity of trade-mark*—The defendant charged with falsely applying a trade-mark may contest the validity of the registered mark. *R. v. Cruttenden* (1905), 10 O.L.R. 80, 10 Can. Cr. Cas. 223; *Lambert Pharmacal Co. v. Palmer*, 21 Que. K.B. 451.

*Mark "calculated to deceive"*—See note to sec. 486.

*False trade description*—The use of the words "quadruple plate" in an advertisement of sale of silver-plated ware may constitute a false trade description, the application of which is an offence under this section. *R. v. T. Eaton Co.* (1899), 31 Ont. R. 276; 3 Can. Cr. Cas. 421.

It is not necessary that the false trade description should be physically connected with the goods or that it should accompany the same, and oral evidence is admissible to connect the description of the goods in the advertisement with the goods afterwards sold. *R. v. Eaton, supra*. Describing wine by the name of a particular quality of wine of which there was only a small percentage, and that of a blending and not a consumable kind, has been held an offence. *Holmes v. Pipers, Limited* [1914] 1 K.B. 57, 83 L.J.K.B. 285, 23 Cox C.C. 689.

The description in an invoice of the goods is sufficient, but an oral statement made on the sale is not within this section. *Coppen v. Moore* [1898] 2 Q.B. 300, 306, 67 L.J.Q.B. 689; *Langley v. Bombay Tea Co.* [1900] 2 Q.B. 460, 69 L.J.Q.B. 752.

Gunpowder manufacturers contracted to supply gunpowder under the trade-mark of "R.L.G., No. 4." Owing to an explosion they were unable to manufacture the powder, but they obtained gunpowder equal in quality from a German manufacturer, and packed it in barrels supplied by the government, and inserted their own trade name on the labels as contractors. They sustained a loss by having to import the

gunpowder, and no complaint was made by the government, but no communication was made on delivery that the gunpowder was of German manufacture. The Q.B. Division held justices were wrong in refusing to convict, as the description attached implied they were delivering gunpowder of their own manufacture, when, in fact, it was not such. *Starey v. Chilworth Gunpowder Co.*, 24 Q.B.D. 90; 59 L.J.M.C. 13. Selling machine-made cigarettes with a label describing them as hand-made is a false trade description. *Kirshenboim v. Salmon and Gluckstein, Limited*, [1898] 2 Q.B. 19, 67 L.J.Q.B. 601. A. bought six barrels of beer from L., a brewer, and received with the casks an invoice describing the casks as barrels. One was six gallons short:—Held, that the delivery of the invoice might be an application of a false trade description, although such invoice was not physically attached to the goods, and that evidence of L. having in previous transactions sent casks of short measure was admissible evidence of L. having authorized a false trade description to be used. *Budd v. Lucas* [1891] 1 Q.B. 408, 60 L.J.M.C. 95, 17 Cox C.C. 248.

The foundation of a margarine mixture made in France and imported as "Oleo margarine" was mixed at Southampton with a small percentage of imported Danish butter and English milk. The finished product was called "Le Dansk" and sold in England in card boxes under the description of "Le Dansk French Factory, Le Dansk, Paris." The conviction was affirmed on the ground that the words were a false trade description and the article was obviously represented as being of foreign make when it was not. *Bischof v. Toler*, 44 W.R. 189; 65 L.J.M.C. 1. At his establishment in Ireland, Lipton sold under the descriptions (1) "Lipton's prime, mild cured," and (2) "First quality smoked ham, own cure at Lipton's market," hams which had been manufactured and cured by him in America. The Queen's Bench (Ireland) held that neither of the descriptions was a false trade description within this section. *R. v. Lipton*, 32 L.R. (Ir.) 115. Appellant asked at respondent's shop for two half-pounds of tea, and was supplied with two packets, on each of which was stamped on the outside in ink a notice that the weight, including the wrapper, was half a pound. The weight of the tea in each case was slightly less than half a pound, but the weight of the tea and wrapper was more than half a pound. The Q.B. Division upheld the refusal of the magistrates to convict, and held there had been no false trade description applied within the meaning of the Act. *Langley v. Bombay Tea Co.* [1900] 2 Q.B. 460; 69 L.J.Q.B. 752; 19 Cox C.C. 551.

An article was sold in packets as "S.'s patent refined isinglass." On analysis the contents were found to be gelatine. An information for unlawfully applying to gelatine a false description, and thereby stating it to be isinglass, was dismissed on the ground that isinglass was often used for gelatinous matters, and that the words "patent refined isin-

glass" were not an untrue description. *Gridley v. Swinborne*, 52 J.P. 791; 5 T.L.R. 71.

A piece of china was sold at Christie's, marked in the catalogue "Dresden," but on the lot being reached the auctioneer said to the assembled buyers, "Our attention has been drawn to this lot, and we sell it for what it is worth," and put his pen through the word "Dresden." No attempt was made to show the article was Dresden china. The Q.B. Division set aside a conviction of the auctioneers, and held that defendant might show in his defence he acted innocently, although at the time of sale he had reason to suspect the genuineness of the trade-mark or trade description, and so be exonerated under this sub-section. *Christie v. Cooper* [1900] 2 Q.B. 522, 69 L.J.Q.B. 708.

W. was convicted for applying to a watch a false trade description as an "English lever," the facts being that several of its parts were of foreign manufacture, though they were finished and all put together and adjusted at appellant's factory in England. It was contended that the proper description of the watch was an "Anglo-Swiss" watch. The Q.B. Division eventually sent the case back to the magistrate to be re-stated on one point. *Williamson v. Tierney*, 17 Times L.R. 174, 83 L.T. 592; 65 J.P. 70. In the re-stated case, the magistrate held that he found, as a fact, upon the evidence before him that the watch would not be regarded as an "English" watch in the trade by reason of certain material parts being of foreign manufacture. The Q.B. Division held that the question was one of fact, and that no appeal lay. *Williamson v. Tierney*, 17 T.L.R. 424.

The prosecutor must make out beyond all question that the goods are so got up as to be calculated to deceive. *Payton v. Snelling* [1901] A.C. 308, 17 R.P.C. 628, 70 L.J. Ch. 644.

*Imported goods*—In any prosecution hereunder for applying a false trade description in that the place or country in which any goods are made or produced is misrepresented (sec. 335 (t)), evidence of the port of shipment is *prima facie* evidence of the place or country in which such goods were made or produced. Sec. 992.

*Time limitation*—No prosecution for this offence shall be commenced after the expiration of three years from its commission. Sec. 1140.

*Costs in prosecutions for trade-mark and false trade description offences*—Code sec. 1040.

*Reimbursement to innocent party out of proceeds of forfeited goods*—Code sec. 1039.

*Special provisions as to marks on watches and watch-cases*—Code sec. 336.

*Special provisions as to marks on bottles, casks, and other containers of beverages*—Code secs. 490, 491 (a), 491 (2).

*Information for purpose of forfeiture only, where owner not found*—Code sec. 635.

**Selling goods falsely marked.—Exceptions.**

**489.** Every one is guilty of an indictable offence who sells or exposes, or has in his possession, for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be, unless he proves,—

- (a) that having taken all reasonable precaution against committing such an offence he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and,
- (b) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; and,
- (c) that otherwise he had acted innocently.

*Origin*—Sec. 448, Code of 1892; 51 Vict., Can., ch. 41, sec. 6; Merchandise Marks Act, 1887, Imp., 50-51 Vict., ch. 28, sec. 2, sub-sec. (2).

*Punishment*—Code sec. 491, 1035 (3).

*Forfeiture of goods falsely marked*—Code secs. 491 (2), 1039.

*Compensation to innocent party out of proceeds of forfeited goods*—Code sec. 1039.

*Award of costs*—Code sec. 1040.

*Time limitation*—A prosecution is not to be commenced later than three years from the commission of the offence. Code sec. 1140, sub-sec. (a).

*Special provisions as to labels on bottles, casks and containers of beverages*—Code secs. 490, 491 (a), 491 (2).

*Selling goods falsely marked or falsely represented*—If the seller is aware of the false marking, and uses it to induce the buyer to buy, a charge may be laid as for obtaining money on false pretenses. Code sec. 404, 405; and there may be an attempt to obtain money by false pretenses where the transaction did not become the full offence because the effort to deceive the buyer was ineffectual and he bought in order to complete a case for prosecution. *R. v. Lyons* (No. 1), 16 Can. Cr. Cas. 152 (Que.). The Code sections dealing with the false application of trade-marks, and of false trade descriptions, and with the sale of goods after the false application, do not extend beyond the circumstances under which the trade-mark or trade description has been applied to

the goods themselves or is deemed to have been so applied. Code sec. 487.

If a false trade description or false trade-mark, as the case may be, has not been "applied" within the meaning of sec. 487, but there has been a false representation in some other way as to the class of goods of their origin, the prosecution will then have to rely upon a charge of false pretences or of an attempt of that offence.

It is deemed to be so applied if used in a manner calculated to lead to the belief that the goods are designated or described by that trade-mark or trade description, for example, by so describing them in an invoice accompanying the goods. Code sec. 487 (d); *Coppen v. Moore* [1898] 2 Q.B. 300 and 306; 67 L.J.Q.B. 689.

*Reasonable precaution*—In *Coppen v. Moore* [1898] 2 Q.B. 300 and 306, 67 L.J.Q.B. 689, decided under the English Merchandise Act, 1887 (50 and 51 Vict., Imp., c. 38), the prosecution was for selling goods to which a false description was applied, and in the case stated by the justices it appeared that the prosecutor asked a salesman in the accused's shop for an English ham; the salesman pointed to some American hams, and said: "These are Scotch hams." The prosecutor chose one, and asked for an invoice containing a description of the ham bought, and was given one, stating the purchase of a "Scotch" ham. It was held by Wright and Darling, J J., that the oral statement that the ham was Scotch did not amount to a breach of the Act, but the statement in the invoice was an application of a false description to the goods sold, within the meaning of the statute; but they reserved the question of whether the employer was liable for the act of his servant, for the consideration of the court for Crown Cases Reserved. On this point it appeared that the employer was not present at the time of the sale; that he had issued a printed circular to his employees, forbidding the sale of the hams under any specific name or place of origin, but there was evidence that the American hams were dressed so as to deceive the public; on the strength of which it was found that the employer had not taken all reasonable precautions against committing an offence against the Act, and the court therefore held that, under the circumstances, the employer was criminally responsible for the act of his servant, as he had not discharged the onus of showing that he had acted innocently. On this point Lord Russell said: "We conceive the effect of the Act to be to make the master a principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants, in all cases within the section with which we are dealing, when the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility when he can prove that he had acted in good faith and done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

*False statement that article patented or copyrighted*].—A false trade description includes a false statement, where false in a material respect (Code sec. 335 (l) ), that the goods are the subject of an existing patent, privilege or copyright. Code sec. 335, sub-sec. (t).

**Defacing trade mark.—Using trade marks of others by trafficking in bottles.—Using bottles.—*Prima facie* evidence.**

**480.** Every one is guilty of an indictable offence who,—

- (a) wilfully defaces, conceals or removes the trade mark duly registered, or name of another person upon any cask, keg, bottle, siphon, vessel, can, case, or other package, unless such cask, keg, bottle, siphon, vessel, can, case or other package has been purchased from such other person, if the same shall have been so defaced, concealed or removed without the consent of, and with intention to defraud such other person:
- (b) being a manufacturer, dealer or trader, or bottler, trades or traffics in any bottle or siphon which has upon it the trade mark duly registered or name of another person, without the written consent of such other person, or without such consent fills such bottle or siphon with any beverage for the purpose of sale or traffic.

2. The using by any manufacturer, dealer or trader or bottler, other than such other person, of any bottle or siphon for the sale therein of any beverage, or the having by any such manufacturer, dealer, trader or bottler upon any bottle or siphon such trade mark or name of such other person, or the buying, selling or trafficking in any such bottle or siphon without such written consent of such other person, or the fact that any junk-dealer has in his possession any bottle or siphon having upon it such a trade mark or name without such written consent, shall be *prima facie* evidence of trading or trafficking within the meaning of paragraph (b) of this section.

*Origin*].—Sec. 449, Code of 1892; 63-64 Vict., Can., ch. 46.

*"Trade-mark" defined*].—Code sec. 335, sub-sec. (s).

*"Name" of another person*].—"Name" includes any abbreviation of a name. Code sec. 335, sub-sec. (n).

*Sub-sec. (a)—Wilfully concealing or removing name or trade-mark from bottles, etc.*].—Sub-sec. (a) is unlimited as to the persons to whom

it shall apply, but the offence must have been done "wilfully." Sub-sec. (b), on the other hand, does not contain the word "wilfully," but its operation is restricted to manufacturers, dealers, traders or bottlers.

*Sub-sec. (b)—Liability of manufacturers, dealers, etc., trading in re-filled bottles*—*Mens rea*, or guilty knowledge, is not an essential ingredient of the offence under sub-sec. (b). *R. v. Newcombe* (1918), 29 Can. Cr. Cas. 249; *R. v. Coulombe*, 6 O.L.R. 99, 20 Can. Cr. Cas. 31. A verdict of "guilty without his knowledge" may therefore be supported as a verdict of guilty. *R. v. Newcombe*, supra. The master will be criminally responsible under sub-sec. (b) for the acts of his servant within the general scope of the servant's authority, although the master had no personal knowledge of the filling of the other dealer's bottles or even that they were in his possession as a milk dealer. *R. v. Newcombe*, supra; and see *Cundy v. Le Cocq*, 13 Q.B.D. 207, 53 L.J.M.C. 125. It is not necessary that there should have been an intent to defraud the person to whom the bottles were illegally supplied by the accused. *Wood v. Burgess*, 59 L.J.M.C. 11, 24 Q.B.D. 162.

Where the bottles bearing the label of one dealer are used by another dealer without removing or concealing the name label (Code sec. 490 (a)), the addition of the label of the second dealer will not prevent a conviction for selling goods with a false trade description under Code sec. 489 if the appearance on the bottle of the original name was calculated to deceive. *Stone v. Burn*, 27 Times L.R. 6.

*Sub-sec. (b)—Bottle or siphon which has "upon it," etc.*—The words "upon it" have a wider significance than the words of sec. 449 of the 1892 Code which applied only where the name, etc., was "blown or stamped or otherwise permanently affixed." The present form of sec. 490 is wide enough to protect paper labels affixed to a bottle. *R. v. Wittman* [1917] 3 W.W.R. 438 (B.C.); *R. v. Irvine*, 9 O.L.R. 389, 9 Can. Cr. Cas. 407, 409.

*Punishment*—Code sec. 491

**Penalty where none otherwise provided.—On indictment.—On summary conviction.—Forfeiture.**

**491.** Every one guilty of an offence defined in this Part in respect to trade marks or names, or in respect to trade descriptions or false trade descriptions for which no penalty is in this Part otherwise provided, is liable,—

- (a) on conviction on indictment, to two years' imprisonment, with or without hard labour, or to a fine, or to both imprisonment and fine; and,
- (b) on summary conviction, to four months' imprisonment, with or without hard labour, or to a fine not exceeding one hundred dollars; and, in case of a



second or subsequent conviction, to six months' imprisonment, with or without hard labour, or to a fine not exceeding two hundred and fifty dollars.

2. In any case every chattel, article, instrument or thing, by means of, or in relation to which, the offence has been committed shall be forfeited.

*Origin*—Sec. 450, Code of 1892; 51 Vict., Can., ch. 41, sec. 8; Merchandise Marks Act, 1887, Imp., 50-51 Vict., ch. 28, sec. 2, sub-sec. (3).

*When servant not liable for trade-mark offence committed bona fide under master's orders*—Code sec. 495.

*Punishment of corporation defendant*—Any corporation convicted of an indictable or other offence punishable with imprisonment may, in lieu of the prescribed punishment, be fined in the discretion of the court before which it is convicted. Code sec. 1035, sub-sec. (3), superseding R. v. T. Eaton Co. (1898), 29 Ont. R. 591, 2 Can. Cr. Cas. 252.

*Summary conviction proceedings against corporation*—Code sec. 720A (8-9 Edw. VII, Can., ch. 9); 1035, sub-sec. (3).

*Ordering destruction or sale of forfeited goods*—See sec. 1039.

*Costs to or against private prosecutor*—See Code sec. 1040.

*Time limitation*—See sec. 1140 (a) as to indictments, and 1142 as to summary prosecutions under Part XV.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Second offences*—See secs. 465, 963 and 964.

*Notice by advertisement where complaint laid for forfeiture against unknown owner*—Code sec. 685.

#### **Falsely representing that goods are manufactured for His Majesty.**

**492.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars, who falsely represents that any goods are made by a person holding a royal warrant, or for the service of His Majesty or any of the royal family, or any government department of the United Kingdom or of Canada.

*Origin*—Sec. 451, Code of 1892; 51 Vict., Can., ch. 41, sec. 21; Merchandise Marks Act, 1887, Imp., sec. 20.

*Summary conviction for first offence*—See sec. 729.

**Unlawful importation of goods liable to forfeiture.**

**493.** Every one is guilty of an offence and liable, on summary conviction, to a penalty of not more than five hundred dollars nor less than two hundred dollars who imports or attempts to import any goods which, if sold, would be forfeited under the provisions of this Part, or any goods manufactured in any foreign state or country which bear any name or trade mark which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and such goods shall be forfeited.

*Origin*—Sec. 452, Code of 1892; 51 Vict., Can., ch. 41, sec. 22.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

**Defence of reasonable precaution.**

**494.** Any one who is charged with making any die, block, machine or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark, or any mark, so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves,—

- (a) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines or other instruments for making or being used in making trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in Canada, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and,
- (b) that he took reasonable precaution against committing the offence charged; and,

- (c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and,
- (d) that he gave to the prosecutor all the information in his power with respect to the person by or on whose behalf the trade mark, mark or description was applied;

shall be discharged from the prosecution but is liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

*Origin*—Sec. 453, Code of 1892; 51 Vict., Can., ch. 41, sec. 5; Merchandise Marks Act, 1887, Imp., sec. 6.

*Any "trade-mark"*—See definition of "trade-mark" in sec. 335 (s).

*False trade description*—See the definitions in sec. 335, sub-secs. (l) and (s), and sec. 337.

#### Offence under Part VII.—When servant not liable.

**495.** No servant of a master, resident in Canada, who *bona fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, gives full information as to his master, is liable to any prosecution or punishment for any offence defined in this Part.

*Origin*—Sec. 454, Code of 1892; 51 Vict., Can., ch. 41, sec. 20; Merchandise Marks Act, 1887, Imp., sec. 19.

*For any offence defined "in this Part"*—This section is a re-enactment in Canada of sec. 19 of the Merchandise Marks Act, Imp. The provisions taken from that Act made up Part XXXIII of the 1892 Code and that "part" was consequently given the heading "Forgery of trade-marks; fraudulent marking of merchandise."

The words "in this Part" in sec. 454 of the 1892 Code were then clearly restricted to offences of the class indicated by that heading; but on the revision of the Code in 1906 there was a re-arrangement and consolidation of the various parts and the trade-mark clauses were placed as they stand at present in Part VII under the general title of "Offences against rights of property and rights arising out of contracts and offences connected with trade." The question does not appear to have been raised in any reported case whether or not this statutory defence given to a servant will apply to offences under Part VII other than those relating to trade-marks and merchandise marks. The better interpretation would appear to limit it in like manner as it was limited in the 1892 Code. It was probably an oversight on the part of the revisers in 1906 that the words "in this part" were not preceded by the

words "in the sections relating to forgery of trade-marks and fraudulent marking of merchandise" in like manner as the definition of "goods" now appearing in sec. 335 (m) was amended on its transfer from sec. 443 (d) of the 1892 Code.

*Offences connected with Trade and Breaches of Contract.*

**Conspiracy in restraint of trade.**

**496.** A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

*Origin*—Code of 1892, sec. 516.

"*Any unlawful act in restraint of trade*"—The mere fact that the purposes of a trade union are in restraint of trade is not to be considered as making its acts unlawful within the meaning of sec. 496; and the members of a trade union are not guilty of a conspiracy in restraint of trade because of their being associated together for a common purpose of operating in restraint of trade if nothing more than restraint of trade is involved in the common purpose. Sec. 497. As to collateral offences of intimidation and violence, see secs. 501-503. An important limitation or exception is enacted by Code sec. 590 upon the operation of sec. 498. Sec. 590 declares that no prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done "for the purpose of a trade combination" unless such act is an offence punishable by statute. This presumably limits prosecutions for trade combines in the strict sense of the term to the cases mentioned in sec. 498. If an act comes within the wording of sec. 590, a prosecution cannot be brought for conspiracy at common law, thus modifying the criminal law of England, which is the foundation of Canadian criminal law. See Code secs. 10, 11, 12, 16. There are, however, the offences of criminal breach of certain contracts under sec. 499, intimidation of workmen, sec. 501, violence and threats of violence to workmen, sec. 502, intimidation in regard to dealing in grain or other edible stores, sec. 503, and combines to prevent bidding on sales of public lands, sec. 504. In particular, sec. 502 refers to violence and threats of violence "in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture." The reference to an unlawful combination to raise the rate of wages does not imply that all of such combinations are unlawful, but is intended to limit the operation of that part of sec. 502 to cases of violence, or threats of violence, which are done or made in pursuance of such combinations when they are for some reason unlawful, *ex. gr.*, in cases in which strikes are prohibited under the Industrial Disputes Investigation

Act or similar labour laws pending an official investigation. To determine what acts are within the phrase "act done for the purpose of a trade combination," reference must be made to the definition of "trade combination" contained in sec. 2, sub-sec. (38), which is as follows: "any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen or the conduct of any master or workman in or in respect of his business or employment or contract of employment or service." Code sec. 2, sub-sec. (38) taken from sec. 519 of the Code of 1892 and R.S.C. 1886, ch. 173, sec. 13.

It being proved that a member of a trades union had conspired to injure a non-union workman by depriving him of his employment, this was held not to be excepted as an "act for the purpose of trade combination," and a conviction for a conspiracy was sustained. *R. v. Gibson* (1889), 16 O.R. 704; and see *Patterson v. C.P.R.* [1917] 1 W.W.R. 1154, 10 Alta. L.R. 408; *Williams v. United Mine Workers* [1919] 1 W.W.R. 217 (Alta.); *R. v. Day*, (1905) 17 Can. Cr. Cas. 403 (Ont.); and see note to sec. 498.

By sec. 335, sub-sec. (a) an "act," for the purposes of the sections in Part VII relating to offences connected with trade and breaches of contract includes a default, breach or omission. As this latter definition is likewise taken from sec. 519 of the 1892 Code derived from R.S.C. 1886, ch. 173, sec. 13, the definition will probably be held to apply to the exception contained in sec. 590, although contained in Part XII and not in Part VII, as well as to the word "act" contained in sec. 496. The definitions, the exception and the offences were all contained in the one "Part" of the former Code, but a different method of classification placed them in separate "Parts" of the present Code. In this, as well as in other portions of the Code, these separated parts of what was once a single statute have to be assembled again in their original juxtaposition for the purposes of interpretation. Sec. 498 also contains a qualification by which it is not to apply to combinations of workmen or employees for their own reasonable protection as such. Sec. 498 (2); *Lefebvre v. Knott*, 32 Que. S.C. 441, 13 Can. Cr. Cas. 223; *Graham v. Knott*, 14 B.C.R. 97; same case *sub nom.* *Graham v. Bricklayers and Masons' Union*, 9 W.L.R. 475.

Sec. 496 seems to be a mere preliminary to the enactments contained in secs. 497 and 590, which latter followed what is now sec. 497 in the former Code (Code of 1892, sec. 518), and seems not to be a qualifying clause to sec. 498, except in so far as concerns secs. 497 and 590. These and sub-sec. (2) of sec. 498 indicate that certain things are lawful notwithstanding sec. 498. Sec. 498, by making indictable every conspiracy or agreement within secs. (a), (b), (c) and (d), necessarily makes such agreements "unlawful" within the meaning of sec. 496.

*Trade conspiracies and combinations*—See Code secs. 2 (38), 335 (a),

496-503, 581, 590, 1012; Conciliation and Labour Act, R.S.C. 1906, ch. 96; Combines Investigation Act, Can., 1910, ch. 9; Industrial Disputes Investigation Act, 1907, Can., ch. 20, as amended, 1910, Can., ch. 29, the Department of Labour Act, 1909, Can., ch. 22.

**Exception as to trade union.**

**497.** The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section.

*Origin*—Code of 1892, sec. 517, R.S.C. 1886, ch. 131, sec. 22.

*"Trade union" defined*—Trade Unions Act, R.S.C. 1906, ch. 125, sec. 2.

*Aiding continuance of an illegal mining strike*—See the Industrial Disputes Investigation Act, 1907, Can., ch. 20, secs. 56, 60; R. v. Neilson, 17 Can. Cr. Cas. 298 (N.S.).

*Purposes of a trade union*—See notes to secs. 496 and 498.

**Conspiracy to unduly limit transportation facilities.—To restrain commerce.—To unduly lessen manufacturing.—To unduly lessen competition.—Employees' union for their reasonable protection excepted.**

**498.** Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,—

- (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or,
- (b) to restrain or injure trade or commerce in relation to any such article, or commodity; or,
- (c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or,
- (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

*Origin*—Code of 1892, sec. 520, as amended by 62-63 Vict., ch. 46 and 63-64 Vict., ch. 46; 52 Vict., Can., ch. 41.

*Trade combines generally*—The original statute, 52 Vict., Can., ch. 41, recited that "it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade and to provide penalties for the violation of the same."

Parliament set out as the recital shows, to declare what was to be held unlawful and evidently intended to declare that the unduly doing that which was referred to in sub-sec. (d) amongst others, were unlawful things and must be prohibited. *Shragge v. Weidman* (1912), 2 W.W.R. 330, 336, 46 S.C.R. 1, per Idington, J.

The section, however, is not a purely declaratory enactment, but covers ground not covered by the existing law at the time it was passed. *Weidman v. Shragge* (1912), 2 W.W.R. 330, 336, 46 S.C.R. 1, reversing *Shragge v. Weidman*, 15 W.L.R. 616, and restoring *Shragge v. Weidman*, 14 W.L.R. 561; *Dominion Supply Co. v. Robertson* (1917), 39 O.L.R. 495, 12 O.W.N. 187.

This Act not only destroys a former right of combination, but also renders illegal every direct or indirect device contrived by the art of men to serve those agreeing in the purpose of acquiring the market for themselves and adopted by them to execute such purpose, and thus also destroys the devices they may have incidentally adopted to promote the main purpose. All that is, directly or indirectly, knowingly used to promote any criminal purpose must be held void. A difference exists between the consequence flowing from the application of the public policy principle and that of this statute. *Weidman v. Shragge* (1912), 2 W.W.R. 330, 344, per Idington, J.; *Mogul S.S. Co. v. McGregor* [1892] A.C. 25, and the English law distinguished. For subsequent English cases, see *Allen v. Flood* [1898] A.C. 1; *Quinn v. Leatham* [1901] A.C. 539; *Stott v. Gamble* [1916] 2 K.B. 504, *re Bowman* [1915] 2 Ch. 471.

Sec. 498 does not abolish the doctrine of restraint of trade violating public policy. *Shragge v. Weidman* (1912), 2 W.W.R. 330, 345. Where the illegality of a contract is to be the defence of a civil action and the question of undue restraint of trade depends on the surrounding circumstances, the illegality should be specially pleaded. *Northwestern Salt Co. v. Electrolytic Alkali Co.* [1914] A.C. 461. But the failure to plead illegality in the formal pleadings will not prevent the court from refusing relief on the ground of public policy where the restraint of trade is quite unreasonable and void on the face of the contract. *Ibid.*; *MacEwan v. Toronto General Trusts Corporation* (1917), 28 Can. Cr. Cas. 387 (Can.), reversing *MacEwan v. Toronto General Trusts Corporation*, 36 O.L.R. 244.

*Option for non-jury trial*—Code sec. 581.

*Special appeal from non-jury trial in trade combine cases*—An appeal upon all issues of law and fact shall lie from any conviction by the judge without the intervention of a jury for any offence mentioned in sec. 498 to the court of appeal (sec. 2, sub-sec. 7), in the province where such conviction is made; and the evidence taken upon the trial shall form part of the record in appeal, and, for that purpose, the court before which the case is tried shall take note of the evidence, and of all legal objections thereto. Code sec. 1012.

*Trade conspiracy prosecutions limited to the statutory offences*—Code sec. 590, sec. 2, sub-sec. (38).

*Sub-sec. (a)—Unduly limiting facilities for production, transportation or dealing in commodities*—The limitation of facilities for transportation, manufacturing, etc., must be an "undue" limitation. Compare sub-secs. (c) and (d) where the word "unduly" appears in a similar connection.

The mere fact standing alone and without other evidence that for a consideration which it is not contended was unreasonable the owner of a salt mine or works and plant should agree to give the sole and exclusive control for a limited period to another person of those works and plant, retaining only a right to manufacture for the local trade and sell to that trade at prices to be fixed by the purchaser of the control of the salt works, would not justify the court in holding such an agreement illegal. *MacEwan v. Toronto General Trusts Corp'n.* (1917), 28 Can. Cr. Cas. 387, 391, (Can.), reversing.

The question of illegality is one which, as a general rule, depends upon the surrounding circumstances and where no evidence of these surrounding circumstances was given, and the contract on the face of it is not so unreasonable as between the parties, or so detrimental to the public, that the court would refuse to enforce it, it will not be declared invalid in a civil action. *MacEwan v. Toronto General Trusts Corp'n.*, supra; *Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co.* [1913] A.C. 781; *North Western Salt Co. v. Electrolytic Alkali Co.* [1914] A.C. 461.

*Sub-sec. (b)—Conspiracy to do unlawful act in restraint of trade in some commodity*—Sub-sec. (b) is aimed at agreements the object of which is to restrain or injure trade or commerce in commercial commodities. *R. v. Gage*, 18 Man. R. 175, 13 Can. Cr. Cas. 415 and 428; *Weidman v. Shragge* (1912), 2 W.W.R. 330, 46 S.C.R. 1, reversing *Shragge v. Weidman*, 15 W.L.R. 616; and see *Shragge v. Weidman*, 14 W.L.R. 561, trial judgment restored by the decision in (1912) 2 W.W.R. 330. But dicta in *R. v. Gage*, supra and in *Gibbins v. Metcalfe* (1905), 15 Man. R. 588, which would so restrict the interpretation of sub-sec. (b) as to make it apply only to contracts which would have been held unlawful under the doctrine laid down in *Mogul Steamship Co. v. McGregor* [1892] A.C. 25, are no longer to be followed, because of the dicta to the



contrary in the Supreme Court of Canada in the case of *Weidman v. Shragge*, *supra*.

*Sub-sec. (b)—Form of indictment*—The following counts taken from the indictment in *R. v. Gage* (No. 2), 18 Man. R. 175, show the manner of framing an indictment under sub-sec. (b):

1. J. C. G., J. G. McH., and J. L. and other persons, to the jurors unknown, at the city of Winnipeg, in the province of Manitoba, on or about 1st September, 19—, did conspire, combine, agree and arrange with each other to restrain trade or commerce in relation to an article which may be a subject of trade or commerce, to wit, grain.

2. And the jurors aforesaid do further present that the said J. C. G., J. G. McH., J. L. and other persons, to the jurors unknown, at the city of Winnipeg, in the province of Manitoba, on or about 1st September, 19—, did conspire, combine, agree or arrange with each other to injure trade or commerce in relation to an article or commodity which may be a subject of trade or commerce, to wit, grain.

*Sub-sec. (c)—Conspiracy to unreasonably enhance the price of commodities*—A trade association may legally be formed between wholesale dealers with the *bona fide* desire of protecting the interests of the trade generally and without any malicious intent to injure others, with the object of arranging with manufacturers to allow regular trade discounts to jobbers not doing a retail trade whether members of the association or not, and to disallow such discounts to retailers or retailing jobbers, if the objects of the association do not contemplate the raising of the manufacturer's prices nor the prices to be paid by the consumer. *R. v. Beckett*, 15 Can. Cr. Cas. 498, 20 O.L.R. 401.

But it is illegal for the wholesaler to stipulate with the retailer that the latter should sell to the public only at the prices fixed by the wholesaler, if such fixed prices are such as to unreasonably enhance the price to the public. *Stearns v. Avery* (1915), 33 O.L.R. 251, 24 Can. Cr. Cas. 339; *Wampole v. Karn*, 11 O.L.R. 619; *R. v. Elliott*, 9 O.L.R. 648; *Dominion Supply Co. v. Robertson* (1917), 39 O.L.R. 495, 12 O.W.N. 187; *Miles Medical Co. v. Park & Sons* (1911), 220 U.S. 373, 413; *Elliman v. Carrington* [1901] 2 Ch. 275, not followed in *Stearns v. Avery*, *supra*; and see *Standard Oil Co. v. United States* (1910), 221 U.S. 1.

*Sub-sec. (d)—Conspiracy to unduly lessen competition*—In effect clause (d) of sec. 498 of the Code declares in very plain language that an agreement which might in itself be perfectly lawful as made by the parties in the exercise of the freedom to contract or to abstain from contracting, which the English law has for many years recognized in every individual, is unlawful if the object of the parties is to unduly prevent or lessen competition in an article or commodity which is a subject of trade or commerce. In other words, if the object of the parties to the agreement is to interfere with the free course of trade by unduly preventing or lessening competition the agreement is declared to be unlawful. It is not necessary that the agreement should

be in itself fraudulent or otherwise illegal; and all agreements which prevent or lessen competition do not come within the operation of the statute; the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally. And it is for the courts to say whether in the circumstances of each particular case the mischief aimed at exists. *Weidman v. Shragge* (1912), 2 W.W.R. 330, 332, 46 S.C.R. 1, per Fitzpatrick, C.J. So, persons remaining in a particular trade are not to fix prices or otherwise limit competition by agreement among themselves. *Weidmann v. Shragge* (1912), 2 W.W.R. 330, 46 S.C.R. 1, 21 W.L.R. 717, 20 Can. Cr. Cas. 1117; *R. v. Clarke*, 1 Alta. L.R. 358, 14 Can. Cr. Cas. 46, 9 W.L.R. 243; *R. v. Gage*, 18 Man. R. 175, 13 Can. Cr. Cas. 428. But it has been held that Code sec. 498 (d) does not apply to the purchase out and out of a competitor's property, at least where there was no restriction on the seller's subsequent business activities or his re-engaging in business as a competitor. *Stewart v. Thorpe* [1917] 2 W.W.R. 700, 11 Alta. L.R. 473, 28 Can. Cr. Cas. 218, varying [1917] 1 W.W.R. 896. It may, however, be that two persons engaged in a certain business must not arrange to form a company to buy out a third who is a competitor, for the confessed purpose of avoiding his competition if the result can be shown to be an "undue" lessening of competition in the trade; but it has been doubted whether, in that supposititious case, Code sec. 498 is wide enough or was ever intended to cover it. *Stewart v. Thorpe* [1917] 2 W.W.R. 700 at 707, per Stuart, J. Where fifteen companies belonging to an association, each of which sold goods under a condition that the buyer would maintain the association prices in re-selling to the public, and the association was found to control the Canadian trade in the product, such was held in a civil action to constitute an offence both under sub-sec. (b) and sub-sec. (d). *Dominion Supply Co. v. Robertson* (1917), 39 O.L.R. 495, 12 O.W.N. 187; and see *R. v. Master Plumbers*, 14 O.L.R. 295, an appeal from *R. v. Master Plumbers*, 7 O.W.R. 213; same case *sub nom.* *R. v. Central Supply*, 12 Can. Cr. Cas. 371 (Ont.); *Hately v. Elliott*, 9 O.L.R. 185; *R. v. Elliott*, 9 O.L.R. 648, 9 Can. Cr. Cas. 505.

It would seem that it is a question of fact whether an agreement by a manufacturer to sell to certain dealers only in certain localities is an undue lessening of competition in the sale or supply of the product. See *Weidman v. Shragge* (1912), 2 W.W.R. 330, at 341; *R. v. American Tobacco Co.* (1897), 3 Rev. de Jur. 453 (Que.). Any agreement of which the alleged purpose is to "unduly" prevent or lessen competition in the purchase or sale of some article or commodity which may be a subject of trade or commerce will constitute an offence as a trade combination inhibited by sub-sec. (d). *Weidman v. Shragge* (1912), 2 W.W.R. 330, 46 S.C.R. 1, 20 Can. Cr. Cas. 117, reversing *Shragge v. Weidman*, 20 Man. R. 178, 15 W.L.R. 616, and restoring trial judgment,

*Shragge v. Weidman*, 14 W.L.R. 561. For history of Code sec. 498, see that case in vol. 2 W.W.R. 330, at 350 *et seq.*

For the purpose of showing the wrongful intent the prosecutor may tender proof that the evils against which the legislation is directed were the natural and necessary consequence of the contract or combination, monopoly or attempt to monopolize, and that those evils have in fact ensued. *Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co., Ltd.* [1913] A.C. 781, 82 L.J.P.C. 139.

*Sub-sec. (2)—Reasonable protection of employers*—An agreement by employers, made in anticipation of a strike to be ordered by the union to which their workmen belong, to lock out any of the latter who are members of it, if the strike takes place, is valid and does not constitute a combination in restraint of trade or of the freedom of contracting. *Lefebvre v. Knott*, 32 Que. S.C. 441, 13 Can. Cr. Cas. 223.

*Sub-sec. (2)—Reasonable protection of workmen*—As regards the crime of trade conspiracy the purposes of any trade union are not unlawful by reason merely that they are in restraint of trade. Code sec. 497; *Trade Union Act*, R.S.C. 1906, ch. 125; and see *José v. Metallic Roofing Co.* [1908] A.C. 514, reversing *Metallic Roofing Co. v. José*, 12 O.L.R. 200 and 14 O.L.R. 156. Where a painting contractor had agreed to employ only union men, the refusal of the trade union to admit to membership an applicant already in the contractor's employ will not alone constitute a conspiracy in restraint of trade, although the result of the refusal would necessarily be his discharge if the employer lived up to his agreement with the union; *R. v. Day* (1905), 17 Can. Cr. Cas. 403 (Ont.); but if it could have been shown that the rejection was for the express purpose of depriving the man of his employment, the case would not be within the exception of sub-sec. (2) as an act done for the reasonable protection of the workmen, nor under sec. 497 as an act done for the purposes (legal purposes) of a trade union. Compare *Larkin v. Long* [1915] A.C. 814, 84 L.J.P.C. 201, affirming *Long v. Larkin* [1914] 2 Irish R. 285; *Dallimore v. Williams*, 30 Times L.R. 432 and 470.

*Jurisdiction of sessions excluded*—See sec. 685.

*Conspiracy with persons some of whom are unknown*—A charge may be framed so as to charge one person with conspiracy with others named and with others unknown "or with some or one of them." *R. v. Clarke*, 1 Alta. L.R. 358, 14 Can. Cr. Cas. 46.

*Trade conspiracies and combinations*—See Code secs. 2 (38), 496-503, 581, 590, 1012; *Conciliation and Labour Act*, R.S.C. 1906, ch. 96; *Combines Investigation Act*, Can., 1910, ch. 9; *Industrial Disputes Investigation Act*, 1907, Can., ch. 20, as amended, 1910, Can., ch. 29, the *Department of Labour Act*, 1909, Can., ch. 22.

*Conspiracy generally*—See note to sec. 573, dealing with conspiracy to commit an indictable offence.

*Second offences*—See secs. 465, 963 and 964.

**Wilfully breaking contract with danger to life or property.—Wilfully breaking contract connected with supply of power, light, gas or water.—Municipality or company supplying light, power, gas or water wilfully breaking contract.—Railway company wilfully breaking contract, and so cancelling transportation facilities.**

**499.** Every one is guilty of an offence punishable on indictment or on summary conviction before two justices and liable on conviction to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, who,—

- (a) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or,
- (b) being bound, agreeing or assuming, under any contract made by him with any municipal corporation or authority, or with any company, to supply any city or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks such contract knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of power, light, gas or water; or,
- (c) being bound, agreeing or assuming, under any contract made by him with a railway company, or with His Majesty, or any one on behalf of His Majesty, in connection with a government railway on which His Majesty's mails, or passengers or freight are carried, to carry His Majesty's mails, or to carry passengers or freight, wilfully breaks such contract knowing, or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the

running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

2. Every municipal corporation or authority or company, bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with electric light or power, gas or water, which wilfully breaks any contract made by such municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof wholly, or to a great extent, of their supply of electric light or power, gas or water, is liable to a penalty not exceeding one thousand dollars.

3. Every railway company, bound, agreeing or assuming to carry His Majesty's mails, or to carry passengers or freight, which wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car on the railway, is liable to a penalty not exceeding one hundred dollars.

4. It is not material whether any offence defined in this section is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise.

*Origin*—Code of 1892, sec. 521; Can. Stat. 1908, ch. 18, sec. 7 (correcting a clerical error); R.S.C. 1886, ch. 173, secs. 15 and 17.

*Sub-sec (4)—Committed from malice*—“Malice is a term which is truly a legal enigma”; Harris Cr. Law, p. 13.

The terms “malice” and “malicious” are practically eliminated from the Code owing to the confusion of ideas connected with them. “Malice” appears only in two places; here and in sec. 963 (2), where the expression “motive of malice” is retained. Mr. Hoyles' article on The Criminal Law, 38 C.L.J. 231.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Second offences*—See secs. 465, 963 and 964.

*Trade conspiracies and combinations*—See Code secs. 2 (38), 496-503, 581, 590, 1012; Conciliation and Labour Act, R.S.C. 1906, ch. 96;

Combines Investigation Act, Can., 1910, ch. 9; Industrial Disputes Investigation Act, 1907, Can., ch. 20 as amended, 1910, Can., ch. 29; the Department of Labour Act, 1909, Can., ch. 22.

**When secs. 499 and 500 to be posted up.—Penalty for default.—Defacing same.**

**500.** Every such municipal corporation, authority, or company, shall cause to be posted up at the electrical works, gas works, or water-works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of this and the preceding section in some conspicuous place, where the same may be conveniently read by the public; and as often as such copy becomes defaced, obliterated or destroyed shall cause it to be renewed with all reasonable despatch.

2. Every such municipal corporation, authority or company which makes default in complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues.

3. Every person unlawfully injuring, defacing or covering up any such copy so posted up is liable on summary conviction to a penalty not exceeding ten dollars.

*Origin*—Code of 1892, sec. 522; R.S.C. 1886, ch. 173, sec. 19.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

**Intimidation.—By violence.—By threats.—By following.—By hiding property.—By following in disorderly way.—By watching and besetting.**

**501.** Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,—

(a) uses violence to such other person, or his wife or children, or injures his property; or,

- (b) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or,
- (c) persistently follows such other person about from place to place; or,
- (d) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or,
- (e) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road; or,
- (f) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

*Origin*—4-5 Edw. VII, Can., ch. 9; Code of 1892, sec. 523; R.S.C. 1886, ch. 173, sec. 12; Conspiracy and Protection of Property Act, 1875, Imp. (38-39 Vict., ch. 82).

*Who may not try strike charges*—No person who is a master, or the father, son or brother of a master in the particular manufacture, trade or business, in or in connection with which any offence under sec. 501 is charged to have been committed, shall act as a magistrate or justice, in any case of complaint or information under that section, or as a member of any court for hearing any appeal in any such case. Sec. 578.

*"To abstain from doing anything which he has a lawful right to do"*—In *R. v. McKenzie* [1892] 2 Q.B. 519, 61 L.J.M.C. 181, 17 Cox C.C. 542, the defendant was convicted under the corresponding sec. 7 of the English Act. Objection was taken that the conviction stated that he wrongfully and without legal authority followed the informant in a disorderly manner with two or more other persons in certain streets with a view to compel him to abstain from doing acts which he had a legal right to do, but did not state what the acts were. The court held that the conviction was bad, as it ought to have stated what the acts were which he had a legal right to do. But where the indictment as in *R. v. Hulme* (1913), 9 Cr. App. R. 79 has stated what the informant was doing, but has omitted the formal statement that he had a legal right to do it, the conviction thereon will be upheld; the point raised in *R. v. McKenzie* not then being applicable.

*Sub-sec (a)—"Injures his property"*—In *Smith v. Moody* [1903] 1 K.B. 56, the conviction followed the words of the Act (compare Code sec. 723, sub-sec. 3), and in holding the conviction bad Lord Alverstone, C.J., at p. 60, said: "The second objection to the conviction is that it does not sufficiently specify the property of the respondent which

the appellant is alleged to have injured, the only words used being 'did injure the property of' the respondent. I have come to the conclusion that this objection is good and must prevail. I was at first inclined to think that the defect was cured by sec. 39 of the Summary Jurisdiction Act, 1879, which provides that 'the description of any offence in the words of the Act . . . creating the offence, or in similar words, shall be sufficient in law'; but on further considering the question, which is undoubtedly one of importance, it seems to me that it could not have been intended by that section to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by sec. 39 is that the offence itself need only be described in the words of the statute creating it. As was pointed out in the argument for the appellant, it clearly would not be sufficient to say, in a conviction for larceny, 'did steal the property of' the prosecutor without any further particulars; and, in my opinion, sec. 39 does not cure the omission from a conviction of such particularity in the description and details of the offence as has always been required."

*Sub-sec. (b)*—"Intimidates by threats"—It is for the jury to find whether the words used amounted to intimidation. *R. v. Baker* (1911), 7 Cr. App. B. 89; *R. v. Walton* (1863), L. & C. 288, 9 Cox C.C. 268, *R. v. Tomlinson* [1895] 1 Q.B. 706, 18 Cox C.C. 75; *Curran v. Treleavan* [1891] 2 Q.B. 545, 61 L.J.M.C. 9; *Wood v. Bowron*, L.R. 2 Q.B. 21, 36 L.J.M.C. 5.

*Sub-sec. (c)*—"Persistently follows about from place to place"—See *Smith v. Thomasson*, 16 Cox C.C. 740, 54 J.P. 596.

*Sub-sec. (e)*—"With another person, following in a disorderly manner"—See *ex parte Wilkins*, 64 L.J.M.C. 221.

*Sub-sec. (f)*—"Picketing in furtherance of strike"—A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful. *Quinn v. Leatham* [1901] A.C. 495, at 583; *Krug Furniture v. Berlin Union*, 5 O.L.R. 563.

In *Lyons v. Wilkins* [1899] 1 Ch. 255, the plaintiffs sought by a civil action to restrain the defendants, members of a trades union, from watching and besetting the works of the plaintiffs, and also the works of a third person who worked for the plaintiffs, for the purpose of persuading work people, and such third person, to abstain from working for the plaintiffs; and a perpetual injunction was granted restraining the defendants from watching and besetting the plaintiff's premises for the purpose of persuading, or otherwise preventing, persons working for them, or for any purpose except merely to obtain or communicate information; and also from watching or besetting the premises of the third person for the purpose of persuading or preventing him from working for the plaintiffs, or for any purpose except merely to obtain



or communicate information. See also *Canada Foundry Co. v. Emmett*, 2 O.W.R. 959, 3 O.W.R. 631; *Dominion Coal Co. v. Bousfield*, 8 E.L.R. 145; *Le Roi Mining Co. v. Rossland Miners' Union*, 8 B.C.R. 30; *Branch v. Roth*, 10 O.L.R. 284; *Vulcan Iron Works v. Winnipeg Lodge*, 16 Man. R. 207; *José v. Metallic Roofing Co.* [1908] A.C. 514, reversing *Metallic Roofing Co. v. José*, 12 O.L.R. 200, 14 O.L.R. 156.

An injunction forbidding the besetting of the employer's premises by striking employees should contain an exception by the words "except for the purpose of obtaining and communicating information." *Cotter v. Osborne*, 16 Man. R. 395, 18 Man. R. 471. The form of injunction order commonly applied is that of *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] A.C. 426. *Le Roi Mining Co. v. Rossland Miners' Union*, 8 B.C.R. 370.

Whilst workmen, members of a trade union, have a right to strike and to combine for that purpose in order to improve their own position, provided the means resorted to be not in themselves unlawful, yet they have no right to induce other workmen, who are not members of the union and who desire to continue working to leave their employment, or to endeavour to prevent the employers from getting other men to work for them and for that purpose to watch and beset the places where the men happen to be, or to induce the employers' workmen to break their contracts, as these are actionable wrongs and picketing and besetting are expressly made unlawful by sec. 501 of the Code. *Cotter v. Osborne*, 18 Man. R. 471. The destruction during the progress of this suit of a book kept by an officer of the union at its headquarters in which were recorded minutes relating to the strike and the non-production of a strike register kept and of the reports handed in from day to day by members of the union actively engaged in picketing and officially appointed for that purpose were held, in a civil action, to be circumstances that justified the court in presuming that they contained entries unfavourable or damaging to the defence and in being satisfied with less convincing evidence, than might otherwise be required, that the wrongful acts of certain members were the authorized acts of the union. *Cotter v. Osborne*, 18 Man. R. 471.

A violation of legal right committed knowingly is a cause of action: *Quinn v. Leatham* [1901] A.C. 495, at p. 510, 70 L.J.P.C. 76. Every person has a right under the law as between himself and his fellow subjects to full freedom in disposing of his own labour or his own capital according to his will. *Idem*. It follows that every person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. *Idem*, at p. 525. Therefore a combination of two or more persons without justification to injure any workman by inciting employers not to employ him is, if it results in damage to him, actionable. *Idem*. This *prima facie* wrongful interference may be negated by showing that the exercise of the

defendants' own rights involved the interference complained of, which interference is merely the exercise of the right of a man to interfere in a matter in which he is jointly interested with others, and such interference gives no cause of action. *Sleuter v. Scott* (1914), 6 W.W.R. 451, affirmed, 8 W.W.R. 714, 21 B.C.R. 155.

In such a case there will be intentional procurement of a violation of individual rights, contractual or other, but just cause for it as being done for the maintenance of the equal civil rights of the defendants. *Glamorgan Coal Co. v. South Wales Miners' Federation* [1903] 2 K.B. 545, at p. 571.

What is "just cause" or "sufficient justification" that will negative the *prima facie* right of action is, in many cases, a difficult question to determine, as to which no general rule can be laid down. The good sense of the tribunal which had to decide would have to analyze the evidence and discover on which side the line fell. *Glamorgan Coal Co. v. South Wales Miners' Federation*, supra, at p. 574; *Giblan v. National Amalgamated Labourers Union* [1903] 2 K.B. 600, at p. 618, 72 L.J.K.B. 907; *Sleuter v. Scott* (1914), 6 W.W.R. 451, 452.

*Prima facie* a combination to interfere with the civil rights of another, whether it be a right to full freedom in disposal of his own labour or his own capital, or any other right of citizenship, is an unlawful combination, because such interference if carried into effect is an actionable wrong, and it is this fact and not any mere malicious motive which constitutes the combination a conspiracy. *Glamorgan Coal Co. v. South Wales Miners' Federation* [1903] 2 K.B. 545, 570; *Sleuter v. Scott*, supra.

A body of men may refuse to work with another if it is not shown that their purpose was to molest him in pursuing his calling and prevent him except on conditions of their own making from earning his living thereby. *Graham v. Knott*, 14 B.C.R. 97. But if they not only exercised their undoubted right to work or refuse to work, but successfully and intentionally endeavoured to dictate conditions on which another should work, they can only escape liability if they had "just cause." The direction given to the jury by Fitzgibbon, L.J. in *Quinn v. Leatham*, approved in the *Giblan* case, supra [1903] 2 K.B. 600, at p. 619, and in *Quinn v. Leatham*, supra [1901] A.C. 495, at p. 508, is that the jury were to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants (in that case of his employers), and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests. In the *Giblan*

case, *supra*, it was held that the right of action was not defeated when the object was to compel payment of a debt to the union. In *Conway v. Wade* [1909] A.C. 506, at p. 515, 78 L.J.K.B. 1025, the right was not defeated even as against a single individual, and *a fortiori*, not against a combination of individuals, when the object was to compel payment of a fine imposed by the union.

*Joint indictment for crimes committed in concert*].—See Code sec. 858 and notes.

*Summary conviction for first offence*].—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Second offence on indictment*].—See Code secs. 465, 851, 963, 964 and 982.

*Industrial Disputes Investigation Act, Can.*].—The Industrial Disputes Investigation Act, 1907, 6-7 Edw. VII, Can., c. 20, provides for a reference, in certain cases, of disputes between employers and employees to boards of conciliation and investigation; by s. 56 prohibits strikes or lockouts "prior to or during" such a reference; and by s. 60 declares that "any person who incites . . . any employee to go or continue on strike contrary to the provisions" of the Act shall be guilty of an offence and liable to a fine. In *R. v. McGuire*, 16 O.L.R. 522, 13 Can. Cr. Cas. 312, the defendant was convicted under the above s. 60 of unlawfully inciting the employees of a mining company to go on strike. At the time when the alleged offence was committed, neither the mine-owners nor their employees had made application for the appointment of a board under the Act. It was held that the prohibition by the statute of strikes or lockouts "prior to or during a reference" of the dispute to a board does not apply solely to cases in which one of the parties to the dispute has made application for the appointment of such a board, but makes all strikes and lockouts illegal until there has been such a reference, and the board has made its report thereon. A strike is therefore "contrary to the provisions of the Act," before as well as after it has been invoked by either the employers or employees, and, as there was evidence to support the conviction, it must be affirmed. *Rex v. McGuire*, 16 O.L.R. 522, 13 Can. Cr. Cas. 312. See also amending Act, 1910, Can., ch. 29; *Williams v. United Mine Workers*, [1917] 1 W.W.R. 217 (Alta.).

*Blackmail, threats and intimidation*].—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

*Trade conspiracies and combinations*].—See Code secs. 2 (38), 495-503, 581, 590, 1012; Conciliation and Labour Act, R.S.C. 1906, ch. 96; Combines Investigation Act, Can., 1910, ch. 9; Industrial Disputes Investigation Act, 1907, Can., ch. 20 as amended 1910, Can., ch. 29; the Department of Labour Act, 1909, Can., ch. 22.

**Intimidation to prevent working at any trade.**

**502.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with intent to hinder him from working or being employed at such trade, business or manufacture.

*Origin*—Code of 1892, sec. 524; R.S.C. 1886, ch. 163, sec. 9.

*Violence and threats of violence in unlawful trade conspiracy*—A trade conspiracy is an agreement to do, or procure to be done, any unlawful act in restraint of trade. Code sec. 496. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful as regards the criminal law. Code sec. 497.

No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute. Sec. 590.

"Trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service. Code sec. 2, sub-sec. (38).

And an "act," for the purposes of the sections relating to offences connected with trade and breaches of contract, includes a default, breach or omission. Code sec. 335 (a).

See notes to secs. 498, 501.

*Second offences*—See secs. 465, 963 and 964.

*Trade conspiracies and combinations*—See Code secs. 2 (38), 495-503, 581, 590, 1012; Conciliation and Labour Act, R.S.C. 1906, ch. 96; Combines Investigation Act, Can., 1910, ch. 9; Industrial Disputes Investigation Act, 1907, Can., ch. 20 as amended 1910, Can., ch. 29; the Department of Labour Act, 1909, Can., ch. 22.

**Using violence to hinder buying grain, etc.—To prevent conveyance of same.—By violence hinders seamen, etc., loading or unloading.—Using violence with intent to hinder.**

**503.** Every one is guilty of an offence punishable on indictment, or on summary conviction before two justices, and liable

on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who,—

- (a) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes, or other produce or goods, in any market or other place; or,
- (b) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, while on the way to or from any city, market, town or other place with intent to stop the conveyance of the same; or,
- (c) by force or threats of violence, or by any form of intimidation whatsoever, hinders or prevents, or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship labourer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed; or with intent so to hinder or prevent, besets or watches such ship, vessel or employee; or,
- (d) beats or uses any violence to, or makes any threat of violence against, any such person with intent to hinder or prevent him from working at or exercising such trade, business, calling or occupation or on account of his having worked at or exercised the same.

*Origin*—Code of 1892, sec. 525; 50-51 Vict., Can., ch. 49; R.S.C. 1886, ch. 173, sec. 10.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Second offence on indictment*—See Code secs. 465, 851, 963, 964 and 982.

*Trade conspiracies and combinations*—See Code secs. 2 (38), 495-503, 581, 590, 1012; Conciliation and Labour Act, R.S.C. 1906, ch. 96;

Combines Investigation Act, Can., 1910, ch. 9; Industrial Disputes Investigation Act, 1907, Can., ch. 20 as amended 1910, Can., ch. 29; the Department of Labour Act, 1909, Can., ch. 22.

**Intimidation to prevent bidding on public lands.**

**504.** Every person is guilty of an indictable offence and liable to a fine not exceeding four hundred dollars, or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any province of Canada, by intimidation, or illegal combination, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale.

*Origin*—Code of 1892, sec. 526; R.S.C. 1886, ch. 173, sec. 14.

*Second offences*—See secs. 465, 963 and 964.

*Trading Stamps.*

**Issuing trading stamps.**

**505.** Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding five hundred dollars, who, by himself or his employee or agent, directly or indirectly, issues, gives, sells or otherwise disposes of, or offers to issue, give, sell or otherwise dispose of trading stamps to a merchant or dealer in goods for use in his business.

*Origin*—Can. Stat., 4-5 Edw. VII, ch. 9, sec. 1, 7-8 Edw. VII, ch. 18, sec. 5.

*"Trading stamps" defined*—See secs. 335 (u) and 335 (2), as amended 1908. By the latter an offer, printed or marked by the manufacturer upon any wrapper, box or receptacle, in which goods are sold, of a premium or reward for the return of such wrapper, box or receptacle, to the manufacturer, is not a trading stamp within the meaning of this Part. Can. Stat., 1908, ch. 18, sec. 5.

A voting ticket given by a trader to each purchaser of goods to enable the latter to become a contestant for prizes to be distributed in a voting contest or to aid another contestant by voting for him or by transferring the ticket to him, is a "trading stamp" within secs. 335 (u) and 505. *R. v. Pollock* (1916), 26 Can. Cr. Cas. 24, 36 O.L.R. 7.

*"Every one"*—A partnership or corporation is included. Code sec. 335 (g).

*"Merchant"*—This includes any partnership, company or body corporate doing a mercantile business. Code sec. 335 (g).

*Exception*—Sec. 343 declares that Part VII shall not apply to any

trading stamp "issued" by a manufacturer or vendor before November 1, 1905.

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

**Trading stamps.—Giving to a purchaser of goods.**

**506.** Every one is guilty of an indictable offence and liable to six months' imprisonment, and to a fine not exceeding two hundred dollars, who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly, gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a purchaser from him of any such goods.

*Origin*—4-5 Edw. VII, Can., ch. 9.

*Trading stamps*—As to what are included in this term, see secs. 335 (2), 336 (u), 343.

*Merchant or dealer*—Code sec. 335 (g).

*Agent*—Code sec. 335 (g).

*Purchaser*—Code sec. 335 (g).

*Second offences*—See secs. 465, 757, 851, 963, 964, 982.

**Executive officer of offending company liable for aiding, abetting, counselling or procuring offence under secs. 505, 506.**

**507.** Any executive officer of a corporation or company guilty of an offence under the two last preceding sections who in any way aids or abets in or counsels or procures the commission of such offence, is guilty of an indictable offence and liable to the punishment stated in the said sections respectively.

*Origin*—4-5 Edw. VII, Can., ch. 9.

*Exception*—See sec. 343.

*Second offence*—See secs. 465, 757, 851, 963, 964, 982.

**Offence to receive trading stamps on purchase of goods.**

**508.** Every one is guilty of an offence and liable, on summary conviction, to a fine not exceeding twenty dollars, who, being a purchaser of goods from a merchant or dealer in goods, directly or indirectly receives or takes trading stamps from the vendor of such goods or his employee or agent.

*Origin*—4-5 Edw. VII, Can., ch. 9.

"Every one"; "*purchaser*"; "*merchant*"; "*vendor*"; "*agent*"—Each of these includes, for the purposes of sec. 508, any partnership, company or body corporate. Code sec. 335 (g).

*Trading stamps*—A definition of what are to be considered "trading stamps" in addition to what are ordinarily so-called is to be found in Code sec. 336, paragraph (u), and see sec. 335 (2), 343. Other trading stamp offences are mentioned in secs. 505-507.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Musical and Dramatic Copyrights.*

**Performing dramatic or musical copyright works without consent of author.**

**508A.** Any person who, without the written consent of the owner of the copyright or of his legal representative, knowingly performs or causes to be performed in public and for private profit the whole or any part, constituting an infringement, of any dramatic or operatic work or musical composition in which copyright subsists in Canada, shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding two hundred and fifty dollars, or, in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding two months, or to both.

*Origin*—Can. Stat. 1915, ch. 12.

*Summary conviction for first offence*—See sec. 729.

**Unauthorized changing of title, etc., of copyrighted drama or music.**

**508B.** Any person who makes or causes to be made any change in or suppression of the title, or the name of the author, of any dramatic or operatic work or musical composition in which copyright subsists in Canada, or who makes or causes to be made any change in such work or composition itself without the written consent of the author or of his legal representative, in order that the same may be performed in whole or in part in public for private profit, shall be guilty of an offence, and shall be liable on summary conviction to a fine not exceeding five hundred dollars, or, in the case of a second or subsequent offence, either to such fine or to imprisonment for a term not exceeding four months, or to both.

*Origin*—Can. Stat., 1915, ch. 12.

A person who suppresses the name of the author of a theatrical play written by a foreigner but protected by the Imperial Statute (1886),



49-50 Vict., ch. 33 (Berne Convention), without the consent of the author, and who has it represented in a theatre in Canada, renders himself guilty of a criminal offence under sec. 508B. *Rex v. Daoust* (Helbronner v. Daoust) (1915), 26 Can. Cr. Cas. 69, 49 Que. S.C. 65.

*Summary conviction for first offence*—See sec. 729.

*Respecting Insurance.*

**Soliciting or carrying on business of insurance.—Unlicensed companies.—Penalty.—Limitation of time for prosecution.**

**508c.** (1) Every one shall be guilty of an indictable offence who, within Canada, except on behalf of or as agent for a company, thereunto duly licensed by the Minister of Finance, or on behalf of or as agent for or as a member of an association of individuals formed upon the plan known as Lloyd's or of an association of persons formed for the purpose of inter-insurance and so licensed, solicits or accepts any insurance risk, or issues or delivers any interim receipt or policy of insurance, or grants in consideration of any premium or payment any annuity on a life or lives, or collects or receives any premium for insurance, or carries on any business of insurance, or inspects any risk, or adjusts any loss, or prosecutes or maintains any suit, action or proceeding, or files any claim in insolvency relating to such business, or receives directly or indirectly any remuneration for doing any of the aforesaid acts.

(2) Any one convicted of any such offence shall for a first offence be liable to a penalty of not more than fifty dollars or less than twenty dollars, and, in default of payment, to imprisonment with or without hard labour for a term of not more than three months or less than one month, and for a second or any subsequent offence to a penalty of not more than one hundred dollars or less than fifty dollars, and in addition thereto to imprisonment with hard labour for a period of not more than six months or less than three months.

(3) All information or complaints for any of the aforesaid offences shall be laid or made within one year after the commission of the offence.

(4) One-half of any pecuniary penalty mentioned in this section shall, when recovered, belong to His Majesty and the other half thereof to the informer.

Provided that nothing in this section contained shall be deemed to prohibit or affect or to impose any penalty for doing any of the acts in this section described,—

- (a) by or on behalf of a company incorporated under the laws of any province of Canada for the purpose of carrying on the business of insurance;
- (b) by or on behalf of any society or association of persons thereunto specially authorized by the Minister of Finance or the Treasury Board;
- (c) in respect of any policy or risk of life insurance issued or undertaken on or before the thirtieth day of March, one thousand eight hundred and seventy-eight, by or on behalf of any company which has not since the last mentioned date received a license from the Minister of Finance;
- (d) in respect of any policy of life insurance issued by an unlicensed company to a person not resident in Canada at the time of the issue of such policy;
- (e) in respect of the insurance of property situated in Canada with any British or foreign unlicensed insurance company or underwriters, or with persons who reciprocally insure for protection and not for profit, or the inspection of the property so insured, or the adjustment of any loss incurred in respect thereof, if the insurance is effected outside of Canada without any solicitation whatsoever directly or indirectly on the part of the company, underwriters or persons by which or by whom the insurance is made;
- (f) solely in respect of marine or inland marine insurance;
- (g) in respect of any contract entered into or any certificate of membership or policy of insurance issued, before the twentieth day of July, one thousand eight hundred and eighty-five, by any assessment life insurance company.

*Origin*—Can. Stat., 1917, 7-8 Geo. V, ch. 26, sec. 1.

**Offences.—Discrimination.—Unlawful rebates, etc.**

**508b.** (1) Any insurance company, or any officer, agent or representative thereof, who,—

- (a) makes or permits any distinction or discrimination in favour of individuals between the insured of the same class and equal expectation of life in the amount of premiums charged or in the dividends payable upon any policy of life insurance issued by or on behalf of the company; or,
- (b) makes or assumes to make any stipulation or agreement which is intended to operate as a part of any insurance contract to which the company is or is to become a party, whether in respect of the amount, terms or conditions of the insurance, the premium to be paid or otherwise, except such as is plainly expressed in the policy issued in the case; or,
- (c) pays, allows or gives, or offers to pay, allow or give, directly or indirectly, as inducement to insure, any rebate of the premium stipulated by the policy to be payable, or any special favour or advantage in the dividends or other benefits to accrue thereon, or any advantage by way of local or advisory directorship unless for actual service *bona fide* performed, or any paid employment or contract for service of any kind or any inducement whatever intended to be in the nature of a rebate of premium; or,
- (d) gives, sells or purchases as such inducement or in connection with such insurance any stock, bonds or other securities of any insurance company, or other corporation, association or partnership;

And any person who knowingly receives as an inducement to insure, any rebate of premium or any such special favour, advantage or inducement as aforesaid;

shall for a first offence be liable to a penalty of double the amount of the annual premium chargeable upon the application or policy in respect of which the offence is committed, such penalty not to be less than one hundred dollars, and for a second or subsequent offence to a penalty of double the amount of such

annual premium, the latter penalty not to be less than two hundred and fifty dollars.

(2) Moreover every director, manager or other officer of any insurance company who knowingly consents to or permits the violation of any of the provisions of this section by any agent officer, employee or servant of the company shall be liable to a penalty of five hundred dollars.

(3) The penalties provided for in this section may be recovered either upon summary conviction under Part XV of the Criminal Code, or in any court of competent civil jurisdiction at the suit of any person suing therefor as well for His Majesty as for himself; one-half of any such penalty when recovered to be paid into the Consolidated Revenue Fund and the other half to belong to the informer or person at whose suit the same is recovered.

(4) No director, manager, agent, officer or servant of any insurance company shall be indemnified, either in whole or in part, from the funds of the company for any penalty or costs which he may be adjudged to pay on account of any offence committed against this section.

*Origin*—Can. Stat., 1917, 7-8 Geo. V, ch. 26, sec. 1.



## PART VIII.

### WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY.

#### *Interpretation.*

#### **"Wilfully" defined for purposes of Part VIII.**

**509.** Every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed for the purposes of this Part to have caused it wilfully.

*Origin*—Sec. 481, Code of 1892; R.S.C. 1886, ch. 168, sec. 60.

*Legal justification or colour of right*—See sec. 541, and as to summary conviction offences under sec. 539, the further limitations of sec. 540 as to fair and reasonable supposition of right.

*"Wilful" offences*—Where the Code declares an offence in respect of an act "wilfully" done, the indictment or charge will be insufficient if it omits the word "wilfully" or words to the like import, although the charge alleges the act to have been done "unlawfully." *Ex parte O'Shaughnessy*, 13 Que. K.B. 178, 8 Can. Cr. Cas. 136; *R. v. Barre*, 2 W.L.R. 376, 11 Can. Cr. Cas. 1; and see *R. v. Johnson*, 7 O.L.R. 525, 8 Can. Cr. Cas. 123; *R. v. Tupper*, 11 Can. Cr. Cas. 199; *R. v. Bridges*, 13 B.C.B. 67, 12 Can. Cr. Cas. 548; *R. v. Graf*, 19 O.L.R. 238. Under an election law a "wilful" refusal by an official to permit a voter to vote was held to imply that the refusal was perverse or malicious. *Johnson v. Allen*, 26 Ont. B. 550. And in a prosecution for wilful refusal or neglect of a husband to maintain his wife it was held that there must be an absence of any reasonable ground for believing the refusal or neglect to be lawful. *H— v. H—*, 6 Can. Cr. Cas. 165; and see *McGillivray v. Muir*, 7 Can. Cr. Cas. 360, 6 O.L.R. 154.

It is to be noted that the definition as to reckless acts given by sec. 509 applies only to Part VIII (secs. 509-545). Compare secs. 259 (b), 283, 285.

"Wilful" ordinarily means voluntary or deliberate; *Century Dictionary*, vol. 8; but is often used in penal statutes so as to include the idea of an act intentionally done with a bad motive or purpose, an evil intent, 40 Cyc. 944; *R. v. Child*, L.R. 1 C.C.R. 307, 12 Cox 64, 24 L.T. 556; *R. v. Faulkner*, 13 Cox C.C. 550; *R. v. Cooper*, 5 C. & P. 535; *R. v. Cronin*, 36 U.C.Q.B. 342.

The general principle is that where a person commits an unlawful act unaccompanied by any circumstances justifying its commission, it is a presumption of law that he acted advisedly and with intent to produce the consequences which have ensued. A person cannot shelter himself from punishment on the ground that the mischief he committed was wider in its consequences than he originally intended. *R. v. Pembilton*, L.R. 2 C.C.R. 119, 12 Cox 607, 30 L.T. 405; *Roper v. Knott* [1898] 1 Q.B. 868, 67 L.J.Q.B. 574, 78 L.T. 595; *R. v. Latimer*, 17 Q.B.D. 359, 51 J.P. 184, 16 Cox 70; *R. v. Welch*, 40 J.P. 183, 1 Q.B.D. 23, 13 Cox 121; *R. v. Ward*, 1 C.C.R. 356, 12 Cox 123.

In the *Welch* case, *supra*, Coleridge, C.J., expressed the view that where the act was reckless and cruel there was malice enough to sustain a conviction.

### *Mischief.*

#### **Mischief.—Wilful destruction or damage to property.**

**510.** Every one is guilty of the indictable offence of mischief who wilfully destroys or damages any of the property in this section mentioned, and is liable to the punishment in this section specified, that is to say:—

(A) To imprisonment for life if the object damaged is,—

- (a) a dwelling-house, ship or boat, and the damage is caused by an explosion, and any person is in such dwelling-house, ship or boat; and the damage causes actual danger to life; or,
- (b) a bank, dyke or wall of the sea, or of any inland water, natural or artificial, or any work in, on, or belonging to any port, harbour, dock or inland water, natural or artificial and the damage causes actual danger of inundation; or,
- (c) any bridge, whether over any stream of water or not, or any viaduct, or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal passes, and the damage is done with intent to render and does render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable; or,
- (d) a railway damaged with the intent of rendering and so as to render such railway dangerous or impassable;

(B) To fourteen years' imprisonment if the object damaged is,—

- (a) a ship in distress or wrecked, or any goods, merchandise or articles belonging thereto; or,
- (b) any cattle or the young thereof, and the damage is caused by killing, maiming, poisoning or wounding;

(C) To seven years' imprisonment if the object damaged is,—

- (a) a ship damaged with intent to destroy or render useless such ship; or,
- (b) a signal or mark used for purposes of navigation; or,
- (c) a bank, dyke or wall of the sea or of any inland water or canal, or any materials fixed in the ground for securing the same, or any work belonging to any port, harbour, dock, or inland water or canal; or,
- (d) a navigable river or canal damaged by interference with the flood gates or sluices thereof or otherwise, with intent and so as to obstruct the navigation thereof; or,
- (e) the flood gate or sluice of any private water with intent to take or destroy, or so as to cause the loss or destruction of, the fish therein; or,
- (f) a private fishery or salmon river damaged by lime or other noxious material put into the water thereof with intent to destroy fish therein or to be put therein; or,
- (g) the flood gate of any mill-pond, reservoir or pool cut through or destroyed; or,
- (h) goods in process of manufacture damaged with intent to render them useless; or,
- (i) agricultural or manufacturing machines, or manufacturing implements, damaged with intent to render them useless; or,
- (j) a hop bind growing in a plantation of hops, or a grape vine growing in a vineyard;

(D) To five years' imprisonment if the object damaged is,—

- (a) a tree, shrub or underwood growing in a park, pleasure ground or garden, or in any land adjoining or be-



- longing to a dwelling-house, injured to an extent exceeding in value five dollars; or,
- (b) a post letter bag or post letter; or,
  - (c) any street or other letter box or any receptacle, article, machine or device established or used by authority of the Postmaster-General in connection with the business of the Post-office Department; or,
  - (d) any parcel sent by parcel post, any packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book or other mailable matter, not being a post letter, sent by mail; or,
  - (e) any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged by night to the value of twenty dollars;
- (E) To two years' imprisonment if the object damaged is any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged to the value of twenty dollars.

*Origin*—1913 Can. Stat., ch. 13, sec. 19 (amendment); Code of 1892, sec. 499; R.S.C. 1886, ch. 168; 32-33 Vict., Can., ch. 22; Malicious Damage Act, 1861, Imp.

*"Wilfully destroys or damages"*—The wilfully setting fire by one person to the goods and chattels of another is a criminal offence. *Mortimer v. Fisher* (1913), 4 W.W.R. 454, 457 (Sask.).

*Sub-sec. B (b)—Killing or wounding cattle, horses, etc.*—See definition of "cattle" in Code sec. 2, sub-sec. (5); see other provisions dealing with injury to animals in secs. 536-538.

The castration of a stallion running at large contrary to the provisions of the Entire Animals Ordinance (N.W.T.) was held to be a damage of the stallion within the meaning of s. 510 (B. b.) of the Criminal Code. The fact that the owner of the stallion had expressed an intention to castrate it was held to be no justification of the unauthorized act of the defendant. The interference by the stallion with the defendant's mares also running at large was also held to be no justification, the defendant being in such case at best a mere licensee of the land over which the mares grazed: *McLean v. Rudd*, Alta. L.R. 505, followed. *R. v. Kroesing*, 2 Alta. L.R. 275, 16 Can. Cr. Cas. 312. The proper test in such a case is the question, Did the defendant do

what he did honestly believing the act to be necessary for the protection of his property? Proof of actual malice is not necessary under this section, but although the word "maliciously" is not used, legal malice such as would establish that *mens rea*, without which there can be no criminal intent, must be proven. The fact that the defendant committed the act without any attempt to avail himself of the provisions of the Ordinance relating to impounding stallions, and the evidence adduced not showing that he honestly believed the act necessary to protect his property, it was held that legal malice was sufficiently proven. *Rex v. Kroesing*, 2 Alta. L.R. 275, 16 Can. Cr. Cas. 312.

But on a charge of unlawfully and maliciously killing cattle where it appeared that an animal was killed by the prisoners, when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it, it was held that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, a *mens rea* on the part of the prisoners being disproved. *R. v. Mennel*, 1 Terr. L.R. 487; *R. v. Clamens* [1898] 1 Q.B. 556, 67 L.J.Q.B. 482.

*Cattle brands as prima facie evidence of ownership*

In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be *prima facie* evidence that such cattle are the property of the registered owner of such brand or mark. Code sec. 989.

*Sub-sec. (E)—Amount of damage*—It has been held that the pecuniary "amount" to which "damage" is done by window-breaking within s. 51, of 24 and 25 Vict., c. 97, the Malicious Damage Act, 1861 (Imp.) is to be reckoned without deducting any salvage value; *R. v. Hewitt* (1912), 7 Cr. App. R. 219.

The value of a plate-glass window which had been maliciously damaged need not necessarily be proved by an expert. An opinion of a non-expert as to its substantial value is admissible. *R. v. Beckett* (1913), 8 Cr. App. R. 204. If the amount of damage is less than \$20 and the offence is not within the various classes of offences set forth in sub-secs. (A) to (D) of sec. 510, nor within secs. 511-538 inclusive, reference must be had to secs. 539 and 540, dealing with cases not specially provided for. If the property damaged is of a class as to which no special punishment is by law prescribed, and the damage amounts to less than \$20, the proceedings are by summary conviction under sec. 539. If the damage amounts to \$20 or more and was done "by night," i.e., between 9 p.m. and 6 a.m. (sec. 2, sub-sec. 23), the offence is indictable under sec. 510 (D), clause (e), with a maximum penalty of five years' imprisonment, but if not done by night so as to come within that clause of sub-sec. (D), the offence is still indictable

under sub-sec. (E), but with the lesser penalty up to two years' imprisonment. The maximum term of imprisonment may be shortened (sec. 1054); and see sec. 1081 as to suspended sentences.

*Inland water*—It would seem that a drainage ditch filled with surface water but incapable of being used commercially as a river and not constituting a canal, is not within the term "inland water, natural or artificial." Sub-sec. A (b). *R. v. Braun*, 8 Can. Cr. Cas. 397. See as to mill-ponds and reservoirs, sub-sec. (c).

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510b, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

*Legal justification or colour of right as a defence*—See sec. 541 (1).

*Offender having interest in property*—See sec. 541 (2).

*Reckless acts with knowledge of probable mischief*—See sec. 509.

*Compensation for damage*—See sec. 1048.

### *Arson.*

**Arson.—Wilfully setting fire to building.**

**511.** Every one is guilty of the indictable offence of arson and liable to imprisonment for life who wilfully sets fire to any building or structure, whether such building or structure is completed or not, or to any stack of vegetable produce or of mineral or vegetable fuel, or to any mine or well of oil or other combustible substance, or to any ship or vessel, whether completed or not, or to any timber or materials placed in any shipyard for building or repairing or fitting out any ship, or to any of His Majesty's stores or munitions of war.

*Origin*—Sec. 482, Code of 1892; R.S.C. 1886, ch. 168, secs. 2 to 5, 7, 8, 19, 28, 46 and 47; 24-25 Vict., Imp., ch. 97, sec. 6.

"*Wilfully*"—See sec. 509.

*Whether building is completed or not*—The inclusion of unfinished structures by the express terms of the Code in accordance with the interpretation given in *R. v. Manning*, 1 C.C.R. 338, 25 L.T. 573, 12 Cox 106, to the word "building" used in the English Act, 24-25 Vict., ch. 97, sec. 6.

"*Ship or vessel*"—Under the Canada Shipping Act, R.S.C. 1906, ch. 113 and amendments 1907-1916, a "ship" includes every description of vessel used in navigation not propelled by oars. R.S.C. 1906, ch. 113, sec. 2; and see the Merchant Shipping Act, Imp., 1894.

"*Structure*"—A "threshing separator" is not a "structure" within the meaning of sec. 511, but is covered by the term "agricultural or

manufacturing machines" under sec. 510 of the Code. *Mortimer v. Fisher*, 4 W.W.R. 454, 23 W.L.R. 905.

*Colour of right*—See sec. 541.

*Where accused owns the building burned*—Ownership will not prevent the act being an offence if done with intent to defraud. Sec. 541 (2); *R. v. Bryans*, 12 U.C.C.P. 166; *R. v. Greenwood*, 23 U.C.Q.B. 250; *R. v. Beardaley*, 18 Can. Cr. Cas. 389; *R. v. Wilson*, 1 W.W.R. 272, 21 Can. Cr. Cas. 105, 19 W.L.R. 657. Where the accused was charged with setting fire to his house with intent to defraud an insurance company and the defence raised was that of accident, evidence was admitted to show that two other houses in which the accused had previously lived had been burned down and that he had obtained the money for which they had been insured. *R. v. Gray*, 4 F. & F. 1102. The decision in *Gray's* case was approved in *Makin v. A. G.*, of New South Wales [1894] A.C. 57.

*Evidence of arson*—Where a person under conviction for arson is called by the Crown on the trial of another person on the charge of wilfully setting the same fire, to prove that the latter had instigated him to commit the offence, the testimony of the convict that he had caused the fire at the instance and direction of accused may be rebutted by the testimony of other prisoners that the convict had admitted to them that the accused had had nothing to do with the fire; but the convict must first be asked whether he had made such admission, and have denied doing so. *R. v. Webb*, 22 Can. Cr. Cas. 424, 6 W.W.R. 358, 24 Man. R. 437; Canada Evidence Act, sec. 11.

Where two persons are charged with the same arson on separate informations laid on the same day, by the same informant and both preliminary enquiries are being heard separately before the same justice, the Crown may after the committal for trial of the first prisoner call him as a witness against the second prisoner, and he will be bound to give evidence. *Ex parte Ferguson* (1911), 17 Can. Cr. Cas. 437 (N.S.).

The prisoner already committed was both a competent and compellable witness against another prisoner charged in another proceeding with the identical offence and may be committed for contempt, if he refuses to answer. *Ex parte Ferguson*, *supra*.

A conviction of two persons jointly charged with arson will be set aside where the evidence warrants a finding that the act was committed either by one or the other of them but does not enable the court to determine which one committed the offence nor justify a finding implicating them both. *R. v. Upton* (1915), 25 Can. Cr. Cas. 28, 9 O.W.N. 74.

Where A. was charged with setting fire to B.'s hay rick and evidence had been given that later, on the same night, fires had also occurred at the ricks of C. and D. within a mile distant, evidence of threats, statements and particular acts by A. pointing alone to C.'s or D.'s fires but not implicating A. as to B.'s fire was held inadmissible. *R. v. Taylor*, 5 Cox C.C. 138.

Where A. was charged with setting fire to hay in B.'s barn, and had confessed that he entered the barn, lit his pipe and fell asleep on the hay, a previous confession by him that he had caused a fire three months' previously in C.'s barn several miles distant, in a similar manner, was inadmissible, there being no suggestion of any grudge against B. or C. *R. v. Peel*, 50 Solicitor's Journal (Eng.), 137.

*Interest of accused in the burned building*—See sec. 541.

*Accessory chargeable as a principal*—See sec. 69.

*Conspiracy to commit offence*—See sec. 573.

*Attempts and threats*—See secs. 512, 516.

*Insanity as defence*—See sec. 19. A lunatic is civilly liable in damages to persons injured by his acts, unless utterly blameless. Where a lunatic defendant had set fire to a barn, and the evidence showed that, while not responsible to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong, it was held that he was liable for the damage done. *Stanley v. Hayes*, 8 O.L.R. 81.

*Firing ship with intent to murder*—See sec. 264.

*Extradition*—Arson is an extraditable offence under the treaty of 1842 with the U.S.A.

#### **Attempt to commit arson.**

**512.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that any thing mentioned in the last preceding section is likely to catch fire therefrom.

*Origin*—Sec. 483, Code of 1892; R.S.C. 1886, ch. 168, secs. 9, 10, 20, 29, and 48; 32-33 Vict., Can., ch. 22, sec. 12; Malicious Damage Act, 1861, Imp., secs. 7 and 8.

*"Wilfully attempts"*—See sec. 509.

*Attempt to fire a building*—If B, under A.'s direction, arranges a blanket saturated with oil so that if it is set on fire the flame will be communicated to a building and then lights a match and holds it until it is burning well and then puts it down within an inch or two of the blanket, when the match goes out; A. is guilty of an attempt to set fire to the building. *R. v. Goodman*, 22 U.C.C.P. 338.

*Setting fire to goods in a building*—If the goods are so situated that the person wilfully setting fire to them knows the building is likely to catch fire therefrom, he is guilty under the second clause of sec. 512 in like manner as for an attempt, although he did not intend that the building should burn. A somewhat similar provision was contained in sec. 7 of the English Act of 1861, its effect being to supersede the decision in *R. v. Lyons*, 1 Bell C.C. 38, 8 Cox 84, 28 L.J.M.C. 33.

*Colour of right*—See sec. 541.

*Setting Other Fires.***Wilfully setting fire to wood or crop, lumber, etc.**

**513.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully sets fire to,—

- (a) any crop, whether standing or cut down, or any wood, forest, coppice or plantation, or any heath, gorse, furze or fern; or,
- (b) any tree, lumber, timber, logs, or floats, boom, dam or slide, and thereby injures or destroys the same.

*Origin*—Sec. 484, Code of 1892; R.S.C. 1886, ch. 168, secs. 18, 12; sec. 16.

*"Wilfully"*—See sec. 509.

*Property interest of accused*—See sec. 541 (2).

*Justification or colour of right*—See sec. 541.

**Attempts to set fire to wood or crop, lumber, etc.**

**514.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that any thing mentioned in the last preceding section is likely to catch fire therefrom.

*Origin*—Sec. 485, Code of 1892; R.S.C. 1886, ch. 168, sec. 20; 32-33 Vict., Can., ch. 22, sec. 22.

*"Wilfully attempts"*—See sec. 509.

*"Or who wilfully sets fire," etc.*—This section includes the wilful setting fire where the fire is not directly applied to the crops, timber, etc., referred to in sec. 513, but to something else as to which the intent to burn was more particularly directed. In such case the penalty of sec. 513 is incurred if the person knew that the crops, timber, etc., were likely to catch fire from the setting fire to that which he had determined to burn and had wilfully set fire to. Compare sec. 512. It is also to be noted that by Code sec. 509, if any one causes any event by an act "which he knew would probably cause it, being reckless whether such event happened or not, he is deemed for the purpose of the mischief clauses and other sections embodied in Part VIII to have caused it 'wilfully.'" Where the defendant set fire to a summer-house in a wood and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood. *B. v. Price*, 9 C. & P. 729.

*Colour of right*—See sec. 541.

**Recklessly setting fire to forests.—To logs, booms, etc.—To square timber.—To manufactured lumber.—Discretion to try summarily.**

**515.** Every one is guilty of an indictable offence and liable to two years' imprisonment, who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a provincial or municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide, on the Crown domain, or on land leased or lawfully held for the purpose of cutting timber, or on private property on any creek or river, or rollway, beach or wharf, so that the same is injured or destroyed.

2. The magistrate investigating any such charge may, in his discretion, if the consequences have not been serious, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, and in default of payment by the committal of the offender to prison for any term not exceeding six months, with or without hard labour.

*Origin*—Sec. 486, Code of 1892; R.S.C. 1886, ch. 168, sec. 11; 32-33 Vict., Can., ch. 22, sec. 11.

*Power to summarily convict*—The power here conferred on the magistrate to dispose of the matter summarily may be exercised if the magistrate holding a preliminary enquiry so decides, having regard to the consequences of the crime not having been serious. This impliedly leaves it to the magistrate to decide whether the consequences have been serious or not. If he holds them to be serious, he thereby ousts himself of the special jurisdiction to dispose of the case as a justice of the peace acting under the Summary Convictions clauses, Code secs. 705, *et. seq.* in Part XV of the Code. The Interpretation Act, R.S.C. 1906, ch. 1, defines "magistrate" as "a justice of the peace" unless the context otherwise requires. The word "magistrate" has a different and special significance in Part XVI of the Code as to summary trial of indictable offences because of the definition applicable only to Part XVI, given in Code sec. 771. The special jurisdiction of Code sec. 515 is quite distinct from Part XVI and indicates an intention that the justice of the peace holding a preliminary inquiry under Part XIV (Code secs. 668 *et seq.*) shall have power to exercise the limited jurisdiction of trial which it confers, although such justice may not be a police magistrate or other functionary entitled to hold a "summary trial" under Part XVI. It will be noted also that sec. 515 imposes no condition as to the consent of the accused.

*Colour of right*—See sec. 541.

**Written threats to burn.**

**516.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any building, or any rick or stack of grain, hay or straw or other agricultural produce, or any grain, hay or straw or other agricultural produce in or under any building, or any ship or vessel.

*Origin*—Sec. 487, Code of 1892; R.S.C. 1886, ch. 173, sec. 8; 32-33 Vict., Can., ch. 52, sec. 58; Malicious Damage Act, 1861, Imp., sec. 50.

*Written threats to burn*—Sec. 516 deals with written threats to burn. If the threat be made as part of a written demand of money or property with menaces, the offence may come under sec. 451. *R. v. Smith*, 2 C. & K. 882. A merely oral threat to burn buildings will, however, found proceedings for binding over to keep the peace. Cr. Code sec. 748; *Ex parte Welsh*, 2 Can. Cr. Cas. 35. The threatening letter need not have been addressed directly to the person threatened; the jury may find that a letter addressed to A., making threats against the property of B., was sent with the intention that B. should obtain knowledge of it from A. *R. v. Paddle*, 4 R. & R. 484; It seems unnecessary to state in the indictment the name of the person to whom the writing was uttered. Code sec. 855; *Elsworth's case*, 2 East P.C. 986. It is for the jury to consider in the case of a letter in general terms not properly addressed whether it was meant for the party who got it so as to constitute a threat in respect of the particular building referred to in the indictment. *R. v. Grimwade*, 1 Cox 85, 1 C. & K. 592; *R. v. Carruthers*, 1 Cox 138.

*Written threats to destroy building, etc.*—As to attempted arson, see sec. 512, and as to attempting to set fire to crops, sec. 514. Wilful possession of explosives with intent to cause serious injury to property is dealt with by secs. 113 and 114.

*Colour of right*—See sec. 541.

*Comparison of handwriting*—See Canada Evidence Act, sec. 8; *R. v. Dixon*, 29 N.S.R. 462; *R. v. Harrie*, 6 C. & P. 105.

*Written threats to injure cattle*—See sec. 538.

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510n, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.



*Railways, Mines and Electric Plant.***Injuries affecting railways, likely to endanger property.—With intent.**

**517.** Every one is guilty of an indictable offence and liable to five years' imprisonment who, in manner likely to cause danger to valuable property, without endangering life or person,—

- (a) places any obstruction upon any railway, or takes up, removes, displaces, breaks or injures any rail, sleeper or other matter or thing belonging to any railway; or,
- (b) shoots or throws anything at an engine or other railway vehicle; or,
- (c) interferes without authority with the points, signals or other appliances upon any railway; or,
- (d) makes any false signal on or near any railway; or,
- (e) wilfully omits to do any act which it is his duty to do; or,
- (f) does any other unlawful act.

2. Every one who does any of the acts in this section mentioned with intent to cause such danger is liable to imprisonment for life.

*Origin*—Sec. 489, Code of 1892; R.S.C. 1886, ch. 168, secs. 37 and 38; 23 Vict., Can., ch. 29, sec. 6; 32-33 Vict., Can., ch. 22; 24-25 Vict., Imp., ch. 97, sec. 35.

*Sub-sec (e)—Wilful omission of duty*—See sec. 509 as to the interpretation of the word "wilful."

*Sub-sec. (f)—"Any other unlawful act"*—A conviction made by a magistrate under Code sec. 517 (f) for doing an unlawful act on a railway in a manner likely to cause danger is bad if it does not disclose the nature of the unlawful act. *R. v. Porte*, 14 Can. Cr. Cas. 238, 18 Man. R. 222; *Smith v. Moody* [1903] 1 K.B. 56; *re Effie Brady* (1913), 3 W.W.R. 914, 23 W.L.R. 333, 21 Can. Cr. Cas. 123; *R. v. Jackson* (1917), 40 O.L.B. 173, 29 Can. Cr. Cas. 352.

*Colour of right*—The act must have been done without legal justification or excuse and without colour of right. Sec. 541.

"Property"—See definition in sec. 2 (32).

*Acts done with intent to endanger persons on railway*—See sec. 282.

*Wilful neglect endangering persons on railway*—See sec. 283.

*Obstructing construction or operation of railway*—See sec. 518.

*Wilfully damaging goods in transit*—Sec. 519.

**Obstructing railways.**

**518.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any act or wilful omission, obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith.

*Origin*—Sec. 490, Code of 1892; R.S.C. 1886, ch. 168, secs. 38, 39; 32-33 Vict., Can., ch. 22, sec. 40; 24-25 Vict., Imp., ch. 97, sec. 36.

*Obstructing use of railway*—A drunken man got upon the railway and altered the signals and thereby caused a luggage train to pull up and proceed at a very slow pace. It was held upon a case reserved, that this was the causing of an engine and carriage using a railway to be obstructed. *R. v. Hadfield*, 11 Cox C.C. 574, 39 L.J.M.C. 131, L.R. 1 C.C.R. 253. A person improperly went upon a line of railway and purposely attempted to stop a train approaching, by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train; it was held also to be the offence of unlawfully obstructing an engine or carriage using a railway. *R. v. Hardy*, 11 Cox C.C. 656, L.R. 1 C.C.R. 278, 40 L.J.M.C. 62.

The obstruction may consist in the unauthorized operation of a hand-car. *R. v. Brownell*, 26 N.B.R. 579.

*Cumulative acts*—On an indictment for various acts of obstruction of a railway by placing pieces of iron on the rails in a manner likely to wreck a train, the prosecution may elect to treat the several acts of obstruction continuing for several weeks as cumulative acts forming one offence in law, and the refusal of the trial judge to order that the prosecution elect as to which act of obstruction it would proceed upon, is not error in law. *R. v. Michaud* (1909), 17 Can. Cr. Cas. 89, 39 N.B.R. 418. A conviction on such indictment would be an answer to a fresh indictment for any of the offences as to which evidence was given for the prosecution. Where the trial judge considers it necessary for a fair trial of an indictment charging various acts, any of which would be an offence, he may order the prosecutor to furnish particulars or direct separate trial. *R. v. Michaud*, supra.

*Colour of right*—See sec. 541.

*Wilful omission*—See sec. 509.

*Obstructing railway officer or agent in execution of his duty*—Any person who obstructs or impedes an officer of a railway company in the execution of his duty upon any of the premises of the company, was made liable to fine or imprisonment under sec. 291 of the Railway Act, 1903 (Can.). It was held under it that it is an obstruction of the railway officer for a cabman having no right upon the railway cab-

stand to refuse to move away from same with his cab on the demand of the officer whose duty it was to enforce the company's regulations respecting the station property. *R. v. Leclaire* (1906), 12 Can. Cr. Cas. 332, 15 Que. K.B. 214.

**Wilful damage to goods on railway, etc.**

**519.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged or to one month's imprisonment with or without hard labour, or to both, who,—

- (a) wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or,
- (b) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof.

*Origin*—Sec. 491, Code of 1892; 51 Vict., Can., ch. 29, sec. 297; R.S.C. 1886, ch. 38, sec. 62.

*"Wilfully"*—See sec. 509.

*Value of the goods*—See sec. 728.

*Colour of right*—See sec. 541.

**Damage to mine or oil well.**

**520.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to injure a mine or oil well, or obstruct the working thereof,—

- (a) causes any water, earth, rubbish or other substance to be conveyed into the mine or oil well or any subterranean channel communicating with such mine or well; or,
- (b) damages any shaft or any passage of the mine or well; or,
- (c) damages, with intent to render useless, any apparatus, building, erection, bridge or road belonging to the mine or well, whether the object damaged be complete or not; or,

- (d) hinders the working of any such apparatus; or,
- (e) damages or unfastens, with intent to render useless, any rope, chain or tackle used in any mine or well or upon any way or work connected therewith.

*Origin*—Code of 1892, sec. 498; R.S.C. 1886, ch. 168, secs. 30 and 31; 32-33 Vict., Can., ch. 22, secs. 32 and 33; 24-25 Vict., Imp., ch. 97, sec. 28.

*Sub-sec. (c)—Damage to mining apparatus, building or erection*—A trunk of wood used to convey water to wash the earth from the ore is an "erection" belonging to the mine within this section. *Barwell v. Winterstoke*, 14 Q.B. 704; and so is a scaffold erected at some distance above the bottom of a mine for the purpose of working a vein of coal on a level with the scaffold. *R. v. Whittingham*, 9 C. & P. 234.

*Setting fire to mine or oil-well*—See sec. 511.

*Colour of right*—See sec. 541; *R. v. Matthews*, 14 Cox C.C. 5. An honest belief on the part of the accused that he had a moral right to do the act charged as mischief will not alone constitute "colour of right" so as to exempt him from criminal liability; there must be a fair and reasonable supposition of right in view of what the accused actually knew and of what he ought to have known. *R. v. Watier* (1910), 17 Can. Cr. Cas. 9 (Y.T.).

**Damaging telegraph, telephone or fire alarm.—Obstructing communication.—Attempts.**

**521.** Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully,—

- (a) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes; or,
- (b) prevents or obstructs the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire-alarm, or the transmission of electricity for any such electric light, or for any such purpose as aforesaid.

2. Every one who wilfully, by any overt act, attempts to commit any such offence is guilty of an offence and liable, on

summary conviction, to a penalty not exceeding fifty dollars, or to three months' imprisonment with or without hard labour.

*Origin*—Sec. 492, Code of 1892; R.S.C. 1886, ch. 168, secs. 40, 41; 32-33 Vict., Can., ch. 22, secs. 41 and 42; 24-25 Vict., Imp., ch. 97, sec. 37.

*Breaking insulators*—An information laid under sec. 521 of the Code charged that the accused, on, etc., did unlawfully and wilfully commit damage by breaking four insulators on telegraph poles, the property of the Canadian Pacific Ry. Co., contrary to the provisions of the said section, without stating, as required by the section, that the insulators formed part of and were used and employed in and on the electric telegraph line of the railway, or that the damage was done without legal excuse and without colour of right. The magistrate, however, did not try the accused on the information, but on his electing to be tried summarily, and on the magistrate deciding to try the case, he, as required by sec. 778 (3) in cases of indictable offences, formulated the charge in writing, containing all the requirements of sec. 521, which he read over to the accused, who pleaded guilty thereto, and on such charge, so formulated and pleaded to, the accused was tried and convicted: Held, that the charge being for an indictable offence, it was not essential that the whole subject matter, including matters requiring to be negatived, should be set out in the information, its object being merely to inform the magistrate of the nature of the charge, the accused not being tried and convicted thereon, but on the charge as formulated and read over to him. *R. v. Gill*, 18 O.L.R. 234, 14 Can. Cr. Cas. 294.

*"Wilfully"*—See sec. 509.

*Colour of right*—See sec. 541.

*Telegraph*—The word "telegraph" alone would not include "telephone." Interpretation Act R.S.C. 1906, ch. 1, sec. 36. But telephone equipment is expressly covered by sec. 521.

### *Vessels and rafts.*

**Casting away ship.**—Any act tending to loss of ship.—Interfering with signal.

**522.** Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully,—

- (a) casts away or destroys any ship, whether complete or unfinished; or,
- (b) does any act tending to the immediate loss or destruction of any ship in distress; or,

- (c) interferes with any marine signal, or exhibits any false signal, with intent to bring a ship or boat into danger.

*Origin*—Sec. 493, Code of 1892; R.S. 1886, secs. 46, 51; 32-33 Vict., Can., ch. 22, sec. 48.

*Wilfully*—See sec. 509.

*Colour of right*—See sec. 541.

*Destroying ship with intent to murder*—See sec. 264.

*Setting fire to ship and attempts*—See secs. 511, 512.

#### **Attempt to wreck.**

**523.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who attempts to cast away or destroy any ship, whether complete or unfinished.

*Origin*—Sec. 494, Code of 1892; R.S.C. 1886, ch. 168, sec. 48.

*Attempt to set fire to ship*—See sec. 512.

#### **Preventing or impeding the saving of vessels or of wreckage.**

**524.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully prevents or impedes, or endeavours to prevent or impede,—

- (a) the saving of any vessel that is wrecked, stranded, abandoned or in distress; or,
- (b) any person in his endeavour to save such vessel.

2. Every one who wilfully prevents or impedes, or endeavours to prevent or impede, the saving of any wreck is guilty of an offence punishable on indictment or on summary conviction and liable, on conviction on indictment, to two years' imprisonment, and, on summary conviction before two justices, to a fine of four hundred dollars or six months' imprisonment with or without hard labour.

*Origin*—Sec. 496, Code of 1892; R.S.C. 1886, ch. 168, secs. 52, 53.

*Wilfully*—See sec. 509.

*Colour of right*—See sec. 541.

*Wreck*—Code sec. 2, sub-sec. (41).

#### **Injuring dam, pier or raft, etc.—Blocking up channel.**

**525.** Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully,—

- (a) breaks, injures, cuts, loosens, removes or destroys, in

whole or in part, any dam, pier, slide, boom or other such work, or any chain or other fastening attached thereto, or any raft, crib of timber or saw-logs; or,  
 (b) impedes or blocks up any channel or passage intended for the transmission of timber.

*Origin*—Sec. 497, Code of 1892; R.S.C. 1886, ch. 168, sec. 54.

*"Wilfully"*—See sec. 509.

*Colour of right*—See sec. 541.

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 652.

*Damage to harbour works*—See sec. 510.

### *Public Property.*

#### **Interfering with marine signals.—Mooring vessel to buoys, etc.**

**526.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully alters, removes or conceals, or attempts to alter, remove or conceal, any signal, buoy or other sea mark used for the purposes of navigation.

2. Every one who makes fast any vessel or boat to any such signal, buoy, or sea mark is liable, on summary conviction, to a penalty not exceeding ten dollars, and in default of payment to one month's imprisonment.

*Origin*—Sec. 495, Code of 1892; R.S.C. 1886, ch. 168, secs. 52 and 53; 32-33 Vict., Can., ch. 22, sec. 54; 24-25 Vict., Imp., ch. 97, sec. 48.

*"Wilfully"*—See sec. 509.

*Colour of right*—See sec. 541.

#### **Removing natural bar necessary for a harbour.**

**527.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, who wilfully and without the permission of the Minister of Marine and Fisheries, the burden of proving which permission shall lie on the accused, removes any stone, wood, earth or other material forming a natural bar necessary to the existence of a public harbour, or forming a natural protection to such bar.

*Origin*—56 Vict., Can., ch. 32, sec. 1.

*"Wilfully"*—See sec. 509.

*Colour of right*—See sec. 541.

**Destroying or obliterating election documents.**

**528.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully,—

(a) destroys, injures or obliterates, or causes to be destroyed, injured or obliterated; or,

(b) makes or causes to be made any erasure, addition of names or interlineation of names in or upon;

any writ of election, or any return to a writ of election; or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document, ballot or paper made, prepared or drawn out according to any law in regard to Dominion, provincial, municipal or civic elections.

*Origin*—Sec. 503, Code of 1892; R.S.C. 1886, ch. 168, sec. 55.

*Wilfully*—The word "wilfully" means more than "voluntarily" or "knowingly." The true meaning of the word in such a case seems to be that given it by Mr. Justice Wurtle in *Ex parte O'Shaughnessy*, in 8 Can. Cr. Cas. 136, at 139, 13 Que. K.B. 178. The learned judge says there: "Wilfully means not merely to commit an act voluntarily, but to commit it purposely with an evil intention, or in other words it means to do so deliberately, intentionally and corruptly and without any justifiable excuse." With that meaning attached to "wilfully" the section of the Code would not make it a crime to cut up lists furnished for the legitimate uses of an election organization. *R. v. Duggan*, 12 Can. Cr. Cas. 147, 16 Man. L.R. 441, per Richards, J.A. See also Code sec. 509.

*Colour of right*—See sec. 549.

*"Voters' List"*—What is a voters' list within the meaning of the Code? What parliament has defined as a voters' list in another Act may be of some assistance in reaching a conclusion, but when it is observed that the Code makes it equally an offence to alter any voters' list, whether prepared for the purpose of a provincial election, municipal election, or civic election, as well as for a Dominion election, and that the provincial, municipal and civic legislation of any province may contain many different definitions of a voters' list and may be amended and altered from time to time, and that the Code is equally applicable to all, it does not seem that a definition in any particular election Act can finally determine the interpretation to be placed on sec. 503 of the Criminal Code. *R. v. Duggan*, 12 Can. Cr. Cas. 147, at 164, 16 Man. L.R. 441.

What the court must endeavour to do is to place a fair construction on the language of the Act, having regard to the mischief it was intended to remedy. The court must not create an offence because in its opinion it comes within the scope of the mischief: *Re The Gauntlet*,



L.R. 4 P.C. at p. 191; but it must not lose sight of the mischief in endeavouring to place a reasonable interpretation upon the statute. *R. v. Duggan*, 12 Can. Cr. Cas. 147, at 165, per Phippen, J.A.

There is no doubt that sec. 503 of the Code was framed to avoid alterations or erasures in lists which might prevent those legally entitled from exercising their franchise, or allow unqualified persons a voice in the election of a member. *Ibid.*

*Offences under election laws*—See the Dominion Elections Act, R.S.C. 1906, ch. 6, and the Elections Acts of the various provinces.

*Theft or unlawful taking of election documents*—See sec. 367.

### *Buildings, Fences and Land Marks.*

**Demolition of building to the prejudice of owner, etc., of building occupied by offender.—Severance of fixtures.**

**529.** Every one is guilty of an indictable offence and liable to five years' imprisonment who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, which is built on lands subject to a mortgage or which is held for any term of years or other less term, or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the mortgagee or owner,—

- (a) pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or removes or begins to remove the same or any part thereof from the premises on which it is erected; or,
- (b) pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

*Origin*—Sec. 504, Code of 1892; R.S.C. 1886, ch. 168, sec. 15; 32-33 Vict., Can., ch. 22, sec. 17; 24-25 Vict., Imp., ch. 97, sec. 13.

*Fixtures*—The severance of the fixtures must have been made wilfully and to the prejudice of the mortgagee of the land or of the owner as the case may be. The original Canadian statute of 1869 (ch. 22), made no reference to mortgagees, but referred only to tenants. A tenant who steals a fixture belonging to his landlord, or any chattel let along with the building, is punishable under Code sec. 360.

In *Reynolds v. Ashby & Son* [1904] A.C. 466, 73 L.J.K.B. 946, Lord Lindley said he did not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was

attached, the purpose to be served, and last but not least to the position of the rival claimants to the thing in dispute.

There is no doubt that the Court has made exceptions to the old rule, *quicquid plantatur solo, solo cedit*. See in *re Hulse*; *Beattie v. Hulse* [1905] 1 Ch. 406, at p. 411; 74 L.J. Ch. 246; 92 L.T. 232. *Kokomo Investment Co. v. Dominion Harvester Co.* [1918] 3 W.W.R. 366, 373 (Alta.).

And see *Lambourn v. McLellan* [1903] 2 Ch. 268, 72 L.J. Ch. 617; *Ellis v. Glover and Hobson, Ltd.* [1908] 1 K.B. 388, 77 L.J.K.B. 251; *Hobson v. Gorringe* [1897] 1 Ch. 182, 66 L.J. Ch. 114; *Warner v. Don*, 26 S.C.R. 388.

"*Wilfully*"—See sec. 509.

*Colour of right*—See sec. 541.

*Property interest of accused*—See sec. 541 (2).

#### **Injuries to fences, wall or gate.—Subsequent offence.**

**530.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, who wilfully destroys or damages any fence, or any wall, stile or gate, or any part thereof respectively, or any post or stake planted or set up on any land, marsh, swamp or land covered by water, on or as the boundary or part of the boundary line thereof, or in lieu of a fence thereto.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour.

*Origin*—Code of 1892, sec. 507; 53 Vict., Can., ch. 38, sec. 15; R.S.C. 1886, ch. 168, sec. 27; 32-33 Vict., Can., ch. 22, sec. 29; 24-25 Vict., Imp., ch. 97, sec. 25.

*Wilfully destroys or damages any fence or wall*—By sec. 509 every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed for the purposes of Part VIII to have caused it "*wilfully*."

*Colour of right*—The offence is not complete unless done without legal justification or excuse and without colour of right. Code sec. 541.

"*Colour of right*" means an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done. *R. v. Johnson*, 7 O.L.R. 525, 8 Can. Cr. Cas. 123. Where the law absolutely prohibits a particular act, ignorance of that law does not constitute "*colour of right*" in respect of the doing of the prohibited act. Where it appears in a criminal prosecution under Code sec. 530 for damage to fences that the defendants had "*colour of right*"

as to part only of the fences destroyed and that they could not reasonably have supposed that the destruction of the remainder of the fence was necessary for the assertion of their supposed right of way, the defendants may be summarily convicted of such excess and ordered to pay compensation in respect thereof. *R. v. Daigle*, 15 Can. Cr. Cas. 55; *R. v. Johnson*, 7 O.L.R. 525, 8 Can. Cr. Cas. 123; *Evison v. Marshall*, 32 J.P. 691.

The magistrate should stop the trial as soon as he finds that the title to land is in question, whether the dispute is as to the right or estate in the soil itself, or merely as to the right of way or some easement thereon. *Ex parte Roy*, *R. v. O'Brien*, 38 N.B.R. 109, 12 Can. Cr. Cas. 533; *R. v. Bradshaw*, 38 U.C.Q.B. 564. But an entirely groundless claim does not oust jurisdiction. *R. v. Snape*, 27 J.P. 134, 11 W.R. (Eng.) 434, and see *R. v. Davy*, 27 A.R. (Ont.) 508.

The defendant charged under sec. 530, with breaking down a fence erected across a road which had been a public highway, may set up in answer that the proceedings by which the Municipal Council purported to order the diversion of the highway and the closing of that portion thereof were irregular and invalid, and on its so appearing is entitled to have the charge dismissed by reason of his lawful right to remove the obstruction. *R. v. Hatt* (1915), 25 Can. Cr. Cas. 263; and see *Rideout v. Howlett*, 13 Eastern L.R. 562.

*Proof of boundary*—A sub-division plan may be admissible in evidence although not registered in the land registry office. *R. v. Johnson*, 7 O.L.R. 525, 8 Can. Cr. Cas. 123; and see as to proof of boundary when original monuments are not found. *Home Bank v. Might Directories Ltd.*, (1914) 31 O.L.R. 340; *Weston v. Blackman*, (1917) 12 O.W.N. 96.

*Amount of the injury done*—See sec. 728.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 851, 963, 982, 1053, 1081.

### **Injuring or removing marks indicating boundaries of province, county, etc.**

**531.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully pulls down, defaces, alters or removes any mound, land mark, post or monument lawfully erected, planted or placed to mark or determine the boundaries of any province, county, city, town, township, parish or other municipal division.

*Origin*—Sec. 505, Code of 1892; R.S.C. 1886, ch. 168, sec. 56; C.S.C. ch. 77, sec. 107; R.S.C. 1886, ch. 54, sec. 138.

*"Wilfully"*—See sec. 509.

*"Placed to mark the boundaries"*—Sec. 531 does not make liable

a surveyor who under government authority re-surveys government "Indian lands" and in so doing removes some of the monuments erected on former survey made under the same authority. An owner may mark out and re-mark his property as he pleases, and where he does so in the exercise of the right of ownership and the survey is not made pursuant to any agreement with an adjoining owner nor in the exercise of some statutory power, there can be no conviction under sec. 531, although the first survey had been adopted by a municipality as showing the boundaries and extent of Indian lands inside the corporate limits. *R. v. Austin* (1885), 11 Que. L.R. 76.

When the boundary between a highway and contiguous land had been settled by a judgment and the boundary marks duly placed, a municipal council in the province of Quebec has no power or authority to appoint, by resolution, a surveyor, to draw another boundary line. Any proceedings by the surveyor without notice to the parties, under the resolution, are illegal, and marks placed by him are not "lawfully" placed, within the meaning of *Crim. Code* sec. 532, and their removal does not amount to the offence therein described. A prosecution of the owner of the property, by the corporation, for the offence in question, is, under the circumstances, without probable cause and is inferentially brought through malice, and makes the corporation liable for the damages caused thereby. *Morissette v. Parish of St. Francois Xavier*, 18 Can. Cr. Cas. 291.

*Colour of right*—See sec. 541.

**Injuring or removing other boundary marks.—Exception.—Land surveyor.**

**532.** Every one is guilty of an indictable offence and liable to five years' imprisonment, who wilfully defaces, alters or removes any mound, land mark, post or monument lawfully placed by any land surveyor to mark any limit, boundary or angle of any concession, range, lot or parcel of land.

2. It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks when necessary, if he carefully replaces them as they were before.

*Origin*—Sec. 506, Code of 1892, R.S.C. 1886, ch. 168, sec. 27; 53 Vict., Can., ch. 38, sec. 15; C.S.C. ch. 77, sec. 107; R.S.C. 1886, ch. 54, sec. 138.

*"Wilfully"*—See sec. 509.

*Colour of right*—See sec. 541.

*Proof of boundary*—See note to sec. 530.

*Re-survey by owner*—See note to sec. 531.

*Trees, Vegetables, Roots and Plants.***Injuries to trees, etc.—Second offence.—Subsequent offence.**

**533.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the amount of the injury done, or to two months' imprisonment with or without hard labour, who wilfully destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is growing, the injury done being to the amount of twenty-five cents, at the least.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the amount of the injury done, or to four months' imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence and liable to two years' imprisonment.

*Origin*—Sec. 508, Code of 1892; R.S.C. 1886, ch. 168, sec. 24; 32-33 Vict., Can., ch. 22, sec. 26; 24-25 Vict., Imp., ch. 97, sec. 22.

*Describing the offence in information and proceedings*—See secs. 723-725. By sec. 725 an offence under sec. 533 may be alleged in the following form: "The defendant did cut, break, root up and otherwise destroy or damage a tree, sapling or shrub," and the information or conviction is not to be held void as being multifarious or uncertain, because of that form.

"Wilfully"—See sec. 509.

*Colour of right*—See sec. 541.

*Where accused has an interest in the property*—See sec. 541 (2).

*Joint offenders*—See sec. 728.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 851, 963, 982, 1053, 1081.

*Penalty on summary conviction*—There is but one penalty with a maximum of the sum found to be the amount of the injury added to such further sum not exceeding \$25 as the justice imposes on a first conviction, or \$50 on a second conviction. Sec. 533 does not, as does sec. 539, direct that the amount of the injury shall be paid to the person aggrieved; but it seems a reasonable inference from sec. 728 that the magistrate is to direct that the part of the fine representing the amount of injury done should when realized from a single defendant be paid over to the owner of the property damaged, although in strictness the entire penalty belongs to the Crown. See *R. v. Tebo*, 1 Terr.

**L.R. 196.** If the penalty awarded against each of several joint offenders include the amount of the injury done, the owner receives only the one sum of compensation and the excess belongs to the Crown. Sec. 728. The damage is the monetary amount of injury to the growing trees and not the consequential damage of replacing the injured tree by another. *R. v. Whiteman*, Dears. 353, 6 Cox 370, 18 Jur. 434. Injury done to several trees at the same time so as to form one continuous transaction, may, however, be assessed as one sum. *R. v. Shepherd*, L.R. 1 C.C.R. 118, 17 L.T. 482, 11 Cox C.C. 119. Permission given by the occupant of the land to cut firewood may be an answer to a charge under 533, although the occupant is a mere squatter without legal title. *Dumais v. Hall*, 13 Quebec L.R. 236.

*Justice may discharge from first conviction on making compensation*—See sec. 729.

*Proving previous summary conviction*—See secs. 757, 982.

*Malicious damage to trees or shrubs in gardens*—Where the injury exceeds \$5 and the trees or shrubs are in a park or garden or in land belonging to a dwelling-house, the offence is an indictable one under sec. 510 (D).

*Theft of trees and shrubs*—Code secs. 373, 374, 395.

#### **Injuries to vegetable productions in gardens.—Subsequent offence.**

**534.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment with or without hard labour, who wilfully destroys, or damages with intent to destroy, any vegetable production growing in any garden, orchard, nursery ground, house, hot-house, green-house or conservatory.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence, and liable to two years' imprisonment.

*Origin*—See. 509, Code of 1892; R.S.C. 1886, ch. 168, sec. 25; 32-33 Vict., Can., ch. 22, sec. 27; 24-25 Vict., Imp., ch. 97, sec. 23.

*"Wilfully"*—See sec. 509.

*Colour of right*—See sec. 541. Jurisdiction is not ousted if more damage was done than was necessary to assert or protect the alleged right. *R. v. Clemens* [1898] 1 Q.B. 556, 67 L.J.Q.B. 482; *Heaven v. Grutchley*, 68 J.P. 53, 1 L.G.R. 473.

*Cultivated roots or plants elsewhere than in gardens, etc.*—See sec. 535.

*Property interest of accused*—See sec. 541 (2).

*Growing in any garden, etc.*—See note to sec. 533.

*Suspending sentence on making compensation*—See sec. 729.

*Payment of damage to person aggrieved*—See sec. 728, and note to sec. 533.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 757, 851, 963, 982, 1053, 1081.

*Proving previous summary conviction*—See secs. 757 and 982.

**Injuries to roots or plant growing elsewhere.—Subsequent offence.**

**535.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment with or without hard labour, who wilfully destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard or nursery ground.

2. Every one who, having been convicted of any such offence afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour.

*Origin*—Sec. 510, Code of 1892; R.S.C. 1886, ch. 168, sec. 26; 32-33 Vict., Can., ch. 22, sec. 28; 24-25 Vict., Imp., ch. 97, sec. 24.

"*Wilfully*"—See sec. 509.

*Colour of right*—See sec. 541. Where the right claimed did not in fact exist and the accused did more damage than they could reasonably suppose was necessary for the assertion of the right claimed, the conviction will be sustained at least in respect of the excessive damage. *Heaven v. Crutchley* (1903), 1 L.G.R. 473, 68 J.P. 53, applying *R. v Clemens* [1898] 1 Q.B. 556.

*Cultivated root or plant*—This phrase excludes uncultivated mushrooms and watercress. *Gardner v. Mansbridge*, 19 Q.B.D. 217, 16 Cox 281, 57 L.T. 265. Inappreciable damage as by trespassing over cultivated grass land is insufficient to found a charge under sec. 535. *Eley v. Lytle*, 50 J.P. 308.

*Suspending sentence on first conviction if compensation made*—See sec. 729.

*Over and above the amount of the injury done*—See sec. 728 and note to sec. 533.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 757, 851, 963, 982, 1053, 1081.

*Cattle and Other Animals.*

**Attempt to injure or poison cattle.**

**536.** Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully,—

- (a) attempts to kill, maim, wound, poison or injure any cattle, or the young thereof; or,
- (b) places poison in such a position as to be easily partaken of by any such animal.

*Origin*—Sec. 500, Code of 1892; R.S.C. 1886, ch. 168, sec. 44; 32-33 Vict., Can., ch. 22, sec. 46; 27-28 Vict., Imp., ch. 115, sec. 2.

*"Cattle" defined*—See sec. 2 (5).

*"Wilfully"*—See sec. 509.

*Colour of right*—See sec. 541.

*Placing out poison*—As to civil responsibility for placing out poison, see *Sangster v. Eaton*, 21 A.R. (Ont.), 624; *Cook v. Midland* [1909] A.C. 229.

*Indictment*—An indictment purporting to charge an offence under sec. 536, sub-sec. (b), in laying out poison, but which charged that the poison was wilfully placed in such a position as to be easily partaken of by "animals" instead of by "cattle" (Code sec. 536), should not have been quashed on defendant's motion, but should have been amended or a new indictment in due form preferred. *Richard v. Goulet* (1914), 23 Can. Cr. Cas. 327, 20 Rev. Leg. 390 (Que.).

*Injury to animals other than cattle*—See secs. 537, 538, 542-544A.

*Completed offence of killing or wounding cattle maliciously*—See sec. 510 (B).

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 652.

**Injuries to other animals.—Subsequent offence.**

**537.** Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars over and above the amount of injury done, or to three months' imprisonment with or without hard labour, who wilfully kills, maims, wounds, poisons or injures any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose.

2. Every one who, having been convicted of any such offence, afterwards commits any offence under this section, is guilty of



an indictable offence, and liable to a fine or imprisonment, or both, in the discretion of the court.

*Origin*—Code of 1892, sec. 501; R.S.C. ch. 168, sec. 45; 53 Vict., Can., ch. 37, sec. 16; 32-33 Vict., Can., ch. 22, sec. 47; 24-25 Vict., Imp., ch. 97, sec. 41.

"*Wilfully*"—See sec. 509.

*Colour of right*—See sec. 541.

*Property interest of accused*—See sec. 541 (2).

*Summary conviction of first offenders*—See Code sec. 729.

*Wilfully killing dog, etc.*—The corresponding provision of the English Act, 24 and 25 Vict., ch. 97, sec. 41, makes it an offence "unlawfully and maliciously" to kill, maim or wound any dog, etc., while the Code makes it an offence "wilfully" to kill (sec. 537) without legal justification or excuse and without colour of right (sec. 541). It has been held, however, that the word "wilfully" as applied to the offence under Code sec. 205 of wilfully committing an indecent act, implies that the act was done with evil intent, and without any justifiable excuse. *Ex parte O'Shaughnessy*, 8 Can. Cr. Cas. 136; compare *R. v. Graf*, 15 Can. Cr. Cas. 200, 19 O.L.R. 238. This would indicate that there is very little distinction between the two enactments.

Under the English Act it was held a defence in a prosecution against a gamekeeper, who shot a dog straying near some pheasants confined for breeding purposes in an aviary, to show that the act was done in the *bona fide* belief that it was necessary for the protection of his master's property. *Miles v. Hutchings* [1903] 2 K.B. 714; *Armstrong v. Mitchell*, 20 Cox 497. But the mere trespassing would seem not to be sufficient. *Ibid.*; *Daniel v. Janes*, 2 C.P.D. 351, and *Smith v. Williams* (1892), 9 Times L.R. 9, 37 Sol. J. 11, doubted.

On a charge under sec. 537 for wilfully killing a dog, reference may be had to the rules of the common law under Code sec. 16 for ascertaining whether the dog was killed under circumstances amounting to a legal justification or excuse, and by Code sec. 541 a conviction is not to be made unless the killing of the dog was done not only without legal justification or excuse but without colour of right. *O'Leary v. Therrien* (1915), 25 Can. Cr. Cas. 110 (Que.).

A defence to a criminal charge of wilfully killing a dog which was trespassing on the property of the accused is made out if it be shown that the dog was killed under necessity for the purpose of protecting the defendant's hens in the stable where the dog had gone; and where it is shown that the hens were in peril from the dog at the moment when the shot was fired because of the probability that the dog would attack them; it was not obligatory on the defendant to await the actual attack before shooting the trespassing animal. *Ibid.*

*Punishment on summary conviction*—Sec. 537 (former sec. 501) provides that the guilty person shall be liable on summary conviction (1) to

a penalty not exceeding \$100, etc., or (2) to three months' imprisonment absolute, with or without hard labour. But he is not, under that section, liable to both, or to the latter in default of payment of the former. That section does not specify, as many sections do, what imprisonment the justice may impose, in default of the pecuniary penalty, in order to enforce payment. When the justice comes to make the conviction, and provide for the enforcement of the money penalty, he must look elsewhere. Sec. 739, sub-sec. (b) deals with this matter, namely, the limits and manner of imprisonment which may be imposed "in default of payment of the penalty." There are two branches: First, if the provision, for the breach of which the defendant is summoned, specifies the manner and limit of imprisonment which may be imposed, ~~then~~ the justice is guided by that; and second, if he does not, then this subsection itself supplies the guide, namely, it provides that the imprisonment is not to exceed three months. Sec. 537 does not specify "imprisonment or the term of imprisonment," i.e., which is to follow in default of payment of the penalty. *R. v. Horton*, 3 Can. Cr. Cas. 84; 31 N.S.R. 217; *Reg. v. Turnbull*, 16 Cox C.C. 110; *R. v. Tynemouth Justices*, 16 Q.B.D. 747; 82 L.T. 84.

*"Over and above the amount of the injury"*—Sec. 728 contained in Part XV, as to summary convictions, provides that "when several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property or the amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a justice are directed to be applied."

That provision is of importance as indicating that the person aggrieved may be awarded the amount of the injury included in the fine imposed. Where several persons are convicted of the one offence each may have to pay the full amount of the injury, but the excess after making compensation to the party aggrieved goes for public purposes in like manner as the part of each fine which is over and above the amount of the injury. Sec. 728 seems to imply that where a statute authorizes a justice to impose a fine which includes the amount of the injury he may further direct that the latter amount when realized shall be paid to the person injured, whether several persons join in the commission of the offence or not. The contrary view was taken, however, in *R. v. Cook*, 16 Can. Cr. Cas. 234 (P.E.I.), where it was held that on a summary conviction under sec. 537, for wilfully killing a dog, the whole penalty, which is not to exceed \$100 "over and above the amount of injury done," belongs to the Crown, and there is no jurisdiction except under sec. 729 to award damages to be paid to the owner of the dog. Where the adjudication was that the defendant pay a fine of \$1 and costs and further pay the owner \$20 damages for the loss of

the dog, the summary conviction will be amended by striking out the award of damages. And an amended conviction imposing a fine of \$21 is bad as not conforming with the adjudication. In the same case it was held that Code sec. 539, which empowers the magistrate in certain cases to award compensation up to \$20 to the person aggrieved does not apply to the offence of killing a dog for which Code sec. 537 provides a punishment. *R. v. Cook*, 16 Can. Cr. Cas. 234 (P.E.I.).

"*Not being cattle*"—See Code secs. 2 (5), 510 (b), 536, 538, 542, 544, 544A.

#### Threats by letter to injure cattle.

**538.** Every one is guilty of an indictable offence and liable to two years' imprisonment who sends, delivers, or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison or injure any cattle.

*Origin*—Code of 1892, sec. 502; R.S.C. 1886, ch. 173, sec. 8.

"*Cattle*"—See sec. 2 (5).

*Written threats to burn building*—See secs. 516, 748.

*Letters demanding money by threats*—See sec. 451.

*Requiring convicted person to give recognizance for good behaviour*—See secs. 1058 and 1059.

*Postal offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510D, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

#### Cases not Specially Provided for.

##### Injuries to other property.—Penalty.—Damage.

**539.** Every one who wilfully commits any damage, injury or spoil to or upon any real or personal property, either corporeal or incorporeal, and either of a public or private nature, for which no punishment is hereinbefore provided, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed, to be paid in the case of private property to the person aggrieved.

2. If such sums of money, together with the costs, if ordered, are not paid either immediately after the conviction, or within

such period as the justice, at the time of the conviction appoints, the justice may cause the offender to be imprisoned for any term not exceeding two months, with or without hard labour.

*Origin*—Sec. 511, Code of 1892; R.S.C. 1886, ch. 168, sec. 59, 53 Vict., ch. 37, sec. 18; Malicious Damage Act, 1861, Imp., sec. 52.

*Wilfully commits any damage*—By Code sec. 509 it is enacted that for the purposes of Part VIII every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed to have caused it "wilfully." If the driver of a milk waggon adds water to the milk so as to increase the quantity and appropriate to his own use the excess proceeds of sale without the knowledge of his employer, he is guilty of maliciously damaging the milk. *Roper v. Knott* [1898] 1 Q.B. 868, 67 L.J.Q.B. 574, 62 J.P. 375.

Sec. 539 does not apply to a mere act of trespass where the damage is so small as to be inappreciable. *Eley v. Lytle* (1885), 50 J.P. 308. There must be a finding by the justice of actual damage, however small; fictitious or implied damages assumed because of the act being a trespass will not support a conviction under this section. *Ibid.*; *Gayford v. Chouler* [1898] 1 Q.B. 316, 67 L.J.Q.B. 404, 62 J.P. 165; *Gardner v. Mansbridge*, 19 Q.B.D. 217; *R. v. Hexham Justices*, 3 Times L.R. 465; *Hamilton v. Bone*, 52 J.P. 726, 16 Cox 437.

*Partial or total interest of offender in damaged property*—Where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and if total, shall not prevent his act being an offence, if done with intent to defraud. Code sec. 541 (2).

*Legal justification or excuse*—See Code secs. 16, 540, and 541.

*Colour of right*—See secs. 540, 541. A charge of wilful damage under Code sec. 539 may be answered by showing that the accused acted under a fair and reasonable supposition of right to do the act complained of. Code sec. 540; *R. v. Adamson* (1916), 9 W.W.R. 1130; *re Adamson*, 33 W.L.R. 566 (Sask.).

Parliament must be taken to have invested Justices of the Peace with jurisdiction to summarily try all informations for wilful damage to property for which no punishment is provided in the preceding sections, and in order to try such informations they must of necessity in each case, if it is raised, determine the question as to whether or not the person charged "acted under a fair and reasonable supposition that he had a right to do the act complained of." If the justice determines that the defendant did act under such a supposition he is not liable on summary conviction to the penalty prescribed. If the justice determines that he did not act under such a supposition, he is liable. It cannot, therefore, reasonably be argued that the raising of the question of the fair and reasonable right to do the act of itself ousts the

magistrate's jurisdiction. So far from that being the case, the magistrate's jurisdiction under the secs. 539 and 540 exists and continues unless and until it is found by him that the person acted under a fair and reasonable supposition that he had a right to do the act complained of. *Ex parte* Murphy (1917), 29 Can. Cr. Cas. 1 (N.B.); *White v Feast*, L.R. 7, Q.B. 353.

The doctrine that the jurisdiction of inferior courts is ousted when the title to land comes into question does not apply to cases where the question of title is necessarily involved in the matter which such courts are required by statute to determine. *Ex parte* Murphy, *supra*; *Ex parte* Vaughan, L.R. 2 Q.B. 115. If the accused claimed upon the trial that he did the act complained of under a claim of ownership of the property, it would have been the duty of the magistrate to consider such claim as the only evidence adduced which bore upon the question as to whether the act was done under such a supposition of right as is provided by sec. 540, and the magistrate's jurisdiction would not have been ousted by the title to land thus coming into question. *Ex parte* Murphy, *supra*. Manifest error of the magistrate in the determination of the question of the fairness and reasonableness of the claim of right would be a matter for remedy by way of appeal to the County Court, and possibly in some cases by way of *certiorari* for want of jurisdiction. Where an appeal to the District or County Court is the more appropriate remedy a *certiorari* may be refused for that reason. *Ex parte* Murphy, *supra*. The magistrate's jurisdiction could only be ousted by proof that the applicant did the act complained of under a fair and reasonable supposition that he had a right to do it and it is for him to make that proof. *R. v. Adamson*, (1916) 9 W.W.R. 1130, 33 W.L.R. 566; *ex parte* Murphy (1917), 29 Can. Cr. Cas. 1 (N.B.); *R. v. Davy*, 4 Can. Cr. Cas. 28, 27 A.R. 508 (Ont.); *R. v. Daigle*, 15 Can. Cr. Cas. 58; *R. v. Watier*, 17 Can. Cr. Cas. 9; *R. v. Johnson*, 8 Can. Cr. Cas. 123. A summary conviction made notwithstanding evidence which should have convinced the justices of this fair claim of right will be quashed on *certiorari* if there was no evidence before the magistrate to disprove or discredit such fair claim of right. *R. v. Adamson* (1916), 9 W.W.R. 1130, (a case of statutory right to pass over a temporary road directed by municipal ordinance to be laid out over private property).

*Awarding compensation on summary conviction of joint offenders*—See sec. 728.

*Where damage exceeds \$20*—See sec. 510.

*Conviction to specify the wilful act, etc.*—A conviction should specify the particular act done and that it was done wilfully and should state also what real or personal property was damaged and the amount of damage. *R. v. Leary*, 8 Can. Cr. Cas. 141; *R. v. Spain*, 18 Ont. R. 385; *R. v. Coulson*, 24 Ont. R. 246, *R. v. Caswell*, 20 U.C.C.P. 275; *Re Donnelly*, 20 U.C.C.P. 165; *Smith v. Moody* [1903] 1 K.B. 56. But the lack of certain details in the manner of charging the offence either in

the information or conviction is cured by secs. 723-725 in summary conviction matters.

*Sabotage*].—"Sabotage" is a word imported from France and refers to the heavy wooden boot of the French workman which is especially designed to break up machinery and destroy property. Wilful injury secretly done by factory workmen to the machinery and plant upon which they are employed and intended as a method of retaliation for failure to grant increased wages is commonly designated an "act of sabotage," but the phrase is not used in the Code. Where none of the preceding sections of Part VIII apply to the particular facts, sec. 539 seems applicable to such offences, where the damage is less than \$20 and sub-sec. (E) of sec. 510 where the damage is \$20 or more.

*Petty trespasses punishable under provincial law*].—See R.S.O. 1914, ch. 111.

### *Limitation.*

**Exception to sec. 589.—Fair claim of right.—Sporting trespasses.**

**540.** Nothing in the last preceding section extends to,—

- (a) any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of; or,
- (b) any trespass, not being wilful and malicious, committed in hunting or fishing, or in the pursuit of game.

*Origin*].—Sec. 511, Code of 1892; R.S.O. 1886, ch. 168, sec. 59; 53 Vict., ch. 37, sec. 18; 32-33 Vict., Can., ch. 22, sec. 60; 24-25 Vict., Imp., ch. 97, sec. 52.

*Fair and reasonable supposition of right*].—Whether or not the supposition of right relied upon was a "fair and reasonable one" is a question primarily left to the justice to decide, subject, of course, to any right of appeal. See Code secs. 749 *et seq.*, 761-769. It is not enough that the accused believed he had a right to do the act complained of, if such belief was quite unreasonable. *Ex parte* Murphy (1917), 29 Can. Cr. Cas. 1 (N.B.); *R. v. Davy*, 27 A.R. 508, 4 Can. Cr. Cas. 28 (Ont.); *Brooks v. Hamlyn*, 63 J.P. 215, 79 L.T. 734; *White v. Feast*, L.R. 7 Q.B. 353, 36 J.P. 436. And there may be a conviction notwithstanding a claim of right reasonably made, if the defendant does more damage than could reasonably be supposed to be necessary for its assertion or protection. *R. v. Clemens* [1898] 1 Q.B. 556, 67 L.J.Q.B. 482, 78 L.T. 205.

Where rural municipalities had a statutory right to open temporary roads across private property and the municipal council had passed a resolution purporting to give the defendant and her agents the right to cross the informant's land, in pursuance of which defendant instructed

her agent to cross the land with a load of hay, believing that she had the right to do so, an inference is raised that the defendant acted under a fair and reasonable supposition of right, displacing the liability to summary proceedings under sec. 539 for wilful injury to property; and where there was no evidence to the contrary, the justices were without jurisdiction and their summary conviction of defendant was quashed on *certiorari*. *R. v. Adamson* (1916), 9 W.W.R. 1130, 25 Can. Cr. Cas. 440, 9 S.L.R. 91.

The language of sec. 540 qualifies the restriction on the jurisdiction of the magistrate in a way which does not appear in sec. 705, which latter section is a positive ouster of jurisdiction in assault cases in which "any question arises" as to the title to lands, etc. In either case a mere pretence of a right would not oust jurisdiction. *Arnold v. Morgan* [1911] 2 Q.B. 314.

But it seems that under sec. 709 in a case of assault when there is a *bona fide* claim of right material to the decision, the justice has no jurisdiction to determine either the existence of the right or to determine whether, in the case before him, there has been an excessive user of the alleged right. *Rex v. Cork J.J. (Ir.)* [1913] 2 I.R. 391.

Under sec. 540 the justice may find an excess of force quite unnecessary for the maintenance of the alleged right, and convict in respect of the excess. *Ex parte Smith* (1890), 7 Times L.R. 42; *R. v. Clemens* [1898] 1 Q.B. 556, L.J.Q.B. 482.

The justice is to decide whether the evidence supporting a claim of right under sec. 540, is true. *Reeve v. Stonham*, 43 J.P. 732. So if the justice disbelieves an alleged oral agreement set up to justify breaking padlocks to a shop, the conviction will be sustained on *certiorari* if there is no evidence other than the discredited testimony to show a *bona fide* claim of right. *Reeve v. Stonham*, 43 J.P. 732. The court on *certiorari* may find that the justice had no evidence before him on which he could reasonably find that the claim of right made by the accused was absurd in law, and may in that event quash a conviction made by a justice who found in favour of the *bona fides* of the accused, but against him on the question of the reasonableness of the claim of right. *Travis v. West* (1894), cited *Stone's Justice*, 39th ed., 900; *Scott v. Baring* (1895), 64 L.J.M.C. 200, 72 L.T. 495.

If the evidence should have convinced the justices that the applicant "acted under a fair and reasonable supposition" of a right to do the act complained of, and there was no evidence to the contrary, the justices were not justified in convicting; *Paley on Convictions*, 8th ed., p. 157; and the conviction will be quashed on *certiorari*, and any moneys which have been paid under the conviction will be ordered returned to the applicant. *R. v. Adamson* (1916), 9 W.W.R. 1130, 9 Sask. L.R. 91, 33 W.L.R. 566, 25 Can. Cr. Cas. 440. The mere raising of the question of fair and reasonable right does not oust the magistrate's jurisdiction; the jurisdiction exists and continues unless and until he finds (or on the

evidence was bound to find) that the person acted under a fair and reasonable supposition that he had a right to do the act complained of. *Ex parte* Murphy (1917), 29 Can. Cr. Cas. 1 (N.B.); same case, *R. v. Mullins*, 29 Can. Cr. Cas. 1 (N.B.); *White v. Feast*, L.R. 7 Q.B. 353, 36 J.P. 436; *R. v. Davy*, 27 A.R. 508, 4 Can. Cr. Cas. 28 (Ont.); *Ex parte* Vaughan, L.R. 2 Q.B. 115.

*Onus of proof*—It is for the defendant to make the proof of fair, and reasonable supposition of right if he claims to oust the jurisdiction of the magistrate on that ground. *Ex parte* Murphy (1917), 29 Can. Cr. Cas. 1 (N.B.); same case, *R. v. Mullins*, 29 Can. Cr. Cas. 1 (N.B.).

*Certiorari and prohibition on question of ouster of magistrate's jurisdiction*—In dealing with the "extraordinary remedies" (Code sec. 1120 *et seq.*) of *certiorari*, habeas corpus and prohibition, the question in each case is whether the finding of the facts on which the magistrate's decision is based is submitted to the magistrate or not. The question whether the magistrate's jurisdiction begins when a certain state of facts actually exists or when that state of facts is alleged, may depend on the form of the statute conferring the jurisdiction. If he is the person appointed with jurisdiction to try, *inter alia*, that question of fact, he does not act without jurisdiction by coming to a wrong decision. So where a tax official had jurisdiction to report for taxation if he "discovers" that a person chargeable had not made a return, a writ of prohibition will not be granted to restrain proceedings upon the assessment unless it can be shown that there were no grounds upon which the official in question could honestly have believed that the person assessed was chargeable. *R. v. Adamson* (1916), 9 W.W.B. 1130, 9 Sask. L.R. 91, 25 Can. Cr. Cas. 440, 33 W.L.B. 566. The jurisdiction based upon a certain official "discovering" a certain state of facts meant that he must have honestly come to that conclusion upon the information in his possession. *R. v. Bloomsbury Income Tax Commissioners* [1915] 3 K.B. 768, 131 Times L.R. 565. Sometimes jurisdiction is conferred only when a state of things actually exists; but as a general rule jurisdiction is conferred not conditionally upon the actual existence of a state of things but upon information of the existence of a state of things. In such cases the decision of the question whether the state of things exists or not is part of the jurisdiction conferred upon the tribunal, and then, provided the tribunal applies the proper test for the decision of the question, the superior court does not interfere either by prohibition, *certiorari* or habeas corpus. *Brittain v. Kinnaird* (1819), 1 Brod. & B. 432; *R. v. Bolton* (1841), 1 Q.B. 66; *Allen v. Sharp* (1848), 2 Ex. 352; *Brown v. Cocking* (1868), L.R. 3 Q.B. 672; *Elston v. Rose* (1868), L.R. 4 Q.B. 4; *R. v. Clerkenwell Commissioners* [1891] 2 Q.B. 879; *Cave v. Mountain* (1840), 1 Man. & G. 257; *Liverpool Gas Co. v. Everton* (1871), L.R. 6 C.P. 414; *R. v. Bradford* [1908] 1 K.B. 365; *R. v. Morn Hill Camp Commanding Officer* [1917] 1 K.B. 176, 86 L.J.K.B. 410. Where the remedy by appeal or stated case is avail-



able, the magistrate or inferior court should be asked to certify the facts in such detail along with his findings thereon that the question of law sought to be raised thereon can be brought before a superior court in that way. As to cases stated by justices in summary conviction matters (Code Part XV), see Cr. Code secs. 761-769.

*Assault and battery cases where title to lands involved*—See sec. 709.

**Mischief.—Colour of right.—Partial interest.—Fraud.**

**541.** Nothing shall be an offence under any of the foregoing provisions of this Part unless it is done without legal justification or excuse, and without colour of right.

2. Where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and if total, shall not prevent his act being an offence, if done with intent to defraud.

*Origin*—Code of 1892, sec. 481; R.S.C. 1886, ch. 168, sec. 61.

*Justification or excuse*—See Code sec. 16, under which all rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under the Code except in so far as they are thereby altered or are inconsistent therewith.

With the exception of the rule of sec. 56, which justifies the owner or lawful possessor of moveable property in resisting the taking of it by a trespasser, the Code contains no provision to the effect that a person may use force in defence of his moveable property. Nevertheless sec. 16 makes it clear that "all rules and principles of the common law which under any circumstances render a justification or excuse for any act or a defence to any charge" remain in force.

In *Miles v. Hutchings* [1903] 2 K.B. 714, 72 L.J.K.B. 775, the facts were that an information had been laid against a gamekeeper for unlawfully and maliciously killing a dog, that the dog was at the time near an aviary, in which pheasants, the property of the gamekeeper's master, were at the time confined for breeding purposes; and the court held that the test of the gamekeeper's liability was whether he acted under the *bona fide* belief that what he was doing was necessary for the protection of his master's property and that it was the only way in which the property could be protected. And see Code sec. 537, 539, and notes to same. Injury done to property in reckless disregard of consequences is to be considered a wilful act. Sec. 509.

Ignorance of the law (see Code sec. 22) or ignorance of his legal rights by the party charged will not be an excuse. He must have an

honest belief in the state of facts which if true would give him a legal right. *R. v. Watier*, 17 Can. Cr. Cas. 9, at 15. (Y.T.).

Sec. 541 (1) of the Cr. Code which declares that as to certain offences (*inter alia*, wilful damage to property) the act must have been done "without legal justification or excuse and without colour of right," is to be construed as a proviso or exception which forms a matter of defence or excuse but need not be formally alleged in an information or conviction. *R. v. Gill*, 14 Can. Cr. Cas. 294, 18 O.L.R. 234.

*Colour of right*—In the case of *Regina v. Davey*, 27 A.R. (Ont.) 508, 4 Can. Cr. Cas. 28, the rule laid down by Lister, J.A., who delivered the judgment of the court, was: "It is, I think, settled that an honest belief on the part of the person charged that he has the right to do the act does not oust the magistrate's jurisdiction. What the section of the Code requires in order to oust the jurisdiction of the magistrate is that the act shall be done under a fair and reasonable supposition of right. Whether such supposition is warranted is for the magistrate to determine on the evidence."

"The context of the words shows the sense in which they are used in this section. Legal justification or excuse is an answer to a criminal charge under this part of the Act as it would be in a civil action. Then follow the words, 'and without colour of right.' This means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would not be an answer to a civil action, but it is properly made an answer to a criminal charge, because it takes away from the act its criminal character." *R. v. Johnson*, 7 O.L.R. 525, 8 Can. Cr. Cas. 128.

"To do an act in ignorance that it is prohibited by law is not to do it with colour of right. There must be at least an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done." *Regina v. Fetzer* (1900), 19 N. Zeal. L.R. 438; *R. v. Daigle*, 15 Can. Cr. Cas. 55.

It is a claim of right or title, honestly raised and really believed in, whether, in fact, such right or title really exists or not. There may be a good colour of right if the title set up be only colourable if made sincerely. *R. v. Daigle*, 15 Can. Cr. Cas. 55; *Watkins v. Major*, L.R. 10 C.P. 661; *Cornwall v. Saunders*, 3 B. & S. 206; *Scott v. Baring*, 18 Cox 128, 72 L.T. 495.

*Intent to defraud where accused is entire owner of property destroyed*—Notwithstanding the fact that the accused may wholly own the property destroyed or attempted to be destroyed, the offence will be complete under sec. 541 (2) if done with intent to defraud. *R. v. Bryans*, 12 U.C.C.P. 161; *R. v. Wilson*, 1 W.W.R. 272, 19 W.L.R. 657, 21 Can. Cr. Cas. 105. So it is an offence even to conspire to burn down one's own building with intent to defraud the insurance company. *Ibid.* And evidence of a prior unsuccessful attempt to induce a person to burn another building for the insurance may, if not too remote in

time, be relevant as showing the fraudulent intent of the accused. *R. v. Wilson*, 1 W.W.R. 272. The court may order the prosecutor to deliver particulars of any fraud charged. Code sec. 859.

*Cruelty to Animals.*

**Ill-treating animal—Injuries by ill-usage in driving.—Fighting of animal.**

**542.** Every one is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding fifty dollars, or to three months' imprisonment with or without hard labour, or to both, who,—

- (a) wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird, or any wild animal or bird in captivity; or,
- (b) while driving any cattle or other animal is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal; or,
- (c) in any manner encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature.

*Origin*—Sec. 512, Code of 1892; 58-59 Vict., Can., ch. 40, sec. 1; R.S.C. 1886, ch. 172, sec. 2; Cruelty to Animals Act, 1849, Imp.; 32-33 Vict., Can., ch. 27, sec. 1; 33 Vict., Can., ch. 29, sec. 1.

*"Before two justices"*—There is no jurisdiction in one justice to summarily try a charge under Code sec. 285 for injury by furious driving. *R. v. Nelson* (1916) 28 Can. Cr. Cas. 276 (Ont.). A summary conviction could be made under sec. 542 of the Code only by two justices or a police magistrate having the jurisdiction of two justices, and not by a single justice. *R. v. Nelson*, *supra*.

*Time limit for prosecution*—See sec. 1140 (e).

*Information*—An information and summons thereon both describing the offence as "unlawfully abusing a mare contrary to sec. 542 of the Criminal Code," sufficiently describe an offence under this section without specific mention of any of the words "wantonly," "cruelly," or "unnecessarily," which are used in that section. *R. v. Cornell*, 8 Can. Cr. Cas. 416, 6 Terr. L.R. 101.

*Several offences*—The Cruelty to Animals Act, 1849, Imp., sec. 2, enacts that "If any person shall . . . cruelly . . . ill-treat,

abuse or torture . . . any animal" he shall be liable to a penalty. The defendant was charged before justices that he "did cruelly ill-treat, abuse and torture a certain animal, to wit, a grey gelding." On the hearing of the summons the justices being of the opinion that several offences were charged called on the prosecutor to elect on which he would proceed, which he, declining to do, they dismissed the summons. On appeal, the Divisional Court held that the justices were right, and dismissed the appeal holding that the words "ill-treat," "abuse" and "torture" in the Act created three separate offences, and therefore a conviction for "ill-treating, abusing and torturing" would be bad. *Johnson v. Needham* [1909] 1 K.B. 626.

The objection upheld in *Johnson v. Needham*, supra, is probably cured under sec. 725 of the Code by analogy to the example there given of an offence under sec. 533.

In *R. v. Cable, ex parte O'Shea* [1906] 1 K.B. 719, a conviction for cruelly ill-treating, abusing and torturing five cows was supported as being for a single offence and not, as contended by the defence, for five separate offences. And see *Rodgers v. Richards* [1892] 1 Q.B. 555. In *R. v. Rawson* [1909] 2 K.B. 748, the information was held to charge only one offence, although for cruelty to four ponies between certain dates by neglecting to supply them with proper food; and where four convictions were recorded three of them were quashed.

An information against both master and servant for ill-treating a horse by "working and causing it to be worked" while in an unfit state, is not bad for duplicity. *Bartholomew v. Wiseman*, 56 J.P. 455.

*Cruelty to animals*—An owner of premises tying up an estray is bound to properly feed and water the estray. *Bolton v. MacDonald*, 3 Terr. L.R. 269.

Branding animals (*ex. gr.* sheep) where reasonably necessary for the purpose of identification is not cruelty, although it may be painful, if it cannot be done effectually without inflicting the pain. *Bowyer v. Morgan*, 22 Times L.R. 426, 95 L.T. 27.

The question under this section is whether there was cruelty in fact, not whether the accused intended to commit cruelty. *Duncan v. Pope*, 80 L.T. 120, 15 Times L.R. 195.

Where unnecessary suffering is caused to an animal by the owner, it has been held in England that an offence is committed against sub-sec. 1 of the Protection of Animals Act, Imp., 1911, even if the act is done in pursuance of a custom and for commercial reasons. So the owner was held liable for allowing a cow to be overstocked with milk before offering her for sale. *Waters v. Braithwaite*, 30 T.L.R. 107.

As to rabbit coursing in a fenced enclosure, see *Waters v. Meakin* [1916] 2 K.B. 111, decided under the Protection of Animals Act, 1911, Imp.

"Unnecessarily" in sec. 542, means "without good reason." *Ford v. Riley*, 23 Q.B.D. 203; *Murphy v. Manning*, L.R. 2 Ex. D. 307; *R. v. McDonagh*, 28 L.R. Ir. 204.

The use of an overdraw check rein on a horse is ordinarily not an offence under this section although it causes discomfort to the animal. *Society v. Lowry* (1894), 17 Montreal Legal News 118.

The cutting of the combs of cocks to fit them for fighting or winning prizes at exhibition has been held to be cruelty. *Murphy v. Manning*, L.R. 2 Ex. D. 307; but as to dishorning cattle the better opinion appears to be that it is not an offence; *Callaghan v. Society*, 11 Cox C.C. 101; *R. v. McDonagh*, 28 L.R. Irish 204; *Todrick v. Wilson*, 1891, L.J. (Eng.) 191; although it was held to be in *Ford v. Wiley*, L.R. 23, Q.B.D. 203.

The spaying of sows is not cruelty. *Lewis v. Fermor*, L.R. 18 Q.B.D. 532.

Causing a horse to be worked when it was apparent that it was not in a fit state for working is ill-treatment and abuse within sec. 542, and the abettor is liable as a principal under sec. 69. *Benford (or Benfield) v. Sims* [1898] 2 Q.B. 641, 67 L.J.Q.B. 655, 78 L.T. 718. But a mine manager will not be liable for cruelty inflicted by his subordinates without proof of guilty knowledge on his part. *Small v. Warr*, 47 J.P. 20; *Elliott v. Osborne*, 17 Cox 346, 65 L.T. 378, 56 J.P. 38. Sec. 542 does not make it an offence to leave an animal to die a natural death instead of killing it when it is known to be incurable and suffering pain; but turning it out to pasture may be an act of torture if the animal is given increased pain by moving about to get feed. *Everitt v. Davies*, 42 J.P. 248, 38 L.T. 360. But leaving a cab-horse an inordinate length of time without food or protection, and hitched to the cab on the street until it suffers from hunger and exposure is an abuse and torture within sec. 542. *Anderson v. Wood*, 47 J.P. 84, 9 Court of Sessions cases (4th series Just.) 6.

*Appeal*—Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no *locus standi* to appeal from the justices' order dismissing the charge; the notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed. *Canadian Society, etc. v. Lauzon*, (1899) 4 Can. Cr. Cas. 354 (Que.).

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 662.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Joint offenders on summary conviction*—See sec. 728.

*Half of fine to municipality and half to informant*—See sec. 1043 making special provision for penalties awarded under secs. 542 and 543,

following in this respect the former statute R.S.C. 1886, ch. 172 (Cruelty to Animals Act) from which secs. 542 and 543 are derived.

*Bull-fights, cock-fights, etc.*—Maintaining a cock-pit is an offence under sec. 543.

*Captive wild animals and birds*—These were brought within the section by the amendment of 58-59 Vict., Can., ch. 40.

"Cattle"—See sec. 2 (5).

*Care of cattle during transportation by rail or boat*—See secs. 544, 544A, 545.

*Malicious injury to cattle*—See sec. 510 (B).

*Wilfully maiming or injuring animals*—See secs. 536-538.

*Killing animals with intent to steal hide, etc.*—See secs. 345, 350.

*The Injured Animals' Act, Ont.*—An Act respecting the destruction, by constables and others, of injured animals, was introduced and enacted in Ontario in 1911 at the request of the Toronto Humane Society. This statute, R.S.O. 1914, ch. 248, is known as The Injured Animals' Act, and makes the following provisions:—(2) Where a police constable, or the inspector of an incorporated humane society or society for the prevention of cruelty to animals, finds any horse so severely injured that it would, in his opinion, be cruel to allow the horse to live, he shall, if the owner refuses to consent to the destruction of the animal, or is absent, at once summon a veterinary surgeon, if any such surgeon resides or can be found within a reasonable distance, or, if no such surgeon can be obtained, then two reputable citizens, and if it appears by the certificate of such surgeon or by a statement signed by such two citizens that the animal is, or appears to be, incapable of being so cured or healed as to live thereafter without suffering, it shall be lawful for such police constable or inspector, without the consent of the owner, to kill or cause to be killed the said animal with such instrument or instruments or appliances, and with such precautions and in such a manner as to inflict as little pain and suffering as possible.

(3) If any horse is abandoned, or left to die in any street, road, commons or public place, it shall be the duty of any police constable or inspector, as mentioned in sec. 2, to make a reasonable attempt to ascertain the owner of such animal, and if such owner cannot be found, or, if found, refuses to give his consent to the killing of such horse, then the said constable or inspector shall proceed in the manner set forth in sec. 2.

(4) Where any large animal, such as a horse, cow, sheep or hog, is severely injured by any railway engine or train, the conductor of the train shall report the occurrence to the nearest station agent of the railway, who shall forthwith notify the owner, if possible, and the nearest constable, who shall proceed as provided by sec. 2.

**Keeping cock-pit.—Confiscation.**

**543.** Every one is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour, or to both, who builds, makes, maintains or keeps a cock-pit on premises belonging to or occupied by him, or allows a cock-pit to be built, made, maintained or kept on premises belonging to or occupied by him.

2. All cocks found in any such cock-pit, or on the premises wherein such cock-pit is, shall be confiscated and sold for the benefit of the municipality in which such cock-pit is situated.

*Origin*—Sec. 513, Code of 1892; R.S.C. 1886, ch. 172, sec. 3.

*Prosecution within three months*—See sec. 1140 (e).

*Application of fines*—See sec. 1043.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 652.

**Conveyance of cattle without proper rest and nourishment by railways, etc.**

**544.** No railway company within Canada whose railway forms any part of a line of road over which cattle are conveyed from one province to another province, or from the United States to or through any province, or from any part of a province to another part of the same, and no owner or master of any vessel carrying or transporting cattle from one province to another province, or within any province, or from the United States to or through any province, shall confine the same in any car, or vessel of any description, for a longer period than twenty-eight hours without unloading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unloading and furnishing water and food by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains.

2. In reckoning the period of confinement, the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting

railway or vessels from which they are received, whether in the United States or in Canada, shall be included.

3. The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water.

4. Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof or, in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall in such case have a lien upon such cattle for food, care and custody furnished and shall not be liable for any detention of such cattle.

5. Where cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company then having charge of the cars in which they have been transported shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean sawdust or sand before reloading them with live stock.

6. Every railway company, or owner or master of a vessel, having cattle in transit, or the owner or person having the custody of such cattle, as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions of this section, is liable for every such failure on summary conviction to a penalty not exceeding one hundred dollars.

*Origin*—Sec. 514, Code of 1892; R.S.C. 1886, ch. 172, secs. 8, 9, 10, 11.

*Transportation of "cattle"*—See definition of "cattle" in sec. 2, sub-sec. (5).

*Sub-sec. (6)*—"Or the owner or person having the custody," etc.]—As to registered ownership of cattle brands, see sec. 989.

*Extension from 28 to 36 hours*—See sec. 544A.

*Penalty not to be remitted on making compensation*—See sec. 729.

*Prosecution within three months*—See sec. 1140 (e).

#### **Time of confinement of cattle on railways extended.**

**544A.** Upon the written request of the owner or person in charge of any cattle so carried, which written request shall be separate and apart from any printed or other bill of lading of



other railroad or shipping form, the time of confinement of such cattle may be extended to thirty-six hours where such cattle are carried on cars fitted with the necessary appliances and are, during such time, fed and watered without being unloaded.

*Origin*—Adapted from a similar provision in the U.S. Interstate Commerce law; Can. Stat. 1909, 8-9 Edw., ch. 9, sec. 2.

*Or other bill of lading or other railroad or shipping form*—The official text reading "of other railroad or shipping form" which is followed in printing sec. 544A in this edition, was probably a typographical error for the word "or"; but the correction can be made only by statute.

**Search of premises.—Obstructing officer.**

**545.** Any peace officer or constable may, at all times, enter any premises where he has reasonable grounds for supposing that any car, truck or vehicle as to which any company or person has failed to comply with the provisions of the last preceding section, is to be found, or enter on board any vessel in respect whereof he has reasonable grounds for supposing that any company or person has, on any occasion, so failed.

2. Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment.

*Origin*—Sec. 515, Code of 1892; R.S.C. 1886, ch. 171, sec. 12.

*Refusing admission to peace officer*—This sub-section applies only to refusal of admittance on search made under secs. 544 and 545, as to infraction of the cattle feeding regulations on cattle transportation by rail or boat. Other obstructions of peace officers in the execution of their duty are dealt with in Code sec. 169.

*Summary conviction for first offence*—Offences under this section are excluded from those for which under sec. 729 a first offender may be discharged on making satisfaction to the party aggrieved, at the discretion of the magistrate making the summary conviction.

*Prosecution within three months*—See 1140 (e).

## PART IX

### OFFENCES RELATING TO BANK NOTES, COIN AND COUNTERFEIT MONEY.

#### *Interpretation.*

#### **Definitions.**

**546.** In this Part, unless the context otherwise requires,—

- (a) ‘current gold or silver coin,’ includes any gold or silver coin of any of His Majesty’s mints, or gold or silver coin of any foreign prince or state or country, or other gold or silver coin lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty’s dominions;
- (b) ‘current copper coin’ includes copper coin coined in any of His Majesty’s mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty’s dominions;
- (c) ‘counterfeit’ means false, not genuine;
- (d) ‘gild’ and ‘silver’ applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively;
- (e) ‘utter’ includes ‘tender’ and ‘put off’;
- (f) ‘counterfeit token of value’ means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which although genuine has no value as money.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3; Code of 1892, sec. 460; R.S.C. 1886, ch. 167, sec. 1.

*Sub-sec. (b)—Current copper coin*—'Copper coin' includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver. Code sec. 2 (8).

*Sub-sec. (c)—"Counterfeit"*—For statutory presumptions in counterfeiting cases, see Code secs. 955, 980. The court is to order that counterfeit coin produced on a trial under Part IX shall be cut in pieces in open court or in the presence of a justice, and then to be delivered to or for the owner thereof if claimed. Code sec. 957.

**Counterfeit raising of denomination.—Counterfeit reducing of size.**

**547.** Any genuine coin prepared or altered so as to resemble or pass for any current coin of a higher denomination is a counterfeit coin.

2. A coin fraudulently filed or cut at the edges so as to remove the milling, and on which a new milling has been added to restore the appearance of the coin, is a counterfeit coin.

*Origin*—Code of 1892, sec. 460; R.S.C. 1886, ch. 167, sec. 1; 24-25 Vict., Imp., ch. 29, sec. 9.

*"Counterfeit coin"*—'Counterfeit' means false, not genuine. Code sec. 546 (c). The offence of counterfeiting may be complete, although the intended counterfeiting was not perfected. Sec. 548. The counterfeit raising of the denomination of a coin makes it a 'counterfeit coin' and so does the addition of a new milling to restore the appearance of a genuine coin fraudulently filed or cut. Sec. 547.

*Coin with new milling*—Sub-sec. (2) of sec. 547 is an affirmation of what had been decided under the Imperial statute, 24-25 Vict., ch. 29, sec. 9, in *R. v. Hermann*, 4 Q.B.D. 284, 48 L.J.M.C. 106.

*Genuine but valueless coin*—See Code sec. 549, as to knowledge and fraudulent intent.

*Making double-headed coin from two genuine coins*—A coin made by splitting two genuine coins, and joining the heads together so as to make a double-headed coin, has been held counterfeit in Australia. *R. v. McMahon* [1894] 15 N.S.W. Law Rep. 131, 136.

*Proof of counterfeiting*—Code, 955, 957, 980.

*Certain offences—When complete.*

**Counterfeiting complete although intended counterfeiting not perfected.**

**548.** Every offence of making any counterfeit coin, or of buying, selling, receiving, paying, tendering, uttering or putting off, or of offering to buy, sell, receive, pay, utter or put off, any counterfeit coin is deemed to be complete, although the coin

so made or counterfeited, or bought, sold, received, paid, tendered, uttered or put off, or offered to be bought, sold, received, paid, tendered, uttered or put off, was not in a fit state to be uttered, or the counterfeiting thereof was not finished or perfected.

*Origin*—Code of 1892, sec. 461; R.S.C. 1886, ch. 167, sec. 27.

*Counterfeit*—See secs. 546, 547, 549, 953, 957, 980.

**Coin, etc., genuine but valueless.—Must be knowledge and fraudulent intent.**

**549.** In the case of coin or paper money which, although genuine, has no value as money, it is necessary in order to constitute an offence under this Part that there should be knowledge on the part of the person charged that such coin or paper money was of no value as money, and a fraudulent intent on his part in his dealings with or with respect to the same.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3.

*Valueless but genuine paper money*—Paper money is included in the phrase 'counterfeit token of value' used in sec. 569. See sec. 546 (f).

### *Bank Notes.*

**Purchasing, receiving or possessing forged bank notes.**

**550.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse, the proof whereof shall lie on him, purchases or receives from any person, or has in his custody or possession, any forged bank note, or forged blank bank note, whether complete or not, knowing it to be forged.

*Origin*—Code of 1892, sec. 430; R.S.C. 1886, ch. 165, sec. 19.

*Using counterfeit token of value*—Code sec. 546 includes spurious paper money within the statutory definition of this phrase, and sec. 569 (d) makes it an indictable offence to purchase, exchange, accept, take possession of or use such. If the counterfeit be of a bank note, the prosecution may be under sec. 550 for the offence of having a forged bank note in possession knowing it to be forged. R. v. Tutty, 9 Can. Cr. Caa. 544, 38 N.S.R. 136.

*Destruction of forged bank notes*—Code sec. 632.

*Stamping as counterfeit*—Every officer charged with the receipt or disbursement of public moneys, and every officer of any bank, and every person acting as or employed by any banker, shall stamp or write in plain letters, upon every counterfeit or fraudulent note issued in the

form of a Dominion or bank note, and intended to circulate as money, which is presented to him at his place of business, the word "Counterfeit," "Altered," or "Worthless." If such officer or person wrongfully stamps any genuine note he shall, upon presentation, redeem it at the face value thereof. Bank Act, R.S.C. ch. 29, sec. 75.

"*Bank note*"—See definition in sec. 2 (4).

*Second offence*—See sec. 568.

*Joint custody or possession*—See Code sec. 5.

*Defacing bank bills or Dominion notes*—Every person who in any way defaces any Dominion or provincial note, or bank note, whether by writing, printing, drawing or stamping thereon, or by attaching or affixing thereto, anything in the nature or form of an advertisement, shall be liable to a penalty not exceeding twenty dollars. Bank Act, R.S.C. ch. 29, sec. 137.

#### **Printing circulars, etc., in likeness of notes.**

**551.** Every one is guilty of an offence and liable, on summary conviction before two justices, to a fine of one hundred dollars or three months' imprisonment, or both, who designs, engraves, prints or in any manner makes, executes, utters, issues, distributes, circulates or uses any business or professional card, notice, placard, circular, hand-bill or advertisement in the likeness or similitude of any bank note, or any obligation or security of any government or any bank.

*Origin*—Code of 1892, sec. 442; 53 Vict., Can., ch. 31, sec. 3; 50-51 Vict., Can., ch. 47, sec. 2.

*Similitude of any bank note*—See definition of "bank note," sec. 2 (4):

*Advertising counterfeit money*—See sec. 569.

#### *Coin.*

**Making counterfeit gold or silver coin.—Changing into counterfeit.—Gilding to resemble coin.—Gilding silver coin.—Gilding or silvering copper coin.**

**552.** Every one is guilty of an indictable offence and liable to imprisonment for life who,—

- (a) makes or begins to make any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or,
- (b) gilds or silvers any coin resembling or apparently intended to resemble or pass for, any current gold or silver coin: or.

- (c) gilds or silvers any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or,
- (d) gilds any current silver coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold coin; or,
- (e) gilds or silvers any current copper coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold or silver coin.

*Origin*—Code of 1892, sec. 462; R.S.C. 1886, ch. 167, secs. 3 and 4.

*Variance from true coin*—See Code sec. 955.

*Evidence of counterfeiting*—Code secs. 546-549; 955, 957, 980.

*Extradition*—Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money; are extraditable offences with the U.S.A. under the Extradition Convention of 12 July, 1889, article 2; see also the supplementary Convention of 26 June, 1901.

**Buying, selling or trading in counterfeit gold or silver coin.—  
Importing or receiving into Canada.**

**553.** Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him,—

- (a) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, at or for a lower rate or value than the same imports, or was apparently intended to import, any counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin; or,
- (b) imports or receives into Canada any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin knowing the same to be counterfeit.

*Origin*—Code of 1892, sec. 463; R.S.C. 1886, ch. 167, secs. 7 and 8.

*Variance from true coin*—See Code sec. 955.

*Current gold or silver coin*—Foreign coins are included. See sec.

546 (a).

**Manufacturing or importing copper coin.**

**554.** Every one who manufactures in Canada any copper coin, or imports into Canada any copper coin, other than current copper coin, with the intention of putting the same into circulation as current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars for every pound troy weight thereof; and all such copper coin so manufactured or imported shall be forfeited to His Majesty.

*Origin*—Code of 1892, sec. 464; R.S.C. 1886, ch. 167, sec. 28.

*Seizure of unlawfully imported copper coin*—Code secs. 623-626, 1041.

*Seizure of counterfeit coin*—Code sec. 632.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

**Exportation of counterfeit coin.**

**555.** Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority or excuse the proof whereof shall lie on him, exports or puts on board any ship, vessel or boat, or on any railway or carriage or vehicle of any description whatsoever, for the purpose of being exported from Canada, any counterfeit coin resembling or apparently intended to resemble or pass for any current coin or for any foreign coin of any prince, country or state, knowing the same to be counterfeit.

*Origin*—Code of 1892, sec. 465; R.S.C. 1886, ch. 167, sec. 9.

*Second offence*—See sec. 568.

*Variance from true coin*—See Code sec. 955.

*Evidence that coin is counterfeit*—See sec. 980.

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 652.

**Making or possessing, etc.—Matrix, etc., for coinage.—Edgers, etc.—Press for coinage.**

**556.** Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him, makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession,—

- (a) any puncheon, counter puncheon, matrix, stamp, die, pattern or mould, in or upon which there is made or

- impressed or which will make or impress, or which is adapted and intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, or any part or parts of both or either of such sides; or,
- (b) any edger, edging or other tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin, knowing the same to be so adapted and intended; or,
- (c) any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin.

*Origin*—Code of 1892, sec. 466; R.S.C. 1886, ch. 167, sec. 24.

*Making instrument for coining*—Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings, and the die-sinker, suspecting fraud, informed the authorities and under their direction made the die for the purpose of detecting the prisoner, it was held that the defendant was rightly convicted as a principal although the die-sinker was an innocent agent in the transaction. *R. v. Bannon* (1844), 2 Mood. C.C. 309, 1 C. & K. 295.

*Possessing a mould for coining*—In *R. v. Baker* (1912), 7 Cr. App. R. 217, in charging the appellant, the Clerk of the Court left out the words "without lawful authority or excuse," and the appellant, who was not represented by counsel, answered "Yes; I am guilty of having them in my possession." A plea of guilty was entered, and on being asked whether he had anything to say why judgment should not be passed upon him, he said for the first time that he only used the moulds for making medals. The Court of Criminal Appeal annulled the conviction and judgment, and remanded the defendant to appear and plead at the trial court, on the ground that what the prisoner said either amounted to a plea of not guilty or else it was an unfinished informal plea. On his new trial the accused was convicted. It appeared that evidence was then admitted that he had passed a gilded shilling as a sovereign. It was not suggested that that coin was made in the



mould, but Pickford, J., speaking for the court, said it was "by no means clear that evidence of passing counterfeit coins would not be admissible in such a case although the coin did not come from the mould." *R. v. Baker* (1912), 7 Cr. App. R. 252. It did not, however, become necessary to decide the point, as there was evidence on which the jury could convict and no miscarriage of justice from the admission of the disputed evidence.

*Search warrant*—Code secs. 629, 629A, 630-632.

*Ordering destruction of instrument for coining*—Code sec. 632.

*Current gold or silver coin*—See sec. 546 (a).

*Variance from true coin*—See Code sec. 955.

*Has in possession*—Compare revenue statutes for possessory offences. *R. v. Brennan*, 6 Can. Cr. Cas. 29, 35 N.S.R. 106.

#### Conveying out of H. M. mint into Canada.

**557.** Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him, knowingly conveys out of any of His Majesty's mints into Canada, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press or engine used or employed in or about the coining of coin, or any useful part of any of the several articles aforesaid, or any coin, bullion, metal or mixture of metals.

*Origin*—Code of 1892, sec. 467; R.S.C. 1886, ch. 167, sec. 25.

#### Clipping current gold or silver coin.

**558.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who impairs, diminishes or lightens any current gold or silver coin, with intent that the coin so impaired, diminished, or lightened may pass for current gold or silver coin.

*Origin*—Code of 1892, sec. 468; R.S.C. 1886, ch. 167, sec. 5.

*Current gold or silver coin*—See definition in sec. 546 (a).

*Second offence*—See sec. 568.

#### Defacing current coin.

**559.** Every one is guilty of an indictable offence and liable to one year's imprisonment who defaces any current gold, silver or copper coin by stamping thereon any names or words, whether

such coin is or is not thereby diminished or lightened, and afterwards tenders the same.

*Origin*—Code of 1892, sec. 469; R.S.C. 1886, ch. 167, sec. 17.

*Current gold or silver coin*—See definition in sec. 546 (a).

*Current copper coin*—See definitions in secs. 2 (8) and 546 (b).

*Second offence*—See sec. 568.

*Uttering defaced coin*—Code secs. 546 (e), 548, 566.

**Possessing clippings, etc., of current gold or silver coin.**

**560.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully has in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which have been produced or obtained by impairing, diminishing or lightening any current gold or silver coin, knowing the same to have been so produced or obtained.

*Origin*—Code of 1892, sec. 470; R.S.C. 1886, ch. 167, sec. 6.

*Current gold or silver coin*—See sec. 546 (a).

*Cumulative offences*—Unlawful possession of skins of game animals under the Quebec Game laws has been held not to constitute a separate offence as to each skin. *Zimmerman v. Burwash*, 29 Que. S.C. 250. The same principle seems applicable to possessory offences relating to the coinage.

*Second offence*—See sec. 568.

**Possession with intent to utter.—Counterfeit gold or silver coin.—  
Counterfeit copper coin.**

**561.** Every one is guilty of an indictable offence and liable to three years' imprisonment who has in his custody or possession, knowing the same to be counterfeit, and with intent to utter the same or any of them,—

(a) any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin; or,

(b) three or more pieces of counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin.

*Origin*—Code of 1892, sec. 471; R.S.C. 1886, ch. 167, secs. 12 and 16.

*Having possession of counterfeit coin*—Possession for another is included; Code sec. 5; and the possession of one person may be the

joint possession of several, and each is liable if one has possession with the knowledge and consent of the rest. Code sec. 5, sub-sec. (2). Where several are charged with a joint receiving, and a separate receiving is proved as to any part, the jury may convict of such separate receiving on the same indictment. Code sec. 954.

*Current copper coin*—See definitions in secs. 2 (8) and 546 (b).

*Variance from true coin*—See Code sec. 955.

*Destruction of seized counterfeit coin*—Code sec. 632.

*Proof of guilty knowledge*—In the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having passed other counterfeit money or bills at about the same time, or that he had many such in his possession, which circumstances tend strongly to show that he was not acting innocently and had not taken the money casually, but that he was employed in fraudulently putting it off. *R. v. Brown* (1861), 21 U.C.Q.B. 330.

On a charge of having counterfeit coins in possession, proof that the accused also had in his possession "trade dollars," which, although genuine, were not worth their stamped value, and that he had attempted to put them off as worth their stamped value, is not admissible as showing intent to put off the counterfeit coin. *R. v. Benham* (1899), 4 Can. Cr. Cas. 63, 8 Que. Q.B. 448.

And on a charge of uttering, evidence of the accused having passed other counterfeit money at about the same time, either before or after the offence charged, or of his having possession of other counterfeit money, is admissible in proof of guilty knowledge. *R. v. Forster*, *Deara*. C.C. 456; *R. v. Whiley*, 2 Leach C.C. 983.

Before an issue can be said to be raised which would admit evidence of other similar criminal acts in proof of guilty knowledge or intent or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear, the issue must have been raised in substance, if not in so many words, and the issue so raised must be one to which the evidence is relevant. *Thompson v. Director of Public Prosecutions* (1918), 87 L.J.K.B. 478, 484 (H.L.), affirming *R. v. Thompson* [1917] 2 K.B. 630, 86 L.J.K.B. 1321. The mere theory that a plea of not guilty puts everything in issue is not enough for this purpose. *Thompson v. Director of Public Prosecutions*, supra. Compare *R. v. Rodley* [1913] 3 K.B. 468, 82 L.J.K.B. 1070; *Perkins v. Jeffery* [1915] 2 K.B. 702; *R. v. Mackenzie* (1910), 6 Cr. App. R. 64, 27 Times L.R. 152; *Dal Singh v. King-Emperor* (1917), 86 L.J.P.C. 140, L.R. 44 Ind. App. 137; *Makin v. Attorney-General of N.S.W.* [1894] A.C. 57, 63 L.J.P.C. 41.

Evidence of subsequent acts forming a part of the same conspiracy may be relevant as showing means attempted to escape detection and punishment. *R. v. Bachrack* (1913), 28 O.L.R. 32, 4 O.W.N. 615, 21 Can. Cr. Cas. 257, 266; *R. v. Letain* [1918] 1 W.W.R. 505, 29 Can. Cr.

Cas. 389 (Man.); R. v. Law, 19 Man. R. 275; R. v. Rhodes [1899] 1 Q.B. 77, 68 L.J.Q.B. 83, 19 Cox 182.

*Evidence of coin being counterfeit*—Code secs. 955, 980.

*Second offence*—See sec. 568.

*Arrest by peace officer without warrant*—See secs. 647, 648, 649, 652.

**Making counterfeit copper coin.—Making, etc., tools for copper coinage.—Dealing in counterfeit copper coin.**

**562.** Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

- (a) makes, or begins to make, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin; or,
- (b) without lawful authority or excuse, the proof of which shall lie on him, knowingly
  - (i) makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession, any instrument, tool or engine adapted and intended for counterfeiting any current copper coin,
  - (ii) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin, at or for a lower rate of value than the same imports or was apparently intended to import.

*Origin*—Code of 1892, sec. 472; R.S.C. 1886, ch. 167, sec. 15.

*Counterfeit copper coin*—Code sec. 2; sub-sec. (8), secs. 546, 547, 548, 549.

*Variance from true coin*—See Code sec. 955.

*Proof of guilty knowledge*—See note to sec. 561.

*Destruction of seized counterfeit coin*—Code sec. 632.

*Second offence*—See sec. 568.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

**Making counterfeit gold or silver foreign coin.—Bringing into Canada.—Having in possession.—Uttering.—Making counterfeit foreign copper coin.**

**563.** Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

- (a) makes, or begins to make, any counterfeit coin or silver

- coin resembling, or apparently intended to resemble or pass for, any gold or silver coin of any foreign prince, state or country, not being current coin; or,
- (b) without lawful authority or excuse, the proof of which shall lie on him,
- (i) brings into or receives in Canada any such counterfeit coin, knowing the same to be counterfeit,
- (ii) has in his custody or possession any such counterfeit coin, knowing the same to be counterfeit, and with intent to put off the same; or,
- (c) utters any such counterfeit coin; or,
- (d) makes any counterfeit coin resembling, or apparently intended to resemble or pass for, any copper coin of any foreign prince, state or country, not being current coin.

*Origin*—Code of 1892, sec. 473; R.S.C. 1886, ch. 167, secs. 19-23.

*Variance from true coin*—See Code sec. 955.

*Destruction of seized counterfeit coin*—Code secs. 623-626, 632.

*Proof of guilty knowledge*—See note to sec. 561.

*Second offence*—See sec. 568.

*Recovery of penalty by civil action where justices find possessor not aware of unlawful manufacture or importation*—Code secs. 623-626.

*Importing counterfeit coin*—Code sec. 553.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

*Arrest without warrant*—A peace officer may arrest without warrant a person who "has committed" an offence under paragraphs (b) or (d) of sec. 563, Code sec. 647.

#### Uttering counterfeit gold or silver coin.

**564.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who utters any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin, knowing the same to be counterfeit.

*Origin*—Code of 1892, sec. 474; R.S.C. 1886, ch. 167, sec. 7.

*Uttering counterfeit gold or silver coins*—To "utter" includes tendering or passing off. Code sec. 546, sub-sec. (e).

*Proof of guilty knowledge*—See note to sec. 561.

*Counterfeit or diminished coin to be broken*—See the Currency Act, 1910, Can., ch. 14.

*Variance from true coin*—See Code sec. 955.

*Possessing with intent to utter*—Code sec. 561.

*Second offence*—See sec. 568.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

**Uttering light gold or silver coin.**—Uttering false gold or silver coin.—Uttering counterfeit copper coin.

**565.** Every one is guilty of an indictable offence and liable to three years' imprisonment who,—

- (a) utters, as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear; or,
- (b) with intent to defraud utters, as or for any current gold or silver coin, any coin not being such current gold or silver coin, or any medal, or piece of metal or mixed metals, resembling, in size, figure and colour, the current coin as or for which the same is so uttered, such coin, medal or piece of metal or mixed metals so uttered being of less value than the current coin as or for which the same is so uttered; or,
- (c) utters any counterfeit coin resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be counterfeit.

*Origin*—Code of 1892, sec. 475; R.S.C. 1886, ch. 167, secs. 11, 14, and 16.

*“Utters”*—The word “utter” in this part of the Code includes ‘tender’ and ‘put off.’ See. 546 (c).

On a charge of uttering base coin, proof that the accused uttered base coin on other occasions approximate in point of time is admissible as evidence that he knew the coin to be base. See note to sec. 561.

*Counterfeit or diminished coin to be broken*—See the Currency Act, 1910, Can., ch. 14.

*Variance from true coin*—See Code sec. 955.

*Second offence*—See sec. 568.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

**Uttering defaced coin.**

**566.** Every one who utters any coin defaced by having stamped thereon any names or words is guilty of an offence, and liable, on summary conviction before two justices, to a penalty not exceeding ten dollars.

*Origin*—Code of 1892, sec. 476; R.S.C. 1886, ch. 167, sec. 18.

*Consent of Attorney-General to prosecution*—See sec. 598.

*Utters coin defaced by stamp*—The word 'utter' includes 'tender' and 'put off.' Code sec. 546 (e).

*Defacing current coin*—See sec. 559.

#### Uttering uncurrent copper coin.

**567.** Every one who utters, or offers in payment, any copper coin, other than current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty of double the nominal value thereof, and in default of payment of such penalty to eight days' imprisonment.

*Origin*—Code of 1892, sec. 477; R.S.C. 1886, ch. 167, sec. 33.

*Informer's share of fine*—See sec. 1041.

*Offences relating to copper coins*—See secs. 2 (8), 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

#### Second offence.—Penalty.

**568.** Every one who, after a previous conviction for any offence relating to the coin under this or any other Act, is convicted of any offence specified in this Part is liable,—

- (a) to imprisonment for life, if fourteen years is the longest term of imprisonment to which he would have been liable had he not been so previously convicted;
- (b) to fourteen years' imprisonment, if seven years is the longest term of imprisonment to which he would have been liable had he not been so previously convicted;
- (c) to seven years' imprisonment, if he would not have been liable to seven years' imprisonment had he not been so previously convicted.

*Origin*—Code of 1892, sec. 478; R.S.C. 1886, ch. 167, sec. 18.

*Coinage offence after previous conviction*—See secs. 851, 963, 982, 1081. The common law requires that a second offence to be punishable as such should have taken place after the prior conviction and not merely after the offence for which the prior conviction was made. *Ex parte McCoy*, 36 N.B.R. 186, 7 Can. Cr. Cas. 487; *R. v. South Shields Justices* [1911] 2 K.B. 1.

There may be a prior conviction for the purpose of a second offence prosecution although sentence was suspended on the first. *R. v. Blaby* [1894] 2 Q.B. 170.

*Advertising Counterfeit Money.*

**Advertising counterfeit money.**—Using any fictitious name or address.—Taking from the mails any letter to a fictitious address.—Purchasing counterfeit money.

**569.** Every one is guilty of an indictable offence and liable to five years' imprisonment who,—

- (a) prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, handbill or any written or printed matter, advertising, or offering or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute, any counterfeit token of value, or what purports to be a counterfeit token of value, or giving or purporting to give, either directly or indirectly, information where, how, of whom or by what means any counterfeit token of value, or what purports to be a counterfeit token of value, may be procured or had; or,
- (b) in executing, operating, promoting or carrying on any scheme or device to defraud, by the use or by means of any papers, writings, letters, circulars or written or printed matters concerning the offering for sale, loan, gift, distribution or exchange of counterfeit tokens of value, uses any fictitious, false or assumed name or address, or any name or address other than his own right, proper and lawful name; or,
- (c) in the execution, operating, promoting or carrying on, of any scheme or device offering for sale, loan, gift, or distribution, or purporting to offer for sale, loan, gift or distribution or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, knowingly receives or takes from the mails, or from the post office, any letter or package addressed to any fictitious, false or assumed name or address, or name other than his own right, proper or lawful name; or,



(d) purchases, exchanges, accepts, takes possession of or in any way uses, or offers to purchase, exchange, accept, take possession of or in any way use, or negotiates or offers to negotiate with a view to purchasing or obtaining or using any such counterfeit token of value, or what purports so to be.

*Origin*—Code of 1892, sec. 480; 51 Vict., Can., ch. 40, secs. 2 and 3.

*Counterfeit bank note*—See secs. 550, 551.

*Counterfeit token of value*—See definition in secs. 546 (f), 549.

*Paper money genuine but valueless*—In the case of coin or paper money which, although genuine, has no value as money, it is necessary in order to constitute an offence under this Part that there should be knowledge on the part of the person charged that such coin or paper money was of no value as money, and a fraudulent intent on his part in his dealings with or with respect to the same. Code sec. 549.

Before the Code it had been held that a person indicted for offering to purchase counterfeit tokens of value could not be convicted on evidence showing that the notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he believed them to be counterfeit, and offered to purchase them under such belief. *R. v. Attwood* (1891), 20 Ont. R. 574. The present definition includes such paper where there is knowledge by the accused that it was of no value and a fraudulent intent in dealing with it.

*Sub-sec. (a)- What purports to be a counterfeit token of value*—Section 569 of the Code covers not only the case of counterfeit money, i.e., false tokens purporting to be bank notes, etc., but false tokens purporting to be counterfeit tokens. The words "what purports to be" in this section import what appears on the face of the instrument; and therefore what was said to the prisoner, or what he thought or believed, would not be of any moment. *R. v. Attwood* (1891), 20 Ont. R. 574, 578. But see sec. 549 as to genuine but valueless paper money.

A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit, token of value, although there is no original of its description. *R. v. Corey* (1895), 1 Can. Cr. Cas. 161, 33 N.B.R. 81.

*Fraudulent scheme as to counterfeit money*—On the trial of any person charged with any of the offences mentioned in sec. 569, any letter, circular, writing or paper, offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom, or by what means, any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *prima facie* evidence of the fraudulent character of such scheme or device. Sec. 981.

*Unlawful possession of forged bank note*—Code secs. 550, 629-631, 632; *R. v. Tutty*, 38 N.S.R. 136, 9 Can. Cr. Cas. 544.

## PART. X.

### ATTEMPTS—CONSPIRACIES—ACCESSORIES.

#### **Attempt to commit certain indictable offences.**

**570.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

*Origin*—Sec. 528, Code of 1892.

*Attempt*—By sec. 72, every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended, whether under the circumstances it was possible to commit such offence or not. It is a question of law whether an act done with intent to commit an offence is too remote to constitute an attempt. Sec. 72 (2); *R. v. Laitwood* (1910), 4 Cr. App. R. 248.

*"Not hereinbefore provided for"*—Offences as to which special provision has been made for the punishment of attempts are included in the following sections of the Code; sec. 188, attempt to break prison, two years; sec. 203, attempt to commit buggery, ten years; sec. 216 (amendment of 1909), procuring, five years; sec. 264, attempt to commit murder, life imprisonment; sec. 270, attempt to commit suicide, two years; sec. 280 (b), attempt to cause bodily injuries by explosives thrown against vessel, fourteen years; sec. 300, attempt to commit rape, seven years; sec. 302, attempt to defile child, two years and whipping; secs. 303, 304 and 305, attempt to procure miscarriage, life imprisonment (303); seven years (304), two years (305); sec. 478, attempt to obtain money or property by forged document, fourteen years; sec. 512, attempt to commit arson, fourteen years; sec. 514, attempt to set fire, seven years; sec. 521, attempt to damage telegraph, etc., fifty dollars fine on summary conviction or three months; sec. 523, attempt to wreck, fourteen years; sec. 536, attempt to injure cattle, two years.

*Verdict for attempt when proved on charge of principal offence*—Code sec. 949.

**Attempt to commit other indictable offences.**

**571.** Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced.

*Origin*—Sec. 529, Code of 1892.

*Attempt proved where full offence charged*—Code sec. 949.

*Full offence proved where attempt charged*—Code sec. 950.

*Attempts by fraudulent means*—An indictment charging any attempted offence by fraudulent means need not set out in detail in what the fraudulent means consisted; sec. 863; but there should be sufficient particularity to give the accused notice of the offence with which he is charged; secs. 852 and 853; and particulars may be ordered under sec. 859.

A conviction for attempting to obtain money by false pretenses is good, although the person to whom the false pretense is made knows it to be false. *R. v. Light* (1915) 24 Cox C.C. 718, following *R. v. Hensler*, 11 Cox C.C. 570, 22 L.T.R. 691; and see *R. v. Lyons* (No. 1) 16 Can. Cr. Cas. 152 (Que.); *R. v. Lyons* (No. 2) 16 Can. Cr. Cas. 352 (Que.).

*Distinguishing attempt from intent or threat*—On an indictment charging an attempt to commit a crime it may be a misdirection not to distinguish an attempt in law from an intention or a threat; *R. v. Landow*, (1913) 8 Cr. App. R. 218; so where there was evidence on which the jury might have found an attempt but not evidence on which it was necessary that they should take that view, it is particularly necessary that the judge should explain the difference between an attempt, a mere intention and an idle threat. *Ibid.*

An attempt implies an intent. Code sec. 72; but intending to commit a crime is not the same as attempting to commit it. *R. v. McCarthy*, (1917) 41 O.L.R. 153, 13 O.W.N. 210, 29 Can. Cr. Cas. 448; *R. v. Eagleton*, (1885) Dears. C.C. 515; *R. v. McPherson*, (1857) Dears. & B. 197. It is open to the jury to believe any part of any evidence and disbelieve any other part, and they may therefore, on a charge in respect of the principal offence credit the testimony only in so far as it shows the lesser offence of an attempt; *R. v. McCarthy*, *supra*; *R. v. Hamilton*, (1897) 4 Can. Cr. Cas. 251 (Ont.); but there may be particular circumstances under which there must have been either the complete offence or no offence at all. *R. v. Menary* (1911) 23 O.L.R. 323, 18 Can. Cr. Cas. 237.

Pretending to the police that one's store has been burglarized will not establish an attempt to procure money by false pretenses from the burglary insurance company carrying the risk where no notice of loss or claim on the policy had been given or served on the company, although the complaint to the police may have been the initial step in a fraudulent scheme to defraud the company. *R. v. Robinson* [1915] 2 K.B. 342. If, however, there were more than one person concerned in the fraudulent scheme, the false complaint might constitute an overt act in a conspiracy to defraud. See Code sec. 444.

*Plea of autrefois*—Code secs. 905-909; *R. v. Elvington*, 31 L.J.M.C. 14, 9 Cox C.C. 86; *R. v. Weiss and Williams* (No 1), (1913) 4 W.W.R. 1358, 25 W.L.R. 286, 21 Can. Cr. Cas. 438; *R. v. Weiss and Williams* (No. 2), (1913) 5 W.W.R. 48, 6 Alta. L.R. 264, 22 Can. Cr. Cas. 42, 25 W.L.R. 351; *R. v. Young Kee*, [1917] 2 W.W.R. 654, 28 Can. Cr. Cas. 236, (Alta.).

*When prosecution for attempt is barred by quashing of conviction for completed offence*—Where all the proceedings in the trial court were brought into the Supreme Court by *certiorari* and the judge of that court assumed charge and jurisdiction over the whole matter and quashed the conviction on the merits of the evidence, this must be treated as equivalent to an acquittal. *R. v. Weiss and Williams* (No. 2), (1913) 5 W.W.R. 48, 6 Alta. L.R. 264, 22 Can. Cr. Cas. 42, 25 W.L.R. 351.

On the principle of *Rex v. Drury*, 18 L.J.M.C. 189, 3 Car. & K. 190, where the conviction has been quashed by *certiorari*, for some mere technical defect, the accused is still liable to be brought before the magistrate again, but he is not so liable where the conviction has been quashed for lack of evidence to support it. *R. v. Weiss and Williams*, *supra*, per Stuart; but see *contra*, *R. v. Weiss and Williams* (No. 1), (1913) 4 W.W.R. 1358, per Beck, J.

A distinction is to be drawn between a case where the conviction has been quashed on the merits and where it has been quashed on a pure technicality. *R. v. Young Kee* (No. 2), [1917] 2 W.W.R. 654, 28 Can. Cr. Cas. 236 (Alta.). Where the objection to the first conviction was that the defendant was not properly before the magistrate and consequently the magistrate was entirely without jurisdiction to try him, the quashing of the conviction on that ground is not a bar. It would be otherwise if the magistrate being clothed with jurisdiction to try a case proceeds to do so in an illegal or improper manner or finds the accused guilty on no legal evidence. *R. v. Young Kee*, *supra*. The conviction after consideration of the evidence ought to be looked upon as a bar to any further prosecution, but where a conviction has been set aside on the sole ground of want of jurisdiction on the part of the justice who tried the case, it should be looked upon as a mere nullity, as though some one not a magistrate at all had assumed the right to try it. *R. v. Young Kee*, *supra*; *Hawkins Pleas of the Crown*, vol. 2, p. 521, sec. 8; *Paley on Convictions*, 8th ed., p. 167.

"*No express provision*" etc.]—See note to sec. 570. The special inclusion of attempts in some of the sub-sections and not in others in an enactment dealing with various cognate offences will not prevent the operation of Code sec. 571, dealing generally with attempts to commit indictable offences, for the offence of attempting the commission of any of the crimes as to which there is no enactment specially dealing with attempts; the doctrine of "*expressio unius*," etc., does not apply to exclude the attempt of the principal offence as against the express language of sec. 571. *R. v. Wing*, 29 O.L.R. 553, 22 Can. Cr. Cas. 426, (see Code sec. 216, as to the offence of procuring).

*Attempted coinage offences*]—See Code sec. 548, as to the completeness of the offence although the intended counterfeiting was not perfected.

*North-West Territories*]—For special provisions as to trial, see N.W.T. Act, R.S.C., ch. 62, secs. 37-55.

*Yukon Territory*]—An attempt to steal may be tried summarily without a jury where the value of the property obtained or received does not in the opinion of the judge exceed \$200. The Yukon Act, R.S.C., ch. 63, sec. 65.

#### **Attempt to commit statutory offences.**

**572.** Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or incites or attempts to incite any person to commit any such offence, and for the punishment of which no express provision is made by such statute.

*Origin*]—Sec. 530, Code of 1892.

*Attempts generally*]—Code sec. 70.

"*No express provision made*" ]—When a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued and no other. *R. v. Robinson*, 2 Burr. 799; *R. v. Sinclair*, 12 Can. Cr. Cas. 20, at 31 (Terr.).

#### **Conspiring to commit indictable offence.**

**573.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

*Origin*—Code of 1892, sec. 527.

*"In any case not hereinbefore provided for"*—Specific enactments are contained in the Code as to certain conspiracies to commit indictable offences; treason, secs. 74 and 75; false accusations, sec. 178; defilement, sec. 218; murder, sec. 286; fraud, sec. 444. See also as to conspiracy in restraint of trade, secs. 496-504, 581, 590, 1012.

*Order for particulars*—See secs. 859, 860, 853, 855, 864.

*Charging conspiracy where offence completed*—A conspiracy to commit an indictable offence is quite distinct from the offence alleged to have been the subject of the conspiracy, and a former acquittal for the offence itself is not a bar to a subsequent prosecution for a conspiracy to commit it, although founded upon the same evidence. *R. v. Weiss* (No. 2), 5 W.W.R. 48 and 460, 6 Alta. L.R. 264, 22 Can. Cr. Cas. 42.

Where a crime has been committed, whether in pursuance of the conspiracy, or in carrying out some purpose of the conspiracy, the guilty person may, according to strict law, be indicted for the crime so committed, and also for the conspiracy; *Reg. v. Button*, 11 Q.B. 929, at pp. 946-947, 18 L.J.M.C. 19; *R. v. Jessop*, 16 Cox C.C. 204; *R. v. Desmond*, 11 Cox C.C. 146.

If a prosecution for the offence committed in pursuance of a conspiracy should occur after a conviction for conspiracy, it would be the duty of the court to apportion the sentence with reference to the former conviction. *R. v. Button*, 11 Q.B. 929; *R. v. Kelly* [1917] 1 W.W.R. 46, 27 Can. Cr. Cas. 140, 186, 27 Man. R. 105. But to prosecute a man for conspiring to commit an offence, when the charge should be for committing the actual offence itself, is strongly condemned by such eminent judges as Lord Cranworth, in *In re Rowlands*, 5 Cox C.C. 497; Lord Chief Justice Cockburn, in *Regina v. Boulton*, 12 Cox C.C. 87; and by Meredith, J.A., in *Rex v. Goodfellow*, 10 Can. Cr. Cas. 424, 11 O.L.R. 359, 365. *R. v. Sinclair*, 12 Can. Cr. Cas. 20, at 32, (Terr.).

Cockburn, C.J., in *Regina v. Boulton*, said: "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of the crime, it is not the proper course to charge the parties with conspiring to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses. I do not say this merely on my own authority; I have the authority of the late Lord Cranworth—one of the ablest of our judges—for the view I have expressed. In a case before him, in which the parties had been indicted, not for the offence they had committed, but for conspiracy to commit it, that eminent judge said that such a course was no doubt legal, but that it would

have been more satisfactory if they had been indicted for that which they had done, and not for conspiring to do it." *R. v. Boulton*, 12 Cox C.C. 87, quoted in *R. v. Sinclair*, 12 Can. Cr. Cas. 20.

*Proof of conspiracy*—The intent of the offence of arson is similar to the intent of the offence of a conspiracy to commit arson, so that evidence of an attempt to commit the former offence at a prior date not too remote may be shown as a similar act to that charged in proof of the design with which the later was committed. *R. v. Wilson* (1911) 1 W.W.R. 272, 21 Can. Cr. Cas. 105, 19 W.L.R. 657.

The acts, conduct and statements of a co-conspirator are properly admissible in evidence upon a charge if they relate to the common design; they are in such case a part of the *res gestæ* in the execution of the purpose of the conspiracy; *R. v. Connolly*, 1 Can. Cr. Cas. 468, 25 Ont. R. 151; *R. v. Wilson* (1911) 1 W.W.R. 272, 21 Can. Cr. Cas. 105, 19 W.L.R. 657. But it is only after the conspiracy has been proved that the acts of the one become evidence against the other. *R. v. McCutcheon*, 25 Can. Cr. Cas. 310 (Ont.).

A statement by one conspirator, not in execution of the common purpose, but in narration of some event forming part of the conspiracy, falls within the rule of hearsay, and is not admissible as evidence against another conspirator, unless made in his presence. See *R. v. Blake*, 6 Q.B. 126; *Stephen Dig.*, p. 6 and 7; *Wills on Evidence*, pp. 116 *et seq.* In consequence of this distinction, the admissibility of writings often depends on the time when they are proved to be in the possession of fellow conspirators, whether it was before or after the apprehension of the accused.

If the acts proved are not such as to show from their very nature that they are parts of a common scheme, the jury must separately consider the case of each defendant and determine from his conduct whether there is evidence of the conspiracy. *R. v. McCutcheon*, 25 Can. Cr. Cas. 310 (Ont.).

Where the conspiracy was formed in Canada and in pursuance of same certain acts were done in the U.S.A., evidence of these is admissible on the prosecution in Canada. *R. v. Bachrack*, (1913) 28 O.L.R. 32, 21 Can. Cr. Cas. 257.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in *intention only*, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself and is the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. *Mulcahy v. R.*, L.R. 3 H.L. 306, 317.

The conspiracy itself is the offence, and whether anything has been done in pursuance of it or not is immaterial. *R. v. Gill* (1818), 2 B. & Ald. 204; *R. v. Seward* (1834), 1 A. & E. 706; *R. v. Richardson* (1834),

1 M. & Rob. 402; R. v. Kenrick, (1843) 5 Q.B. 49; Allen v. Flood [1898] A.C. 1.

It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct either together or severally, that they were acting in concert. R. v. Fellowes (1859), 19 U.C.Q.B. 48, 58.

It must be left to the jury to estimate the weight of the evidence of an accomplice according to their opinion of the motives, character and credibility of the witness, and of the probable nature of his statement. And if it has had the effect of convincing them without doubt of the guilt of the accused they are at liberty to act upon their conviction. Per Robinson, C.J. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48.

If A. and B. conspire together, each is guilty of an offence, and each may be indicted separately, tried alone and convicted, although both be living and within the country and county at the time of the indictment, trial and conviction. R. v. Frawley, (1894) 25 Ont. R. 431, 1 Can. Cr. Cas. 253.

In a charge of conspiracy when the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. R. v. Connolly, (1894) 25 Ont. R. 151, 1 Can. Cr. Cas. 468.

And evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged, as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator. Ibid.

The charge of Coleridge, J., in R. v. Murphy (1837), 8 C. & P., at p. 310, conveniently summarizes the usual method of proving a charge of conspiracy: "Although the common design is the root of the charge, it is not necessary to prove that the parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means—the design being unlawful?'" R. v. Connolly, (1894) 25 Ont. R. 151, 1 Can. Cr. Cas. 468; R. v. Fellowes, 19 U.C.Q.B. 48.

*Conspiracy with persons unknown*—See note to sec. 444.



*Venue*—Where a conspiracy is shown to have been carried on in two counties there is jurisdiction to commit for trial and to hold the trial itself in either of the counties or in another county within the same province if the accused persons are apprehended in such other county. Where persons are brought by process from one county to another upon a conspiracy charge and committed for trial therein but the Crown fails to prove against them any overt act committed within the county in which the proceedings are taken, although charged as committed in both counties, the court of that county has no jurisdiction to convict for a conspiracy committed wholly within the county from which the accused were brought. The defendants brought by process into the county of trial are to be considered as in custody solely in respect of the charge laid, and jurisdiction is not conferred on the courts of the county to which they are taken to try them because of their presence in custody on any other charge preferred by the Crown as to which such court would otherwise have no jurisdiction. *R. v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113.

*Speedy trial jurisdiction*—An election of speedy trial without a jury in the County Court Judge's Criminal Court does not confer jurisdiction in a case in which there would be no jurisdiction over the accused if the trial were upon indictment before a jury. *Semble*, had the charge in the preliminary enquiry not included both counties as the locality of the conspiracy and had no evidence been proven before the committing magistrate of overt acts in his county by some of the persons charged, the committal for trial and the indictment or charge which followed, might have been quashed: but if the evidence of an overt act within the county upon which the committal order was founded is discredited at the subsequent trial, the fact of the committal having been made does not aid the jurisdiction as regards a person brought from another county or district to answer the charge. *The King v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113.

An allegation of the place of the offence is a material one and necessary to be proved to confer jurisdiction upon a county tribunal where the accused were not found or apprehended in the same county in which the trial is to take place. *R. v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427.

*Conspiracy to defraud*—See sec. 444.

*Conspiracy to affect market prices*—See sec. 444.

*Trade combinations or conspiracies*—See Code secs. 496-504, 581, 590, 1012; the Industrial Disputes Investigation Act, 6-7 Edw. VII, Can., ch. 20, 8-9 Edw. VII, Can., ch. 22, 9-10 Edw. VII, Can., ch. 29; the Trade Unions Act, R.S.C. 1906, ch. 125.

*Evidence generally in conspiracy cases*—See note to sec. 444.

**Accessories after the fact in certain cases.**

**574.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

*Origin*—Sec. 531, Code of 1892.

*Accessories after the fact*—Code secs. 71 (defined); 76 (to treason), 267 (to murder), 849 (indictment of accessories after the fact).

Acts intended to destroy or conceal things which may be produced in evidence against a prisoner on his trial, make the doer an accessory after the fact, of whom the correct technical description in an indictment is expressed by the words "receive, harbour and maintain." *R. v. Levy*, 7 Cr. App. R. 61, and see *R. v. Butterfield* (1843) 1 Cox C.C. 39.

*Accessories before the fact*—See sec. 69 as to aiding and abetting or counselling and procuring an offence. Persons who do so are declared guilty parties to the offence itself and may be so charged.

**Accessories after the fact in other cases.**

**575.** Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, if no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced.

*Origin*—Sec. 532, Code of 1892.

*Accessories after the fact generally*—Code sec. 71.



## PART XI.

### JURISDICTION.

#### *Rules of Court.*

**Court's power to make rules.—Regulating sittings.—Regulating practice.—Generally for regulating.—Rules to be laid before Parliament.—Authority in Ontario for making.**

**576.** Every superior court of criminal jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular,—

- (a) for regulating the sittings of the court or of any division thereof, or of any judge of the court sitting in chambers, except in so far as the same are already regulated by law;
- (b) for regulating in criminal matters the pleading, practice and procedure in the court, including the subjects of *mandamus*, *certiorari*, *habeas corpus*, prohibition, *quo warranto*, bail and costs, and the proceedings on application to a justice to state and sign a case for the opinion of the courts as to a conviction, order, determination or other proceeding before him; and,
- (c) generally for regulating the duties of the officers of the court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

2. Copies of all rules made under the authority of this section shall be laid before both Houses of Parliament at the session next after the making thereof, and shall also be published in the *Canada Gazette*.

3. In the Province of Ontario the authority for the making of rules of court applicable to superior courts of criminal jurisdiction in the province is vested in the supreme court of judicature, and such rules may be made by the said court at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose.

*Origin*—Sec. 533, Code of 1892.

*Criminal Practice Court Rules generally*—In addition to the general authority conferred by sec. 576, there is a further authorization by sec. 1126 by which the court having authority to quash a conviction or order made by a justice may prescribe by general order for the giving of security by the applicant.

In a Quebec case it was held that security for costs cannot be ordered against the petitioner for a writ of *certiorari* in a criminal case in the absence of a general rule of court passed under Code sec. 1126. *Tierney v. Choquet* (1908) 13 Can. Cr. Cas. 238.

There is also in Part XV, relating to summary convictions, a special reference to the regulation by rule or order made under sec. 576 of the practice on stated cases by justices for review by a superior court (sec. 705, sub-sec. (b)).

Code sec. 914, sub-sec. 2, provides that the statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as heretofore, subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively.

Any Crown rules altering the mode of entering records of arraignment and proceedings at trial as provided for in sec. 914 will also apply to such inferior courts of criminal jurisdiction as are designated in the Rules. Sec. 914 (3).

*Interpretation of Rules of Court*—Court Rules made by virtue of the power conferred by the Code are to be construed as though embodied in the Code itself. *R. v. Dean*, [1917] 2 W.W.R. 943 (Alta.).

*"Superior court of criminal jurisdiction"*—The courts included in this phrase are mentioned in the defining clause, Code sec. 2 (35).

*"All proceedings relating to any prosecution," etc.*—“In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in *parnam* are *strictissimi juris*; nor should it be forgotten that the formalities of law, though here and there they may lead to

the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as a matter of right of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make, or mould it to suit the exigencies of a particular occasion. The procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much a part of the law as the substantive law itself." Per Cockburn, C.J., in *Martin v. Mackonachie*, 3 Q.B.D. 775.

*Sub-sec. (b)*—"Pleading, practice and procedure in the court"]—

*Sub-sec. (b)*—*Mandamus*—A superior court will not interfere by mandamus when the inferior court has exercised a discretion in the matter within the jurisdiction of the inferior court: In *re Dyson* (1860), 29 L.J.Q.B. 68. This rule holds good even though the inferior court is wrong, not only as to facts, but also as to law. *Reg. v. Adamson*, L.R. 1 Q.B.D. 205, approved in *Reg. v. Evans* (1890), 62 L.T.N.S. 576.

The court does not by mandamus direct either justices or any public body or anybody else upon whom a duty is cast how and in what manner they are to perform their duty. They simply direct them to perform their duty. *R. v. Kingston Justices*, (1902) 86 L.T.N.S. 591; *B. v. Wong Tun* (1916) 10 W.W.R. 15, 26 Can. Cr. Cas. 8 (Alta.).

The court will not interfere with the discretion of the justices in adjourning a hearing. *R. v. Southampton Justices*, 96 L.T.N.S. 697. Conversely, where a county court judge erroneously declines to hear the case on the grounds of want of jurisdiction, an order of mandamus will lie to compel him to hear it. *R. v. The Judge of the Southampton County Court*, 62 L.T.N.S. 321.

A mandamus goes where persons having a jurisdiction to exercise decline to exercise it, upon some matter preliminary to the hearing of the merits of the appeal as regards facts or law. Mellor, J., in *R. v. Justices of Middlesex*, 2 Q.B.D. 519.

A court stenographer is a public official against whom a mandamus may issue for non-performance of his official duty to furnish an applicant with a copy of evidence taken at a criminal trial. Where upon an application for a mandamus it appears that the court stenographer has furnished a complete copy of his record of the evidence, the application must be dismissed although the transcript furnished be shown to be inaccurate by reason of the omission of rulings made by the trial judge or of counsel's admissions taken in lieu of evidence. *R. v. Campbell*, 10 Can. Cr. Cas. 326 (Y.T.).

Where an official with limited statutory powers rules that his jurisdiction does not extend to certain matters, the process of mandamus is frequently used to review such ruling, so where the jurisdiction in the particular matter was denied by a statutory commissioner, and he adjourned the enquiry *sine die* to enable the affirming parties to correct

the ruling by an application to the court, a rule for a mandamus was taken out and on the court deciding that the commissioner was wrong, the mandamus was granted directing the commissioner to "hear and determine the matter of the inquiry according to law." *R. v. Hudson* [1915] 1 K.B. 133; compare *re Lee Him*, 16 Can. Cr. Cas. 383. Where however the statutory authority is bound to inquire whether the material placed before it on the particular application makes out a *prima facie* case, the court ought not on mandamus to interfere with the conclusion arrived at by the statutory authority upon matters of fact unless some mistake in law is involved or, *semble*, a misunderstanding or misjudging the evidence on material points. *R. v. Islington* [1914] 3 K.B. 481, 83 L.J.K.B. 1455, 30 Times L.R. 478.

The court should exercise its discretion by refusing a writ of mandamus where there is an alternative remedy, which is equally convenient, beneficial and effective. *Charleson v. Byrne* (1915) 31 W.L.R. 319, 22 D.L.R. 240 (B.C.); *Sisters of Charity v. Vancouver*, 44 S.C.R. 29; *Rex v. Master of Crown Office*, 29 Times L.R. 427; *Frankel v. Winnipeg* (1912), 3 W.W.R. 405, 22 W.L.R. 597 (Man.).

It may in some cases be necessary to apply both for a mandamus to hear and determine and for a prohibition from acting upon the erroneous decision of the statutory authority. *Attorney-General v. Thompson* [1913] 3 K.B. 198, 29 Times L.R. 510.

✓ Mandamus lies to require an inferior court to enter continuances and to hear an appeal from a summary conviction which it had improperly refused to hear on the merits upon an erroneous ruling against the sufficiency of the notice of appeal. *Rex v. Trottier*, 22 Can. Cr. Cas. 102, 25 W.L.R. 663.

The principles upon which the courts interfere by mandamus with justices of the peace are not essentially different from those regulating the interference with courts of record. The writ will lie to set courts in motion, when they have refused to act, and to compel them to exercise their rightful jurisdiction. The same rule applies to justices of the peace, and they may be compelled by mandamus to hear and determine matters properly within their jurisdiction, and properly brought before them. High on Extraordinary Remedies, sec. 239; *R. v. Meehan* (No. 2), 5 Can. Cr. Cas. 312, 3 O.L.R. 567. The general rule denying relief by mandamus to correct the errors of inferior courts in matters properly within their jurisdiction applies with equal force to proceedings before a justice of the peace, and the writ will not go to correct the erroneous action of a justice in a matter which has been judicially determined by him. And when jurisdiction over the matter in question is vested in a board of magistrates, and they have acted in the premises and have reached a decision, their action will not be corrected by mandamus. High, sec. 243a; *Re Denison*, *R. v. Case*, 6 O.L.R. 104; *R. v. Connolly*, 22 Ont. R. 220; *R. v. Carden*, 5 Q.B.D. 1; *re McLeod*, 25 Can. Cr. Cas.

230, 27 O.L.R. 232; Long Point Co. v. Anderson, 18 A.R. 401 (Ont.); Ameliasburg v. Pitcher, 13 O.L.R. 417.

The writ may, however, be granted if the magistrates have not really exercised a discretion vested in them, but have acted upon a consideration of something extraneous or extra-judicial, which ought not to have affected their decision, and which was the same as declining jurisdiction. *Thompson v. Desnoyers*, 16 Que. S.C. 253, 3 Can. Cr. Cas. 68, at 70.

That a magistrate did not properly appreciate the evidence submitted upon an application for the issue of a warrant of arrest for an indictable offence is not ground for a mandamus to compel him to grant a warrant against his opinion formed in good faith. *Thompson v. Desnoyers*, 3 Can. Cr. Cas. 68, 16 Que. S.C. 253. Only under extraordinary circumstances will the court grant a mandamus to a justice holding a preliminary enquiry, to review the justice's ruling as to the admissibility of evidence. *R. v. Martin*, 18 Can. Cr. Cas. 107; *Re Broom*, 18 Can. Cr. Cas. 254; *Re Eyers & Plows*, 46 U.C.Q.B. 206.

It seems probable that justices would be compelled by mandamus to bring a preliminary enquiry being held by them to a conclusion either by a dismissal of the charge or a committal for trial where there was an equal division and the matter was not disposed of by them as it might have been by adjourning the enquiry to be heard *de novo* before other justices. *Durrand v. Forrester*, 15 Can. Cr. Cas. 125.

In Ontario it is held that an application for a mandamus against a magistrate may be treated as a civil and not a criminal proceeding, although the act which it is proposed the justice shall be ordered to do is the taking of an information for an offence against the criminal law, as part of the duties of his office under a provincial statute governing his appointment. *R. v. Meehan* (No. 1) (1902), 5 Can. Cr. Cas. 307, 3 O.L.R. 361.

A mandamus will not go which would in effect be a direction as to the manner or particular method in which a district court should conduct the hearing of an appeal from a summary conviction. *R. v. Wong Tun* (1916) 10 W.W.R. 15 (Alta.).

Where a rule for mandamus had been discharged with costs on the ground that the affidavits in support were imperfect, and a subsequent rule was obtained by the same parties on the same ground on amended affidavits, the court refused to hear the second application upon the merits, and discharged the second rule, also with costs. *Reg. v. Pickles*, 12 L.J.Q.B. 40. The same rule seems applicable to *certiorari* proceedings. In any case a fresh application should be made to the same judge who had dismissed it on the technical ground. Except in cases of habeas corpus, one judge is cautious about dealing with matters previously disposed of by another. *R. v. McKay*, 17 Can. Cr. Cas. 1 (N.S.).

*Certiorari generally*—See sec. 1124.

*Habeas corpus generally*—See sec. 1120.



*Prohibition*—Prohibition is a remedy that should be sparingly applied, and only in a plain case. *Re Cummings and Carleton*, 25 O.R. 607; 26 A.R. 1; *In re Brass v. Allan*, 26 U.C.Q.B. 123; *R. v. Hamlink*, 17 Can. Cr. Cas. 162 (Ont.).

The question to be decided on a prohibition motion is whether the inferior court had jurisdiction to enter upon the inquiry and not whether there has been any miscarriage in the course of the inquiry. *Long Point Co. v. Anderson*, 18 A.R. (Ont.) 401 at 405.

If the judge of the inferior court had given himself jurisdiction by coming to an erroneous conclusion upon a point of law upon which the limit of his jurisdiction depended, then, in point of fact, he would have had no jurisdiction, and a writ of prohibition in such a case would have been properly awarded. He cannot give himself jurisdiction by placing a wrong construction upon a statute or document or otherwise coming to a wrong conclusion of law upon admitted facts. *Ibid.*

No misinterpretation, actual or intended, of a statute is of the slightest relevancy in determining the question of prohibition unless such misinterpretation itself goes to the jurisdiction. *Re Royston Park & Steelton (Town of)*, 28 O.L.R. 629, at 633.

Where the only question the magistrate had to decide was whether the defendant properly before him had committed the offence charged, and there was no preliminary question for him to decide, prohibition will not be granted because of an alleged error in finding the fact of guilt. *R. v. Burns*, (1918) 29 Can. Cr. Cas. 293 (N.S.); *Hawes v. Hart*, 18 N.S.B. 42. If there is a total absence of jurisdiction because the matter is one with which the inferior court could not deal, prohibition will be ordered although the applicant had in fact consented to the proceedings. *Farquharson v. Morgan*, 63 L.J.Q.B. 474, [1894] 1 Q.B. 552. But where the inferior court has complete jurisdiction so far as the nature of the offence is concerned, it would seem that a mere defect as to the locality of the proceedings raises a question of procedure rather than one of jurisdiction and that it may effectually be waived. *Clarke Brothers v. Knowles* (1918) 87 L.J.K.B. 189, 192.

*Bail generally*—See sec. 700.

*Costs generally*—See sec. 1044.

*Alberta Crown Rules*, 1914]—

#### ALBERTA CROWN PRACTICE.

Practice and procedure of the Supreme Court in Relation to *Man- damus*, *Certiorari*, *Habeas Corpus*, *Prohibition*, and *Quo Warranto*, both in Criminal and Civil Matters and Costs in Such Matters.

#### QUASHING A CONVICTION, ORDER, ETC.

1. (824) In all cases in which it is desired to move to quash a conviction, order, warrant, or inquisition, the proceeding shall be by notice

of motion in the first instance instead of by *certiorari* or by rule or by order *nisi*. (O.1289).

2. (825) The notice of motion unless otherwise directed by a judge shall be served, at least seven days before the return day thereof, upon the magistrate, justice, or justices making the conviction or order or issuing the warrant, or the coroner making the inquisition, and also upon the prosecutor or informant, and upon the Attorney-General, and upon the officer to whom or upon the clerk of the office to which the proceedings are required by law to be transmitted, and it shall specify the objections intended to be raised. (O.1290).

3. (826) Upon the notice of motion shall be endorsed a notice in the following form addressed to the magistrate, justice or justices, coroner, or officer or clerk, as the case may be:

"You are hereby required forthwith after service hereof to return to the Clerk of the Supreme Court at ..... (as the case may be) the conviction (or ..... as the case may be) herein referred to, together with the information and evidence, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice.

Date .....

To A. B., Magistrate at ..... (or as the case may be).

(Signed) C. D. ....,

*Solicitor for the Applicant."*

4. (827) Upon receiving the notice so endorsed, the magistrate, justice, or justices, coroner, officer, or clerk, shall return forthwith to the office mentioned therein the conviction, order, warrant, or inquisition, together with the information and evidence, if any, and all things touching the matter and the notice served upon him with a certificate endorsed thereon in the following form:—

"Pursuant to the accompanying notice, I herewith return to this honourable court the following papers and documents, that is to say:—

- (1) The conviction (or as the case may be);
- (2) The information and the warrant issued thereon;
- (3) The evidence taken at the hearing;
- (4) (All other papers or documents touching the matters.)

"And I hereby certify to this honourable court that I have above truly set forth all the papers and documents in my custody and power relating to the matter set forth in the said notice of motion."

- (2) If the proceedings have been transmitted as required by law by the magistrate, justice, justices, or coroner, to the proper officer he shall in lieu of the certificate above set out certify to the fact of such transmission together with the date thereof.

- (3) If the proceedings have not been received by the officer to whom or the clerk of the office to which the same are by law required to be transmitted, such officer or clerk shall return a certificate of the fact in lieu of the certificate above set out.
- (4) A copy of this Rule shall appear upon or be annexed to the notice of motion served upon the magistrate, justice, or justices, coroner, clerk or officer from whom the return is required. (O. 1292).
5. (828) The certificate shall have the same effect as a return to a writ of *certiorari*. (O. 1293).
6. (829) The motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant, or requisition, and unless the applicant, if not the Attorney-General, is shown to have deposited with the clerk of the court to whom the certificate is required to be returned as security for costs of the application, the sum of \$25 or such other sum as a judge may direct.
- (2) The requirements of this rule as to security for costs shall also apply to motions for prohibition, mandamus or *quo warranto*.

## QUO WARRANTO.

7. (830) No application in the nature of *quo warranto*, except an *ex-officio* application shall be made without leave of a court or a judge, and unless at the time of application for such leave an affidavit be produced by which some person shall depose on oath that such application is made at his instance as relator; and such person shall be deemed to be the relator in case an order shall be made, and shall be named as such relator on such application. (N.S. 48).

8. (831) Every objection intended to be made to the title of a defendant on an application in the nature of a *quo warranto* shall be specified in the notice of motion, and no objection not so specified shall be raised by the relator without the special leave of the court or a judge. (N.S. 49).

9. (832) The court or judge may refuse the application in the nature of a *quo warranto*, with or without costs, and in its or his discretion may, upon such notice as may be just, direct the costs to be paid by the solicitor or other parties joining in the affidavits in support of the application, although not the relator. (N.S. 50).

10. (833) A new relator may by leave of the court or a judge be substituted for the one first named on special circumstances being shown. (N.S. 51).

11. (834) Where several applications in the nature of a *quo warranto* have been made against several persons for the usurpation of the same office and all upon the same or like grounds of objection, the court or a judge may order such applications to be consolidated, or may order all proceedings to be stayed upon all but one, until judgment be given in

that one; provided always that no order be made to consolidate or stay any proceedings against any defendant unless he give an undertaking to disclaim if judgment be given for the Crown upon the application which proceeds. (N.S. 52).

12. (835) If the defendant in an application in the nature of a *quo warranto* does not intend to defend, he may, to prevent judgment by default, file a disclaimer in the office of the clerk or deputy clerk of the court, as the case may be, and deliver a copy to the relator or his solicitor. Upon the disclaimer being filed judgment of ouster may be entered and the costs taxed as in judgment by default. (N.S. 53).

MANDAMUS.

13. (836) The notice in the case of an application for mandamus shall be served upon every person who shall appear to be interested or likely to be affected by the proceedings. The court or a judge may direct notice to be given to any other person or persons and adjourn the hearing for that purpose.

14. (837) Any person whether he has been so served or not who can make it appear to the court or a judge that he is affected by the proceedings for mandamus may show cause against the application and shall be liable to costs in the discretion of the court or judge if the order should be made or the prosecutor obtain judgment. (N.S. 56).

15. (838) No action or proceeding shall be commenced or prosecuted against any person in respect of anything done in obedience to a mandamus issued by the court or any judge thereof. (N.S. 65).

16. (839) No order for mandamus shall be granted unless at the time of application an affidavit be produced by which some person shall depose upon oath that such application is made at his instance as prosecutor and the name of such person shall appear as the person at whose instance it is made. (N.S. 69).

HABEAS CORPUS.

17. (840) No writ of habeas corpus shall be necessary, but an order may be made to the like effect, which order shall have the like consequences that the writ would have.

18. (841) On the argument of a motion for habeas corpus the court or a judge may in its or his discretion direct an order to be drawn up forthwith for the prisoner's discharge, which order shall be a sufficient warrant for any gaoler or constable, or other person for his discharge.

GENERAL.

19. (842) The notice of motion for prohibition, *certiorari*, *quo warranto*, mandamus or habeas corpus shall be returnable before a judge of the Supreme Court or the Appellate Division. (O. 1294).

20. (843) When the motion is made to a judge an appeal shall lie from his order to the Appellate Division of the Court by leave of the Judge or of the Appellate Division, but subject to such right of appeal his decision shall be final. (O. 1297).

20A. In the event of an appeal from an order of discharge, the judge from whose order the appeal is taken may, if he sees fit, stay the execution of the order pending the appeal, or may direct that before the discharge the prisoner enter into a proper recognizance to appear before the Appellate Division and submit to any order which may be made upon appeal. (*Canada Gazette*, January 15, 1916.)

20B. Any order or warrant required to give effect to any order of the Appellate Division may be made or directed by a single judge. (*Canada Gazette*, January 15, 1916.)

21. (844) In all proceedings under these Crown Practice Rules the costs shall be in the discretion of the court or judge who shall have full power to order either the applicant or the party against whom the application is made, or any other party to the proceedings, to pay such costs or any part thereof according to the result.

22. (845) When costs are allowed the fees for all services shall be in the discretion of the taxing officer, not exceeding \$25, provided that the judge may, in his discretion, allow an increased fee in a proper case.

23. (846) Proceedings for attachment for contempt, for disobedience to any writ, judgment or order issued or made under these rules shall lie and shall be the same as for disobedience to any writ, judgment or order in a civil action.

24. (847) When no other provision is made by these rules the procedure and practice shall, as far as may be, be regulated by the Crown Office Rules for the time being in force in England, and subject thereto and to these rules the practice shall be the same as in civil proceedings in the Supreme Court.

#### FORMS.

25. (848) The forms for the time being in use in England under the said Crown Office Rules, where applicable, and where not applicable, forms of the like character as near as may be, shall be used in all the proceedings, except where otherwise ordered by these rules.

#### RULES AS TO CONVEYANCE OF PRISONERS UNDER SENTENCE TO GAOL.

26. (849) Whenever a person is sentenced to imprisonment in a common gaol in the Province of Alberta, by any court in such province, the sheriff or deputy sheriff of any judicial district in such province, or any bailiff, constable or other officer, or other officer or other person by his direction, or by the direction of the court may, if no form of warrant is provided by the Criminal Code therefor, convey to the gaol named in

the sentence any convict sentenced to be imprisoned therein and shall deliver him to the keeper thereof, without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried, and certified by a judge or the clerk or acting clerk of such court.

27. (850) The foregoing shall also apply where, according to the sentence imposed upon the convict, he is made liable to the punishment of death or whipping, or any other punishment.

28. (851) The keeper of the common gaol mentioned in such certified copy of sentence is authorized, and hereby required, to receive the convict mentioned in such certified copy of sentence into his custody in the said gaol, and he and the sheriff of the judicial district in which such gaol is situated, and all other persons and authorities whose duty it is to do so, are hereby authorized and required to carry out and execute the sentence mentioned in such certified copy of sentence, according to its tenor and effect.

*Alberta Rules as to cases stated under sec. 761 of the Criminal Code*—

1. Application to J.P. to state and sign a case.—An application to a justice of the peace to state and sign a case under said sec. 761 shall be in writing and be delivered to such justice or left with some person for him at his place of abode within seven days after the making of the conviction, order, determination or other proceeding questioned. Such application shall state the grounds upon which the proceeding is questioned, and whether the appeal is to be to the Appellate Division or to a judge.

2. J.P. to state and sign a case.—Within fourteen days after such application has been so delivered or left for him the justice shall state and sign and deliver to the appellant, a case setting forth the facts of the case and the grounds on which the proceeding is questioned, stating:

- (a) The substance of the information or complaint.
- (b) The names of the prosecutor (or complainant) and defendant.
- (c) The date of the proceeding questioned.
- (d) A copy of the evidence (if any) in full as taken before the J.P.
- (e) The substance of the conviction, order, determination or other proceeding questioned.
- (f) The grounds on which the same is questioned.
- (g) The grounds upon which the justice supports the proceeding questioned if the justice sees fit to state any.
- (2) But the justice shall not deliver said case until after the appellant shall have entered into a recognizance and paid the fees as provided by sec. 762.

3. Appeal in case of refusal.—In the event of the justice declining or refusing to state a case, the appellant may apply to the court or judge for a rule as provided by sec. 764.

4. Filing of stated case.—Within twenty days after the delivery to the appellant of a case stated by a justice, the appellant shall file the same or cause it to be filed.

(a) With the Registrar of the Court, or

(b) If he desires the matter to be heard and determined by a Judge in Chambers with the Clerk of the Court at the place where the appeal is intended to be heard, provided that upon sufficient cause for the delay being shown the court or judge, as the case may be, may hear and determine the matter although the case was not delivered within said twenty days.

5. Appeal when heard by Appellate Division.—When the case stated has been delivered to the Registrar the same shall, unless the court or a judge otherwise orders, be heard at the next sittings of the Appellate Division, which shall be not sooner than fourteen days after the delivery of the case stated to the Registrar, and the appellant shall give to the respondent ten days' notice in writing of the time and place of hearing the appeal.

6. Appeal, when heard by Judge in Chambers.—When the case has been delivered to the Clerk of the Court, the appellant shall within five days after such delivery apply to the Judge in Chambers to fix a time and place for the hearing of the appeal, and the judge shall thereupon appoint a time and place for such hearing, and a copy of such appointment shall be served upon the respondent, or as the judge may direct, provided that if such application be not made within said period of five days, the judge may, upon sufficient cause for the delay being shown, fix such time and place notwithstanding that said period may have elapsed.

7. Recognizance.—The justice before or immediately after delivering a case stated to the appellant shall transmit the recognizance to the proper Clerk of the Court if the appeal is to a Judge, or to the Registrar if the appeal is to the Appellate Division.

8. Deviation from Rules not to invalidate proceedings.—Slight deviation from strict compliance with these Rules shall not invalidate any proceeding or thing if the court or judge sees fit to allow the same, either with or without requiring the same to be corrected.

*British Columbia Crown Rules*].—The Crown Office Rules, Criminal, 1906, are as follows:—

#### B. C. RULES.

CERTIORARI, HABEAS CORPUS, MANDAMUS, PROHIBITION AND QUO WARRANTO.

1. The practice and procedure in relation to the following matters, viz: certiorari, habeas corpus, mandamus, prohibition and quo warranto, shall be the same as that followed in civil proceedings so far as applicable, and where not applicable shall be analogous thereto.

## RULES OF COURT (B.C.)

[§ 576]

### BAIL.

2. Applications for bail where the party is in custody shall be, in the first instance, by summons before a Judge at Chambers for a writ of habeas corpus, or to show cause why the defendant should not be admitted to bail either before a Judge at Chambers or before a Justice of the Peace, in such an amount as the Judge may direct.

### INFORMATIONS.

3. With the exception of *ex-officio* information filed by the Attorney-General on behalf of the Crown, no criminal information or informations in the nature of a quo warranto, shall be exhibited or received in the Supreme Court without an express order of a Judge of the Supreme Court, nor shall any process be issued upon any information until the person procuring such information to be exhibited, shall have filed in the Registry of the Supreme Court a recognizance in the penalty of \$100, effectually to prosecute such information, and to abide by and observe such orders as the Court shall direct; such recognizance to be entered into before some Justice of the Peace or Registrar of the Supreme Court.

4. No application shall be made for a criminal information against a Justice of the Peace for misconduct in his magisterial capacity unless a notice containing a distinct statement of the grievances or acts of misconduct complained of be served personally on him or left at his residence with some member of his household six days before the time named in it for making the application.

5. The application for a criminal information shall be made to the court by a motion for an order nisi within a reasonable time after the offence complained of, and if the application be made against a Justice of the Peace for misconduct in his magisterial capacity, the applicant must depose an affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge.

### RECOGNIZANCES.

6. No recognizance shall henceforth be forfeited or estreated without the order of the court or a judge.

7. Every recognizance to appear and answer to any indictment found in the Supreme Court or in the County Court Judges' Criminal Court, or to any *ex-officio* or criminal information shall, unless the court or a judge shall by order dispense therewith, contain, besides any other condition which may be imposed, a condition that the defendant shall personally appear from day to day on the trial of such indictment or information and not depart until he shall be discharged by the court before whom such trial shall be had.



8. Whenever it has been made to appear to the court or a judge, that a party has made default in performing the conditions of the recognizance into which he has entered, the court or a judge, upon notice to the defendant and his sureties, if any, to be given in such manner as the court or judge may direct, may order such recognizance to be estreated without issuing any writ of *scire facias*.

9. In proceedings under sec. 589 of the Criminal Code [Sec. 1097, Code of 1906] for breach of recognizance on remand, the certificate of the Justice of the Peace of non-appearance of the accused, indorsed on the back of the recognizance, shall be transmitted by the Justice of the Peace to the Registrar of the Court where if committed the accused would be bound to appear, and he proceeded upon by order of the judge presiding at the assizes, if he thinks proper, in like manner as other recognizances.

10. In summary convictions under sec. 878 of the Criminal Code, [secs. 1097, 1098, Code of 1906] the certificate of default of appearance, as in the preceding rule, shall be transmitted by the Justice of the Peace to the Clerk of the County Court having jurisdiction at the place wherein such recognizance is taken, and he proceeded upon by order of the County Court Judge, if he thinks proper, in like manner as other recognizances.

#### APPEALS.

11. All appeals from the verdict, judgment, or ruling of any court or judge having jurisdiction in criminal cases, or from the conviction, order, or determination of a justice under Part LVIII of the Criminal Code [Part XV, Code of 1906] shall be by case stated, except where otherwise provided by statute.

12. If any justice of the peace declines for the space of one week after being requested, in writing, to state a case, the person aggrieved may apply to the court for an order requiring the case to be stated.

13. Every application by a party aggrieved to a justice to state a case shall be made within four days after the order, determination, or other proceeding has been made or rendered, or within such further time as may be allowed by the court or a judge.

14. The appellant at the time of making such application and before a case is stated by the justice, shall enter into recognizance before some justice of the peace, with or without sureties, in the sum of \$100, conditioned to prosecute his appeal without delay and to submit to judgment and pay such costs as shall be awarded by the court, and in default thereof the justices may proceed and make any such order as if no application for a special case had been made.

#### COSTS.

15. In all proceedings under these Rules the party entitled to costs shall tax the same according to the scale in force in the Supreme Court.

and if no provision is made for work done under these Rules, then the taxing officer shall allow such reasonable amount by analogy to the said scale, or as near thereto as circumstances will admit of.

GENERAL RULES.

16. These Rules may be cited as the "Criminal Rules, 1906," and shall be in force from and after the first day of May, 1906.

17. No Order or Rule annulled by any former Order shall be revived by any of these Rules, unless expressly so declared.

18. Where no other provision is made in these Rules, the present procedure and practice remain in force, and as to matters not provided for, the procedure shall be such as may be directed or confirmed by the court or a judge.

19. The interpretation clauses of the Supreme Court Rules shall apply to these Rules.

[B.C. rule 1041 makes the word "person" include a body corporate or politic unless repugnant to the context.]

20. The "Supreme Court Rules, 1896 (Crown side)" are hereby annulled.

*British Columbia Certiorari Forms*—The B.C. Criminal Rules, 1906, Rule 1, provide that *certiorari* practice and procedure shall be the same as that followed in civil proceedings, so far as applicable, and where not applicable shall be analogous thereto. The Crown Office Rules, 1906 (Civil) to which reference must be had are transcripts from the English Crown Office Rules of 1886 and retain the same numbering. Those as to *certiorari* are as follows:

28. Every application for a writ of *certiorari* shall, except in vacation, be made by motion for an order *nisi* to show cause, and in vacation to a Judge at Chambers for a summons to show cause. Provided that where, from special circumstances, the court or judge may be of opinion that the writ should issue forthwith, the order may be made absolute, or an order be made in the first instance, either *ex parte* or otherwise, as the court or judge may direct.

33. No writ of *certiorari* shall be granted, issued, or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justice or justices of the peace, unless such writ of *certiorari* be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing forth the same has given six days' notice thereof in writing to the justice or justices, or to two of them, if more than one, by and before whom such judgment, order, conviction, or other proceedings shall be so had or made, in order that such justice or justices, or the parties therein

concerned, may show cause, if he or they shall so think fit, against the granting, issuing or allowing such writ of *certiorari*.

35. No order for the issuing of a writ of *certiorari* to remove any order, conviction, or inquisition, or record, or writ of habeas corpus *ad subjiciendum* shall be granted where the validity of any warrant, commitment, order, conviction, inquisition or record shall be questioned, unless at the time of moving, a copy of any such warrant, commitment, order, conviction, inquisition or record, verified by affidavit, be produced and handed to the officer of the court before the motion be made or the absence thereof accounted for to the satisfaction of the court.

36. No writ of *certiorari* shall be allowed to remove any judgment, order or conviction given or made by justices, unless the party (other than the Attorney-General acting on behalf of the Crown) prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognizance with sufficient sureties before one or more justices, or before any judge of the Supreme Court, in the sum of \$100, with condition to prosecute the same at his own costs and charges with effect, without any wilful or affected delay, and to pay the party in whose favour or for whose benefit such judgment, order or conviction shall have been given or made, within one month after the said judgment, order or conviction shall be confirmed, his full costs and charges, to be taxed according to the course of the court where such judgment, order or conviction shall be confirmed, and in case the party prosecuting such *certiorari* shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall be lawful for the said justices to proceed and make such further order for the benefit of the party for whom such judgment shall be given, in such manner as if no *certiorari* had been granted.

37. When cause is shown against an order *nisi* for a *certiorari* to remove any judgment, order or conviction upon which no special case has been stated, given or made by justices of the peace for the purpose of quashing such judgment, order or conviction, the court, if it shall think fit, may make it a part of the order absolute for the *certiorari* that the judgment, order or conviction shall be quashed on return without further order, and in such case no such recognizance as is required by Rule 36 shall be necessary, and a memorandum to that effect shall be indorsed by the proper officer upon the issuing of the writ of *certiorari*.

38. No special case shall be filed, unless the party proceeding upon such special case shall enter into a recognizance as provided by Rule 36, and in default thereof the justices may proceed as in that rule provided.

[See Rule 36 and Form No. 18 therewith].

39. In all civil causes or matters, which shall have been removed by *certiorari* or in respect of which a special case shall have been stated, the recognizance shall be conditioned as regards costs, to pay such costs, if any, as the court shall order.

40. No objection on account of any omission or mistake in any judgment or order of any justice of the peace or court of summary jurisdiction, brought up upon a return to a writ of *certiorari*, shall be allowed, unless such omission or mistake shall have been specified in the order for issuing such *certiorari*.

FORMS.

308. The forms in the Appendix hereto when applicable, and where not applicable, forms of like character may be used in all proceedings under these Rules.

Form No. 13.

*Notice to Justices of Application for Certiorari to Remove Conviction, or Order of Justices Pursuant to Rule 33.*

To A. B. and C. D., Esquires, two of His Majesty's Justices of the Peace in and for the County (or City) of

Take notice that the Supreme Court of British Columbia at \_\_\_\_\_ will be moved on the \_\_\_\_\_ day of \_\_\_\_\_ or as soon after as counsel can be heard (or if in vacation, that application will be made to a Judge in Chambers at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ at the hour of \_\_\_\_\_, in the \_\_\_\_\_ noon), on behalf of E. F., for a writ of *certiorari* to remove into the said division a certain record of conviction (or order), under the hands and seals of you, the said A. B. and C. D., as such justices as aforesaid, made on or about the \_\_\_\_\_ day of \_\_\_\_\_, whereby the said E. F., was convicted of (here describe the offence, or describe concisely the order intended to be removed).

Dated, etc.

(Signed) E. F. (or by his solicitor, stating himself to be the solicitor for the above-named E. F.).

Form No. 14.

*Affidavit of Service of Notice of Application for Certiorari for Conviction, or Order of Justices.*

In the Supreme Court of British Columbia:

I, G. H., of \_\_\_\_\_, clerk to \_\_\_\_\_, solicitor for E. F., make oath and say:—

1. That I, \_\_\_\_\_, did, on the \_\_\_\_\_ day of \_\_\_\_\_, serve A. B., Esquire, one of His Majesty's Justices of the Peace, in and for the County of \_\_\_\_\_, with the notice hereunto annexed, marked A, by delivering a true copy of the said notice to the said A. B.,

at \_\_\_\_\_, in the said county (or where the service is not personal, as follows:

That I, \_\_\_\_\_, did, on the \_\_\_\_\_ day of \_\_\_\_\_, also serve C. D., Esquire, one other of His Majesty's Justices of the Peace. in and for the said county, with the said notice, by delivering a true copy of the said notice to and leaving the same with (the wife, clerk, or servant) of the said C. D., at the house or residence of the said C. D., situate at \_\_\_\_\_, in the said county.

Sworn, etc.,

G. H.

Filed on behalf of

Form No. 15.

*Summons for Certiorari for Conviction or Order of Justices.*

In the Supreme Court of British Columbia.

The Hon. Mr. Justice \_\_\_\_\_, Judge in Chambers.

Upon reading the several affidavits of E. F. and G. H., and the exhibit thereto annexed, filed the \_\_\_\_\_ day of \_\_\_\_\_, 190 , and upon hearing counsel (or the solicitor) for the said E. F.,

It is ordered that all parties concerned attend the Judge in Chambers at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 190 , at the hour of \_\_\_\_\_ in the \_\_\_\_\_ noon, upon the hearing of an application for a writ of *certiorari* to remove into this court a certain record of conviction (or order) under the hands and seals of A. B. and C. D., Esquires, two of His Majesty's Justices of the Peace in and for the county of \_\_\_\_\_, made on or about the \_\_\_\_\_ day of \_\_\_\_\_, whereby E. F. was convicted of (or ordered to, etc.) (Here describe shortly the offence or substance of the order.)

At the instance of \_\_\_\_\_.

Dated, etc.

Form No. 16.

*Judge's Order for Certiorari for Conviction or Order of Justices.*

In the Supreme Court of British Columbia.

The Hon. Mr. Justice \_\_\_\_\_, Judge in Chambers.

Upon reading the affidavit of L. M., filed the \_\_\_\_\_ day of \_\_\_\_\_, 190 , and upon hearing counsel (or the solicitors) on both sides.

It is ordered that a writ of *certiorari* issue to remove into this court a certain (as in the Summons No. 15).

[And see Rule 40 *infra* as to stating the grounds in the order.]

# RULES OF COURT (B.C.)

[§ 576]

## Form No. 17.

### *Certiorari to Remove Conviction, Order of Justices.*

George V, by the Grace of God, etc., to the keepers of Our peace and Our Justices assigned to hear and determine divers crimes, trespasses, and other offences committed within our county (or other jurisdiction, as the case may be) of , and to every of them, greeting:

We being willing for certain reasons that all and singular orders made by you or some of you (or if order of Justices, say by A. B. and C. D., Esquires, two of Our Justices assigned as aforesaid (or if conviction, say all and singular records of conviction, made, etc., whereby). (Here shortly describe the substance of the order or offence, etc., to be removed.) (as is said), be sent by you before Us, do command you, and every of you, that you or one of you do send forthwith under your seals, or the seals of one of you, before Us, in the Supreme Court of British Columbia, at the Court House, at , all and singular the said orders, with all things touching the same, as fully and perfectly as they have been made by you, or some of you, and now remain in your custody or power, together with this Our writ, that We may cause further to be done thereon what of right and according to law We shall see fit to be done.

Witness, etc.

To be indorsed.

By Order of Court (or of Mr. Justice ).

At the instance of the within-named defendant (or as the case may be)

This writ was issued by, etc.

## Form No. 21.

### *Return to writ of Certiorari.*

Indorse the writ thus:—

The execution of this writ appears by the schedules hereunto annexed. The answer of A. B., Esquire, one of the keepers of the peace and Justices within mentioned.

To be signed and sealed by one of the Justices. (L.S.).

## Form No. 18.

### *Recognizances to Prosecute Certiorari for Conviction, or Order of Justices.*

Be it remembered, that on the                      day of                      , 19 ,  
E. F., of                      , N. O., of                      , and P. Q., of                      ,  
come before me, R. S., Esquire, one of His Majesty's Justices of the  
Peace in and for the county of                      , and acknowledge to owe

to Our Sovereign Lord the King the sum of                      dollars of lawful money of Canada to be levied upon their goods and chattels, lands and tenements, to His Majesty's use, upon condition that if the said E. F. shall prosecute with effect, without any wilful or affected delay, at his own proper costs and charges, a writ of *certiorari* issued out of the Supreme Court of British Columbia, to remove into the said Court all and singular orders (or as the case may be) (insert description from *certiorari*) and shall pay to the prosecutors, within one month next after the said orders shall be confirmed in the said Court, all their full costs and charges, to be taxed according to the course of the said Court, then this recognizance to be void or else remain in full force.

Taken and acknowledged the day and year first aforesaid.

Before me,

(Signed, etc.).

NOTE—See Rules 38 and 39. This form is only applicable to convictions; if the case is stated in relation to a civil proceeding, the condition as to payment of costs should be as follows:—

"And shall pay to the prosecutors within one month next after the said orders shall be confirmed in the said Court, such costs, if any, as the said Court may order, to be taxed according to the course of the said Court, then this recognizance to be void, or else to remain in full force."

Taken, etc.

*British Columbia Habeas Corpus Forms*]—

No. 174.

*Summons for Writ of Habeas Corpus ad Subjiciendum.*

In the Supreme Court of British Columbia.

The Honourable Mr. Justice                      , Judge in Chambers.

Upon reading the several affidavits of, etc., filed the                      day of                      19                      , and upon hearing Mr.                      , or counsel (or solicitor) for                      .

It is ordered that all parties concerned attend the Judge in Chambers at                      , on the                      day of                      , 19                      , at the hour of                      in the                      noon, to show cause why a writ of habeas corpus should not issue, directed to                      to have the body of                      , before a Judge in Chambers, at the Supreme Court of British Columbia, at                      , forthwith, to undergo and receive all and singular such matters and things as Our said Court (or Judge) shall then and there consider of concerning him in this behalf; and have you there and then this Our writ.

Dated                      .

To be endorsed.

No. 175.

*Order for Writ of Habeas Corpus ad Subjiciendum.*

In the Supreme Court of British Columbia.

The Honourable Mr. Justice , Judge in Chambers.

(If in a cause on the Crown side, here insert the title, not otherwise.)

Upon reading the several affidavits of, etc., filed the day of , 19 , and upon hearing counsel (or the solicitors) on both sides (or as the case may be).

It is ordered that a writ of habeas corpus issue, directed to , to have the body of A. B. before a Judge in Chambers at the Supreme Court of British Columbia, forthwith to undergo and receive, etc.

Dated, etc.

No. 176.

*Writ of Habeas Corpus Subjiciendum.*

George V, by the grace of God, etc., to Greeting:

We command you that you have in the Supreme Court of British Columbia (or before a Judge in Chambers), at , immediately after the receipt of this Our writ, the body of A. B., being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as our said Court (or Judge) shall then and there consider of concerning him in this behalf; and have you there then this Our writ.

Witness, etc.

To be indorsed:

By order of Court (or of Mr. Justice).

This writ was issued by, etc.

No. 177.

In the Supreme Court of British Columbia.

(If in the cause already on the Crown side, here insert the title, not otherwise.)

Whereas this Court (or the Honourable Mr. Justice , ) has granted a writ of habeas corpus directed to (or other person having the custody of , if so) commanding him to have the body of before the said Court (or before a Judge in Chambers) at , immediately to undergo, etc.

Now, take notice, that you are hereby required to have the body of the said before the Court (or before the said Judge as aforesaid) on the day of , 19 , at the hour of in the noon. And to make a return to the said writ,



or in default thereof, the said Court will then, or so soon after as counsel can be heard, be moved for an attachment against you for your contempt in not obeying the said writ (or if in vacation, that application will then be made to one of the Judges of the said Court for a warrant for your apprehension, in order that you may be held to bail to answer for your contempt in not obeying the said writ).

Dated, etc.

(Signed) M. N., of L., Solicitor for

To (the persons to whom the writ is directed, and any other person upon whom it may be deemed necessary to serve the writ).

No. 178.

*Notice of having obtained Writ of Habeas Corpus ad Subjiciendum on an Informal or Illegal Commitment.*

(Heading as in No. 177.)

Recite the granting of the writ as in No. 177, then say:—

Now take notice, that by virtue of the said writ, the said A. B. will be brought before the said Court (or before a Judge in Chambers) at the , on the of , (at of the clock, etc.), in order that he, the said , may be discharged out of custody as to the commitment by which he is now detained in the custody of the said gaoler.

Dated, etc.

(Signed) M. N., Solicitor for the said

To A. B. and C. D., Esquires, the committing magistrates, and to , the Prosecutor.

No. 179.

*Affidavit of Service of Writ of Habeas Corpus ad Subjiciendum.*

In the Supreme Court of British Columbia.

(If in a case already on the Crown side, here insert the title, not otherwise.)

I, A. B., of, etc., make oath and say:—

1. That I did on the day of , 19 , personally serve C. D., with a writ of habeas corpus issued out of and under the seal of this Honourable Court, directed to the said C. D., commanding him to have the body of before (this Court) immediately to undergo, etc. (Describe the direction and mandatory part of the writ) by delivering such writ of habeas corpus to the said C. D. personally, at , in the County of .

Sworn, etc.

No. 181.

*Affidavit for Writ of Habeas Corpus ad Testificandum, or Order to Testify.*

In the Supreme Court of British Columbia.

I, A. B., of etc., make oath and say:—

1. That C. D., now a prisoner confined in His Majesty's prison at \_\_\_\_\_ in and for the \_\_\_\_\_, undergoing a term of imprisonment for (or under commitment to take his trial for) (here shortly state offence), is and will be a material and necessary witness on behalf of \_\_\_\_\_, on the trial of an indictment (or before the Grand Jury of the County of \_\_\_\_\_, upon an indictment to be preferred against E. F., for certain \_\_\_\_\_, which indictment stands for trial, or is to be preferred, on the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, at \_\_\_\_\_, in and for the County of \_\_\_\_\_, or, as the case may be) of \_\_\_\_\_

2. That the \_\_\_\_\_ cannot safely proceed to trial (or prefer the said indictment) without the testimony of the said C. D.

Sworn, etc.

No. 188.

*Writ of Habeas Corpus to bring up a Prisoner to Plead to an Indictment or for Trial.*

George V, etc., to the gaoler of Our prison at \_\_\_\_\_, in and for Our said \_\_\_\_\_, greeting:

We command you that you have before (description of Court) at \_\_\_\_\_, on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, at the hour of \_\_\_\_\_ in the \_\_\_\_\_ noon, the body of \_\_\_\_\_, being committed and detained in Our prison under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called, then and there to answer to (or to take his trial upon) an indictment against him for \_\_\_\_\_, and so from day to day until he shall have answered as aforesaid (or taken his trial as aforesaid). And to be further dealt with according to law, and have you then there this writ.

Witness, etc.

*British Columbia Supreme Court forms of articles of the peace*—

No. 197.

*Articles of the Peace.*

In the Supreme Court of British Columbia.

Articles of the peace, exhibited by \_\_\_\_\_, of \_\_\_\_\_, against \_\_\_\_\_, through fear of death or of receiving some bodily harm.

1. I, this exhibitant, make oath and say, that (state the circumstances of the case, and the reasons for apprehending danger to life or of receiving bodily injury, and set out threatening letters, if any).

2. I further say, that by reason of the premises aforesaid, I am in great bodily fear, and conceive myself to be in great danger of the loss of my life from the violence of the said \_\_\_\_\_. And fear that the said \_\_\_\_\_ will endeavour to put his threats into execution, or do me some grievous bodily harm and, therefore, I humbly crave that the said \_\_\_\_\_ may be restrained therefrom by this Honourable Court, and ordered to give security to keep the peace toward me, etc.

3. I further say, that I do not make this complaint against the said \_\_\_\_\_ through any hatred, malice, or ill-will which I have or bear towards him, but merely for the preservation of myself from bodily harm, violence and insult.

Sworn in open court, at \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_

(Signed) A. B.

[To be signed by the exhibitant. By the Court.]

No. 198.

*Recognizance for Good Behaviour and to Keep the Peace.*

Be it remembered, that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, (insert the names and descriptions of defendant and bail) come into the Supreme Court of British Columbia before the \_\_\_\_\_ (or before me \_\_\_\_\_, one of His Majesty's Justices of the \_\_\_\_\_, of \_\_\_\_\_), and acknowledged to owe Our Sovereign Lord the King the several sums following (that is to say), the said \_\_\_\_\_, sum of \_\_\_\_\_ dollars, and the said \_\_\_\_\_ and \_\_\_\_\_ the sum of \_\_\_\_\_ dollars, each of lawful money of Canada, to be levied upon the several goods and chattels, lands and tenements, to His Majesty's use upon condition that if the said \_\_\_\_\_ shall be of good behaviour for the space of \_\_\_\_\_ years, to be computed from and after the day of \_\_\_\_\_, 19\_\_\_\_, and keep the peace toward all His Majesty's liege subjects, and especialy towards A. B., and not depart that Court without leave, then this recognizance to be void or else to remain in full force.

(This recognizance is usually given at the time the defendant is sworn to answer the interrogatories, but if not then given, it may be acknowledged before a Judge at Chambers.)

*Nova Scotia*—See the Nova Scotia Crown Rules (1901).

ONTARIO RULES.

*Ontario Crown rules, 1908*—At a meeting of the Supreme Court of Judicature for Ontario, held on 2nd May, 1908, it was ordered that the following rules be adopted, viz:—

1279.—In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance, instead of by *certiorari*, or by rule or order *nisi*.

1280.—The notice shall be served at least six days before the return day thereof, upon the magistrate, justice or justices making the conviction, or order, or issuing the warrant, or the coroner making the inquisition, and also upon the prosecutor or informant (if any), and upon the clerk of the peace, if the proceedings have been returned to his office, and it shall specify the objections intended to be raised.

1281.—Upon the notice of motion shall be indorsed a copy of rule number 1282 together with a notice in the following form, addressed to the magistrate, justice or justices, coroner or clerk of the peace, as the case may be:—

"You are hereby required forthwith, after service hereof, to return to the central office at Osgoode Hall, Toronto, the conviction (or as the case may be) herein referred to, together with the information and evidence, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice."

Dated.

C. D., Solicitor for the applicant (or as the case may be.)

To A. B., Magistrate at,

1282.—Upon receiving the notice so indorsed, the magistrate, justice or justices, coroner or clerk of the peace, shall return forthwith to the central office at Osgoode Hall, Toronto, the conviction, order, warrant or inquisition, together with the information and evidence, if any, and all things touching the matter, and the notice served upon him, with a certificate indorsed thereupon in the following form:—

"Pursuant to the accompanying notice, I herewith return to this honourable court the following papers and documents, that is to say:

"(1) The conviction (or as the case may be);

"(2) The information and the warrant issued thereon;

"(3) The evidence taken at the hearing;

"(4) (Any other papers or documents touching the matter).

"And I hereby certify to this honourable court that I have above truly set forth all the papers and documents in my custody or power relating to the matter set forth in the said notice of motion."

A copy of this rule shall be annexed to the notice of motion served upon the magistrate, justice or justices, coroner, or clerk of the peace, from whom the return is required.

1283.—The certificate shall have the same effect as a return to a writ of *certiorari*.

1284.—The notice shall be returnable before a judge of the High Court of Justice for Ontario sitting in chambers.

1285.—The motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant or inquisition, nor unless the applicant is shown to have entered into a recognizance with one or more sufficient sureties in the sum of \$100 before a justice or justices of the county within which the conviction, order or inquisition was made, or the warrant issued, or before a judge of the county court of said county, or before a judge of the High court, and which recognizance with an affidavit of the due execution thereof shall be filed with the registrar of the court in which such motion is made or is pending, or unless the applicant is shown to have made the deposit of a like sum of \$100 with the registrar of the court in which such motion is made with or upon the condition that he will prosecute such application at his own costs and charges without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceedings is affirmed his full costs and charges to be taxed according to the course of the court, in case the conviction, order or other proceeding is affirmed.

1286.—The judge shall have all the powers of the court in the like matters and may order the production of papers and documents as he may deem necessary.

1287.—An appeal shall lie from the order of the judge to a Divisional Court if leave be granted by a judge of the High Court.

1288.—The rule passed by the High Court of Justice on November 17th, 1886, under the authority of 49 Vict., ch. 49, sec. 6 (D.), and all rules and parts of rules inconsistent with the next preceding nine rules are hereby repealed.

These rules shall come into force on the 1st day of September next [1908].

*Ontario Certiorari practice*—It has been held in Ontario that the Criminal Rules of 1908 remain operative as to the Supreme Court of Ontario so far as they can be applied to that court in a re-organized form as the successor of the Supreme Court of Judicature for Ontario. *R. v. Titchmarsh* (No. 2), (1914) 32 O.L.R. 569, 24 Can. Cr. Cas. 38. Notwithstanding doubts which have been raised (*R. v. Titchmarsh* (No. 1), (1914) 26 O.W.R. 314, 22 Can. Cr. Cas. 419), it seems now to be settled law that the provision of the rules for a motion to quash instead of the issue of a writ of *certiorari* is within the court's powers under Code sec. 576. *R. v. Titchmarsh* (No. 2), (1914) 32 O.L.R. 569, 24 Can. Cr. Cas. 38; *R. v. Jackson*, (1917) 40 O.L.R. 173, 182, 188.

And a conviction removed by the substituted procedure is still a removal "by *certiorari*" within Code sec. 1124. *R. v. Jackson*, (1917) 40 O.L.R. 173, 188. See Ontario Rules 1279-1288 passed May 2, 1908, superseding provisional rules similarly numbered passed on 27th March, 1908.

Provision is made for an appeal, by leave, against an order dismissing a motion to quash. Ont. Rule 1287. This would enable a judge of the High Court Division to give leave to appeal to the Appellate Division of the Supreme Court of Ontario. *R. v. Jackson*, (1917) 40 O.L.R. 173, 182. If the accused elects to proceed first with a motion to quash a summary conviction under which he is in close custody under the award of imprisonment, and the motion to quash fails, on a hearing of the merits, the doctrine of *res judicata* will apply to prevent a renewal of the same points of objection on a subsequent habeas corpus application. *R. v. Jackson*, (1917) 40 O.L.R. 173.

*Ontario Habeas Corpus practice*—Habeas corpus jurisdiction is founded both upon the common law and the statute of Charles II (31 Car. II, ch. 2). In order to come within the benefit of the statute of Charles, it is customary to have the writ marked in the margin "per 31 Car. II," and such marking is held not to be restrictive, and the writ may also be regarded as a common law writ and also as issued under the Habeas Corpus Act specially applicable to the province in extension of the Act of Charles. *R. v. Arscott* (1885) 9 Ont. R. 541. As regards criminal matters there is the Habeas Corpus Act of 1866, 29-30 Vict., Can., ch. 45, which is supplementary to the common law and the statute of Charles. This pre-confederation statute has been carried down through the Ontario statute revisions and is known as the Ontario Habeas Corpus Act (R.S.O. 1914, ch. 84, sec. 8). While extending the scope of habeas corpus procedure to certain civil matters in like manner as did the English Habeas Corpus Act of 1816, 56 Geo. III, ch. 100, it also provided for an appeal from the refusal to discharge, and this right of appeal is held to apply to habeas corpus in criminal matters. *R. v. Jackson*, (1917) 40 O.L.R. 173, 193. And while formerly it was permissible to go from court to court with successive applications, and possibly from one judge to another judge of the same court, (*Ex parte Partington*, 13 M. & W. 679, *ex parte Baker*, (1857) 7 E. & B. 697, *re Baker* (1857) 2 H. & N. 219; *Cox v. Hakes*, (1890) 15 A.C. 506), this right was abrogated in Ontario by the introduction of the right of appeal following a remand to custody. *Taylor v. Scott* (1899) 30 Ont. R. 475; *R. v. Jackson* (1917) 40 O.L.R. 173, 193; *Re Harper*, 23 Ont. R. 63; *Re Hall*, 8 A.R. 135 (Ont.); *R. v. Graves*, 21 O.L.R. 329; same case, *R. v. Graves* (No. 1) 16 Can. Cr. Cas. 150, *R. v. Graves* (No. 2), 16 Can. Cr. Cas. 318 (Ont.); *B. v. Miller* (No. 1), 19 O.L.R. 125; *B. v. Miller* (No. 2), 15 Can. Cr. Cas. 156.

The right to discharge on habeas corpus does not depend on the legality or illegality of the prisoner's caption, but on the legality or

illegality of his detention. *R. v. Whiteside* (1904), 8 O.L.R. 622, 8 Can. Cr. Cas. 478; *R. v. Gage*, (1916) 36 O.L.R. 183, 10 O.W.N. 13, 19, and 364, 26 Can. Cr. Cas. 385.

The Ontario Habeas Corpus Act makes it necessary where a *certiorari* in aid has been granted to consider the depositions and proceedings returned to the *certiorari*, for the purpose of ascertaining whether there is any evidence to sustain the conviction, even where the conviction is regular in form. *R. v. Farrell*, 15 O.L.R. 100, 12 Can. Cr. Cas. 524; *R. v. St. Clair*, 27 A.R. 308 (Ont.); *R. v. Mosier*, 4 P.R. 64 (Ont.); *R. v. Simmons*, 17 O.L.R. 239, 14 Can. Cr. Cas. 5; *R. v. Brisbois*, (1907) 15 O.L.R. 264, 13 Can. Cr. Cas. 96.

An order discharging the accused in a criminal matter on a writ of habeas corpus is not subject to appeal, apart from any provision for appeal specially authorized by statute. *Cox v. Hakes*, 15 A.C. 506.

If the first writ of habeas corpus lapsed because of the prisoner's escape, he may be granted another writ on his being recaptured. *Re Bartels*, 15 O.L.R. 205, 13 Can. Cr. Cas. 59.

Habeas corpus does not lie in respect of a commitment in execution from a court of record, and therefore is not available for the review of the validity of a conviction made by a county court judge's criminal court. *R. v. Harrison*, 15 O.L.R. 231, 13 Can. Cr. Cas. 108.

A writ of habeas corpus to bring up the prisoner for the hearing of a motion for his discharge is not issued as of course, but must be grounded on an affidavit giving some reasonable ground for the application and made by or on behalf of the prisoner. If made by another than the prisoner it should show that the prisoner is under coercion which prevents the affidavit being obtained from him. *Re Ross*, 3 P.R. 301 (Ont.). The application for the writ is ordinarily based on an affidavit of the prisoner himself sworn before a commissioner for taking affidavits, or a notary, attending at the gaol for that purpose. It sets forth that the prisoner is detained under a commitment, a copy of which should be procured and identified by being made an exhibit to the affidavit or attached thereto; that he is detained in custody for no other cause (or if there is more than one commitment the others should also be exhibited); that he believes such detention is unlawful. See *Re Ross*, 3 P.R. 301 (Ont.).

When the order for the writ to issue has been carried into the Crown office and the writ prepared, it is usual for the prisoner's solicitor to sign a consent on the writ itself dispensing with the production of the body of the prisoner. If this were not done, the gaoler would have to be prepaid his expenses in producing the prisoner as required by the writ; and the gaoler would not be bound to produce the prisoner without such pre-payment of expenses. The consent to dispense with the prisoner's attendance does not affect the gaoler's obligation to make return of the cause of detention. This is done by a formal return or answer.

The original writ, not a mere copy, is to be served on the gaoler or other custodian; *Re Carmichael*, 10 C.L.J. 325; and the original writ so served is to be returned into court with the return or answer of the gaoler which will exhibit the original warrant if the commitment was by a justice, and the answer or return will state that the prisoner is held in custody on such warrant of commitment (if more than one, all should be exhibited) and for no other cause. The return may show a valid cause of detention by a new commitment in proper form substituted for a defective one and so defeat the motion for discharge unless the new commitment although seemingly valid can be shown to be invalid and made without jurisdiction in the particular case. *R. v. Walton*, 12 O.L.R. 1.

Unless the applicant is satisfied to rest his motion on the grounds of invalidity which may appear not merely in the commitment as it stood when the writ was applied for, but in any substituted or other commitment which may be produced in making the return to the writ, he will move for a writ of *certiorari* in aid of the habeas corpus proceedings. This ancillary method of *certiorari* is carried out by means of a writ and is not affected by the new procedure of a motion to quash which the Rules substitute for a writ of *certiorari* when the process below is sought to be quashed and set aside. In Ontario, the bringing up of the proceedings below by a *certiorari* "in aid," merely assists in determining whether or no the custody is illegal and no order is made quashing the conviction itself on a habeas corpus motion. But concurrent proceedings might be taken to quash the conviction and to discharge the prisoner on habeas corpus. The double procedure is rarely followed, as the Crown authorities would direct the prisoner's release forthwith on his conviction being quashed.

#### SASKATCHEWAN RULES.

*Saskatchewan Crown Rules*—The Consolidated Crown Practice Rules of Saskatchewan, 1911, took effect from January 1, 1912, and are as follows:

##### *Custody of Papers.*

1. The registrar of the Supreme Court en banc shall have the care and custody of the records and proceedings in respect to proceedings arising by way of *certiorari*, *quo warranto*, injunction in the nature of a *quo warranto*, mandamus, prohibition, or habeas corpus. (C.P.R.)

##### *Certiorari.*

2. Subject to the provisions of this rule being dispensed with, as hereinafter provided, no motion to quash any conviction, order or other proceeding by, or before, a justice or justices of the peace, and brought before the Supreme Court of Saskatchewan, or any judge thereof, by *certiorari*, shall be entertained by such court or judge, unless the defendant is shown to have entered into recognizance in \$200, with one or



more sufficient sureties, before a justice of the peace and deposited the same with the registrar; or to have made a deposit with the said registrar of \$100, in either case, with a condition to prosecute such motion and writ of *certiorari*, at his own costs and charges, with effect and without delay, and if ordered to do so, to pay to the person in whose favour the conviction, order or other proceeding is affirmed his full costs and charges, to be taxed, where such conviction, order, or proceeding is affirmed. (C.P.R. 2.)

3. Every application for a writ of *certiorari*, at the instance of any other person than the Attorney-General on behalf of the Crown, shall be made to a judge by notice of motion or to the court *en banc* for an order *nisi*, to show cause why the writ should not issue. (C.P.R. Am. 1.)

4. Such notice or order *nisi* shall be made upon the justice or one of the justices who made the conviction or order, and upon such other person or persons as the court or a judge shall, upon such application, direct. (C.P.R. Am. 2.)

5. Where, from any cause, the court or a judge is on such application of opinion that the validity of the conviction, or order, can be dealt with on the return of the notice of motion or order *nisi*, the notice or order *nisi* shall also be to show cause why the conviction or order should not be quashed, but in this case the private prosecutor shall be one of the persons to be served, and the judge or court may, in such case, dispense with the giving of security required by rule 2. (C.P.R. Am. 3.)

6. No application for a *certiorari* shall be made after the expiration of six months from the date of the conviction or order. (C.P.R. 5.)

7. On an application for a *certiorari* to remove a judgment, conviction or order, the court or a judge may order such judgment, conviction or order to be quashed, without the actual issue of the writ of *certiorari*; and, if such person is in the custody under any warrant or other process issued on such judgment, conviction or order, the court or judge may, in granting such order for a writ of *certiorari* or to quash such judgment, conviction or order, at any time after said order is granted, order him to be discharged from custody absolutely, or on his giving such security as the court or judge shall direct that if the said judgment, conviction or order is confirmed, or the application for a writ of *certiorari* is dismissed, or the writ of *certiorari* is quashed, he will comply with the provisions of the judgment, conviction or order and pay the fine or penalty imposed, and in case of imprisonment without fine, that he will forthwith surrender himself into the same custody and undergo the remainder of his imprisonment, notwithstanding the term limited for his imprisonment shall have expired. If the recognizance shall be forfeited, a warrant for the apprehension of the defendant may be granted by a judge, which shall authorize his arrest and imprisonment for the unexpired term. (N.S. 37.)

*Quo Warranto.*

8. No information in the nature of a *quo warranto* except an ex-officio information shall be granted without leave of the court or a judge, and unless at the time of application for such leave an affidavit be produced by which some person shall depose on oath that such application is made at his instance as relator; and such person shall be deemed to be the relator in case an order shall be made, and shall be named as such relator in the information, unless the court shall otherwise order. (N.S. 48.)

9. Every objection intended to be made to the title of a defendant on an information in the nature of a *quo warranto*, shall be specified in the notice of motion, and no objection not so specified shall be raised by the relator on the pleadings without the special leave of the court or a judge. (N.S. 49.)

10. The court or a judge may refuse the application for an information in the nature of a *quo warranto*, with or without costs, and in its discretion may, upon such notice as may be just, direct the costs to be paid by the solicitor or other parties joining in the affidavits in support of the application, although he is not the proposed relator. (N.S. 50.)

11. A new relator may, by leave of the court or a judge, be substituted for the one who first entered into the recognizance on special circumstances being shown. (N.S. 51.)

12. Where several applications for informations, in the nature of a *quo warranto*, have been made against several persons for the usurpation of the same office, and all upon the same or like grounds of objection, the court or a judge may order such applications to be consolidated, and only one information to be filed in respect of all of them, or may order proceedings to be stayed upon all but one, until judgment be given in that one:

Provided always that no order be made to consolidate or stay any proceedings against any defendant, unless he give an undertaking to disclaim, if judgment be given for the Crown upon the information which proceeds. (N.S. 52.)

13. If the defendant, in an information in the nature of a *quo warranto*, does not intend to defend he may, to prevent judgment by default, file a disclaimer in the office of the registrar, and deliver a copy to the relator or his solicitor. Upon the disclaimer being filed judgment of ouster may be entered, and the costs taxed as in judgment by default. (N.S. 53.)

*Mandamus.*

14. The notice of motion, in the case of an application for a prerogative writ of mandamus, shall be served upon every person who shall appear to be interested or likely to be affected by the proceedings. The

court or a judge may direct notice to be given to any other person or persons, and adjourn the hearing for that purpose. (N.S. 55.)

15. Any person, whether he has been so served or not, who can make it appear to the court or judge that he is affected by the proceeding for a writ of mandamus, may show cause against the application and shall be liable to costs in the discretion of the court or judge, if the order should be made or the prosecutor obtain judgment. (N.S. 56.)

16. The order for a mandamus need not be served, but where served the cost of service of the order may be allowed in the discretion of the taxing officer, where the writ is not issued. (N.S. 57.)

17. The court or a judge may, if deemed proper, order that any writ of mandamus shall be peremptory in the first instance. (N.S. 60.)

18. Every writ of mandamus shall bear date on the day when it is issued. The writ may be made returnable forthwith, or time may be allowed to return it, either with or without terms, as to the court or a judge shall think fit. (No. 61.)

19. Any person, by law compellable to make return to a writ of mandamus, shall make his return to the first writ. (N.S. 62.)

20. Where a point of law is raised in answer to a return, or any other pleading in mandamus, and there is no issue of fact to be decided, the court or a judge shall, on the argument of the point of law, give judgment for the successful party, without any motion for judgment being made or required. (N.S. 63.)

21. Where the applicant obtains judgment, he shall be entitled forthwith to a peremptory writ of mandamus to enforce the command contained in the original writ, and the judgment shall direct that a peremptory writ do issue. (N.S. 64.)

22. No action or proceeding shall be commenced or prosecuted against any person in respect of anything done in obedience to a writ of mandamus, issued by the court or any judge thereof. (N.S. 65.)

23. When it appears to the court or a judge that the respondent claims no right or interest in the subject matter of the application, or that his functions are merely ministerial, the return to the writ and all subsequent proceedings down to judgment shall still be made, and the proceedings be carried on in the name of the person to whom the writ is directed, and if the court or judge thinks fit so to order, may be expressed to be made on behalf of the person really interested therein.

In that case the persons interested shall be permitted to frame the return, and conduct the subsequent proceedings at their own expense; and, if judgment is given for or against the applicant, it shall likewise be given against or for the persons on whose behalf the return is expressed to be made; and, if judgment is given them, they shall have the same remedies for enforcing it as the person to whom the writ is directed would have in other cases. (N.S. 66.)

24. Where, under the last preceding rule, the return to a writ of mandamus is expressed to be made on behalf of some person other than the per-

son to whom the writ is directed, the proceedings on the writ shall not abate by reason of the death, resignation or removal from office of that person, but they may be continued and carried on in his name; and if a peremptory writ is awarded, it shall be directed to the successor in office or right of that person. (N.S. 67.)

25. No order for the issuing of any writ of mandamus shall be granted, unless at the time of application an affidavit be produced, by which some person shall depose upon oath that such application is made at his instance as prosecutor, and if the writ be granted the name of such person shall be indorsed on the writ as the person at whose instance it is granted. (N.S. 69.)

*Pleadings in Quo Warranto.*

26. When any information in the nature of a *quo warranto* has been filed, the defendant may plead to such information, within such time and in like manner as if the information were a statement of claim delivered in an action, and where the judgment is for the relator, judgment of ouster may be entered for him in all cases. (N.S. 94.)

27. The prosecutor, in answer to a plea that the defendant has held and executed the office or franchise for six years before the exhibiting of the information, may reply any forfeiture, surrender, or avoidance by the defendant within the said six years. (N.S. 95.)

*Pleadings in Mandamus.*

28. When any return is made to the first writ of mandamus, the applicant may plead to the return, within such time and in like manner as if the return were a statement of defence delivered in an action. (C.P.R. 27.)

*Pleadings in Prohibition.*

29. Where pleadings in prohibition are ordered, the pleadings and subsequent proceedings, including judgment and assessment of damages (if any) shall be, as nearly as may be, the same as in an ordinary action for damages. (N.S. 57.)

*Judgment by Default.*

30. In case no statement of defence or other pleading shall be entered within the time limited, the opposite party may file a note of such default, in the proper office, after the expiration of the time limited, upon filing an affidavit showing such default, unless an order of the court or a judge extending such time shall have been obtained and served, in which case such note shall not be filed until after the expiration of the time granted by such order, and after the filing of such note, the party in default shall not, without leave of the court or

a judge, file any further pleading; but the party entering such note may make an application *ex parte* to the court or a judge for such judgment as he may deem himself entitled to. (C.P.R. 29.)

#### *Habeas Corpus.*

31. If a writ of habeas corpus be disobeyed by the person to whom it is directed, application may be made to the court or a judge, on an affidavit of service and of such disobedience for an attachment for contempt. (C.P.R. 30.)

32. The return of the writ of habeas corpus shall contain a copy of all the causes of the prisoner's detention indorsed on the writ, or on a separate schedule annexed to it. (C.P.R. 31.)

33. The return may be amended, or another substituted for it, by leave of the court or a judge. (C.P.R. 31.)

34. When a return to the writ of habeas corpus is made, the return shall first be made and motion then made for discharging or remanding the prisoner, or amending or quashing the return. (C.P.R. 33.)

35. On the argument of a motion for a writ of habeas corpus, the court or a judge may, in their or his discretion, direct an order to be drawn up for the prisoner's discharge, instead of waiting for the return of the writ, which order shall be sufficient warrant for any gaoler or constable, or other person, for his discharge. (C.P.R. 34.)

#### *General.*

36. Application for a prerogative writ of mandamus, for a writ of *certiorari*, or order to quash proceedings without the actual issue of the writ, for a writ of habeas corpus, for prohibition, or for an information in the nature of a *quo warranto*, may be made either to a judge in chambers or in court, or to the court en banc. The court or a judge may, if it be deemed proper, grant *ex parte* an order for the immediate issue of a writ of habeas corpus. (C.P.R. 35.)

37. Any writ may be served, according to the rules relating to the service of writs of summons, under the rules of the Supreme Court. (C.P.R. 36.)

38. It shall not be necessary to serve the original of any writ, judgment, order or other proceeding, but the party served with a copy thereof shall be entitled to inspect the original at the time of service, if he so demand. (C.P.R. 37.)

39. All proceedings under these rules shall be entitled in the Supreme Court and shall be styled in the matter to which they relate, so as to show the name of the applicant as informant, relator, plaintiff, private prosecutor, or otherwise, according to the nature of the case and the name of the defendant, respondent or party against whom the application is made. (C.P.R. 38.)

40. In all proceedings under these rules the costs shall be in the discretion of the court or judge, who shall have full power to order either the applicant or the party against whom the application is made, or any other party to the proceedings, to pay such costs, or any part thereof, according to the result. (C.P.R. 39.)

41. The proceedings for attachment for contempt, for disobedience of any writ, judgment, or order issued or made under these rules, shall conform as nearly as may be to proceedings for contempt for disobedience of any writ, judgment or order in a civil action. (C.P.R. 40.)

42. When a cause or matter is at issue the plaintiff, informant, relator or private prosecutor, as the case may be, may, on notice of motion, apply to a judge in chambers to set the same down for hearing or trial, whereupon such judge may set it down accordingly at such time and place as he may deem advisable.

43. If the plaintiff, informant, relator or private prosecutor does not make such application within two months after the cause or matter is so at issue, the defendant or respondent may, on like notice, apply to a judge in chambers to set the cause or matter down for hearing or trial, or he may give notice of motion dismissing the cause or matter with costs. Upon such application the judge may, if the motion is to set the cause or matter down for hearing, set it down accordingly, or if the motion is to dismiss the cause or matter, make such order and on such terms as he may deem just.

*Application of Rules of Supreme Court.*

44. The following rules and orders of the Supreme Court with respect to civil actions and proceedings in such court shall, as far as applicable, apply to all proceedings in relation to Crown matters, and wherever by any of such rules, it is provided that any act shall be done by, or proceeding held by, or before the local registrar, such act shall be done by, or proceeding held by, or before the registrar:

Order V.....	(Service of other proceedings)
Rule 73.....	(Constitutional questions)
Order XI, except rules 147, 152 and 168 .....	(Pleading generally)
Order XII, except rule 172....	(Statement of claim)
Order XIII, rules 176, 177, 178, 179 and 190 .....	(Defence and counterclaim)
Order XIV.....	(Reply and close of pleadings)
Order XVI.....	(Matters arising pending the action)
Order XVII.....	(Raising points of law or)
Order XXI.....	(Amendment)
Order XXII.....	(Discovery of documents)

Order XXIII, except rules 281 and 305.....	(Examination for discovery)
Order XXIV.....	(Admissions)
Order XXVI.....	(Special case)
Order XXVII, except rule 355.	(Trial)
Order XXVIII.....	(Evidence)
Order XXX.....	(Affidavits and depositions)
Order XXXII.....	(Judgments and entry of judgment)
Order XXXIII.....	(Execution)
Order XXXIV.....	(Discovery in aid of execution)
Order XL.....	(Interpleader)
Order XLII.....	(Motions and applications)
Order XLIII.....	(Applications in chambers generally)
Order XLIV.....	(Court en banc)
Order XLV, except rule 691...	(Sittings and vacation)
Order XLVI.....	(Time)
Order XLVII, except rules 721, 724, 725, 726 and 727....	(Taxation and tariff of costs)
Order XLVIII.....	(Service of orders, etc.)
Order XLIX.....	(Noncompliance and irregularities)

45. The fees, taxable to the registrar for services on the Crown practice side of the court, shall be the fees specified in items 32 to 40 of schedule 2 of the tariff and where no fees are specified by such items such fees as are taxable to the local registrar under the tariff for similar services, except when the service is performed in connection with the court *en banc*, when the fees taxable shall be those taxable to the registrar. (As amended July 15, 1912—*Sask. Gazette*, July 19, 1912.)

46. Where no other provision is made by these rules, the procedure and practice shall, as far as may be, be regulated by the Crown office rules for the time being in force in England.

#### *Forms.*

47. The forms for the time being in use in England under the said Crown office rules where applicable, and where not applicable, forms of the like character, as near as may be, shall be used in all proceedings except where otherwise ordered by these rules. (C.P.R. 42.)

48. These rules may be cited as "The Crown Practice Rules."

*Saskatchewan Rules as to cases stated by justices*—Separate rules under this head are included in the Saskatchewan Consolidated Rules, 1911. These are in force from 1 January, 1912, as follows:—

1. An application to a justice of the peace to state and sign a case, under said sec. 761, shall be in writing, and be delivered to such justice or left with some person for him at his place of abode, within seven clear days from the date of the proceeding questioned.

2. Within one calendar month after such application has been so delivered or left for him, the justice shall state and sign and deliver to the appellant a case setting forth:

- (a) The substance of the information or complaint;
- (b) The names of the prosecutor (or complainant) and defendant;
- (c) The date of the proceeding questioned;
- (d) The facts of the case;
- (e) The conviction, order, determination or other proceeding questioned;
- (f) The grounds on which the same is questioned, which must be confined to the grounds raised at the trial;
- (g) The grounds upon which the justice supports the proceeding questioned, if the justice sees fit to state any.

3. The justice shall not deliver said case until after the appellant may apply to the court *en banc* for a rule as provided by sec. 764 of the Code.

- (a) Or the appellant may in such event apply to a judge sitting in chambers, upon affidavit of the facts, for a summons calling upon the justice and the respondent to show cause why such case should not be stated; and the judge in chambers may, on the return thereof, make such order, with or without payment of costs, as to him seems meet; and the justice being served with such order shall, if ordered to do so, state a case upon the appellant entering into such recognizance and paying the fees to the justice, as provided in said sec. 762.

5. Within ten days after the receipt by the appellant of a case stated by a justice, he shall file or cause it to be filed with the registrar of the Supreme Court *en banc*.

6. Upon sufficient cause for the delay being shown, the court or judge, as the case may be, may hear and determine the matter, although the case was not filed within said ten days.

7. The appellant shall state, in the notice of appeal given to the other party, to the proceeding as required by sub-sec. 2 of sec. 761 of the Code, as amended by chap. 9 of 8 and 9 Edward VII (1919), whether the appeal is to the court *en banc* or to a judge in chambers, and if to the court *en banc* the date of the sittings of such court at which it will be heard.

8. When the case stated has been delivered to the registrar for hearing by the court *en banc*, the same shall be heard at the next sittings of such court, which shall sit no sooner than fourteen days after the delivery of the case stated to the registrar, and the appellant shall give to the respondent ten days' notice in writing of the time and place of hearing the appeal.

9. When the case has been delivered to the registrar for hearing by a judge in chambers, the appellant shall, within five days after such delivery, apply to the judge in chambers to fix a time and place for



the hearing of the appeal, and the judge shall thereupon appoint a time and place for such hearing, and a copy of such appointment shall be served upon the opposite party, or as the judge may direct:

Provided that if such application be not made within said period of five days, the judge may, upon sufficient cause for the delay being shown, fix such time and place, notwithstanding that said period may have elapsed.

10. If the court or a judge order the case to be sent back for amendment, the same shall be forthwith amended by the justice, in accordance with any directions given by the court or a judge, and transmitted when amended by the registrar.

11. An order of a judge, by whom a case stated has been heard, shall have the same effect as an order made by the court under sec. 765 of the Code, and the provisions of sec. 767 of the Code shall apply, where the decision is that of a judge, in the same way as in case of a decision by the court, and any order of the judge may be enforced by process issued out of the court.

12. In so far as these rules do not expressly make provision, whenever a case stated is brought before a judge as hereinbefore provided, the provisions of secs. 761 to 767, both inclusive, and of any amendments and additions thereto as to such a case when before the court shall, *mutatis mutandis*, be applicable to the proceedings on a case before the judge.

13. A justice before, or immediately after, delivering a case stated to the appellant shall transmit the recognizance to the registrar.

14. Slight deviation from strict compliance with these rules shall not invalidate any proceeding or thing, if the court or judge sees fit to allow the same, either with or without requiring the same to be corrected.

*Saskatchewan rules for conveyance of prisoners under sentence to gaols*—The three following rules apply in Saskatchewan under the Consolidated Rules of 1911 in force 1 January, 1912.

1. Whenever a person is sentenced to imprisonment in a common gaol in the Province of Saskatchewan, by any court in such province, the sheriff or deputy sheriff of any judicial district in such province, or any bailiff, constable or other officer, or other officer or other person by his direction, or by the direction of the court may, if no form of warrant is provided by the Criminal Code therefor, convey to the gaol named in the sentence any convict sentenced to be imprisoned therein, and shall deliver him to the keeper thereof, without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried, and certified by a judge or the local registrar or clerk or acting local registrar or clerk of such court.

2. The foregoing shall also apply where, according to the sentence imposed upon the convict, he is made liable to the punishment of death or whipping, or any other punishment.

3. The keeper of the common gaol mentioned in such certified copy of sentence is authorized, and hereby required, to receive the convict mentioned in such certified copy of sentence into his custody in the said gaol, and he and the sheriff of the judicial district in which such gaol is situated, and all other persons and authorities whose duty it is to do so, are hereby authorized and required to carry out and execute the sentence mentioned in such certified copy of sentence, according to its tenor and effect.

*Nova Scotia Crown Rules*—See Appendix to N.S. Laws, 1891:

*General.*

**Jurisdiction of courts generally.**

**577.** Unless otherwise specially provided in this Act, every court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such court to try, wherever committed within the province, if the accused is found or apprehended or is in custody within the jurisdiction of such court or if he has been committed for trial to such court or ordered to be tried before such court, or before any other court, the jurisdiction of which has by lawful authority been transferred to such first mentioned court under any Act for the time being in force.

*Origin*—Code of 1892, sec. 640.

*Trial jurisdiction of criminal courts*—So long as the offence was committed in the same province, a court of criminal jurisdiction in that province may try the charge if the offence was committed in the county or district forming the territorial limit of the court's jurisdiction, or if the accused was found or apprehended within such territorial jurisdiction; but sec. 577 does not authorize the trial by one county tribunal of an offence wholly committed in another county by persons resident in that other county and who were not found or apprehended in the first county, but were brought there from their own county by process wrongly based upon an assumption that they had committed an offence in the county from which the process issued. *R. v. O'Gorman*, 18 O.L.R. 427, 13 O.W.R. 1189, 12 Can. Cr. Cas. 230; *R. v. Roy*, 14 Can. Cr. Cas. 368 (Que.); *R. v. Lynn* (No. 1), 3 Sask. L.R. 339, 17 Can. Cr. Cas. 354, 15 W.L.R. 336; *R. v. Lynn* (No. 2), 4 Sask. L.R. 324, 19 Can. Cr. Cas. 129.

If the accused were brought from his own county to another and there committed for trial, it would seem that such committal must be based on the assumption that it will be proved that the crime was committed in the latter county, the accused not having been apprehended

there so as to give jurisdiction under that head, and if it turns out at a hearing forced upon the defendant that the whole affair occurred in the county from which he was brought, and that if the true facts had been disclosed he would not have been taken from that county to answer a charge elsewhere, the foundation for the jurisdiction of a county tribunal in the county to which he was taken has failed, and the fact of his being temporarily in custody within the jurisdiction of the court will not establish jurisdiction of that court under such circumstances. See *R. v. O'Gorman*, 18 O.L.R. 427, 15 Can. Cr. Cas. 173.

Facilities are afforded by the Code for the transfer of preliminary enquiry proceedings to the place of the offence if begun in another place or county (Code sec. 665); the justice's jurisdiction under sec. 653 seems as well founded on the presence of the accused within his territorial jurisdiction where the offence was committed in another magistrate's territory in the same province as it would be on the fact of a crime being committed within his territorial jurisdiction by a person who had decamped to another place. The provision of sec. 653 is explicit in stating a justice's power to issue process for the purpose of a preliminary inquiry in "any of" the cases mentioned in sub-secs. (a), (b), (c) and (d) of that section. The justice before whom the accused is properly brought because it turned out that he was, as suspected, within the limits of the territorial jurisdiction of the justice issuing the process, may hold the preliminary inquiry (Code sec. 668); but at "any stage of the inquiry" he *may*, after hearing both sides, order that the accused be taken before a justice of the place where the offence was committed, i.e., the place of the alleged offence. Code sec. 665. This latter provision is not a compulsory one, but optional. *R. v. Burke* (1900), 5 Can. Cr. Cas. 29.

The arrest and committal for trial in the one county or district is enough to confer jurisdiction on the local trial court proceeding with the trial upon such committal, although the offence was committed in another judicial district of the same province. *R. v. McKeown*, 20 Can. Cr. Cas. 492 (Que.); *R. v. Sinclair*, (1916) 36 O.L.R. 510, 27 Can. Cr. Cas. 327, 328; appeal quashed, *R. v. Sinclair*, 38 O.L.R. 149, 11 O.W.N. 131.

The general policy of the common law was that a person accused of an offence should be tried in the county where the offence was committed; but sec. 577 of the Code makes a change in that respect, leaving it for the accused to apply to change the venue; *R. v. Sinclair*, 36 O.L.R. 510, *supra*; *re Seeley*, 41 S.C.R. 5, 14 Can. Cr. Cas. 270; or to transfer the preliminary inquiry under sec. 665.

If the accused has been committed in one judicial district for trial by jury, and because of there being no gaol in that district, he is regularly taken to the gaol of an adjoining district to await his trial, he may elect a speedy trial without a jury before the district judges criminal court of the district in which the gaol is situate, although

there is no pretense either that the offence was committed in that district or that the accused was arrested there. *R. v. Harrison*, [1918] 1 W.W.R. 12, 29 Can. Cr. Cas. 159, 10 Sask. L.R. 436; *R. v. Lynn*, 19 Can. Cr. Cas. 129; *R. v. Tetrault*, 17 Can. Cr. Cas. 259.

An exceptional class of cases is that where the accused has been "ordered to be tried before" the court of district in which he was not resident and in which he was not found or apprehended, and in which it is not claimed that the offence was there committed. Such order is commonly termed an order for change of venue, and depends upon special circumstances rendering a fair trial improbable at the place where it would ordinarily be held, in the event which happened, that is to say, whether it was, on the one hand, a committal for trial in the county where the accused was found or apprehended, or was already in custody for some other offence, or, on the other hand, a committal in the district of the offence regardless of the place of arrest. As to such change of venue see Code sec. 884; *R. v. Stauffer*, 4 Sask. L.R. 284, 19 Can. Cr. Cas. 205.

There is a special jurisdiction under sec. 584 to remove possible difficulties as to offences at or near boundaries between local jurisdictions or committed in transit, and under secs. 585-588 as to unorganized or remote districts.

*Territorial jurisdiction in cases of misappropriation and failure to account*—As against an employee receiving money for a company and bound to promptly pay same over to a fellow employee, the omission to account at the particular time when it was his duty to account, and a failure to account at any subsequent time makes out a *prima facie* case of theft, where he had omitted to make the usual entry or issue the usual voucher for the payment. *R. v. Martin* (1912) 2 W.W.R. 602 (Alta.).

The theft may be prosecuted in the jurisdiction in which there was a refusal to account by denying the receipt of the money where such denial evidences an intention to fraudulently convert, although in the ordinary course the moneys which the accused employee received in the regular course and issued vouchers for, would be accounted for in another jurisdiction. *R. v. Martin* (1912) 2 W.W.R. 602 (Alta.), citing *R. v. Rogers*, 14 Cox C.C. 22; *R. v. Murdock*, 5 Cox C.C. 360; *R. v. Taylor*, 3 B. & P. 596; *R. v. Burdett*, 4 B. & Ald. 95.

*Submission to the jurisdiction*—Where the objection is one of want of jurisdiction over the person but the magistrate has jurisdiction to deal with the subject-matter of the charge and under ordinary and regular procedure would have jurisdiction over the person of the accused, the latter can waive compliance with the omitted conditions and submit himself to the jurisdiction. *R. v. Miller* (1913) 25 W.L.R. 296 (Alta.); *Giroux v. The King*, (1917) 56 S.C.R. 63, 29 Can. Cr. Cas. 258; *Giroux v. The King*, 26 Que. K.B. 323, affirmed.

Pleading to the charge before the magistrate holding a summary trial without taking objection that the accused was illegally arrested without a warrant has been held to be a waiver of the objection. *Re Paul* (No. 2) 20 Can. Cr. Cas. 167 (Alta.); *R. v. Davis*, 3 W.W.R. 1, 22 W.L.R. 837, 20 Can. Cr. Cas. 293 (Alta.); *R. v. Miller*, 25 Can. Cr. Cas. 151 (Alta.); *R. v. Pudwell*, 10 W.W.R. 205. A dictum of Hyndman, J., in the latter case that the objection if raised would not have affected the jurisdiction of the magistrate is opposed to the decisions in the other cases above referred to; but see *R. v. Hurst*, 7 W.W.R. 994, 23 Can. Cr. Cas. 389, 30 W.L.R. 176 (Alta.) and *re Paul* (No. 1) 20 Can. Cr. Cas. 160.

*De facto magistrate*—Although a *de facto* magistrate may not be qualified for appointment to such office, the legality of his appointment cannot be inquired into on a motion to quash a conviction made by him in the territorial jurisdiction for which he assumes to exercise judicial functions. *R. v. Cyr* [1917] 2 W.W.R. 1185 (Alta.), citing *O'Neill v. Atty-Gen. of Canada*, 1 Can. Cr. Cas. at 311 and 23 Cyc. 619; *R. v. Cyr* [1917] 3 W.W.R. 849, 29 Can. Cr. Cas. 77 (Alta.), affirming 2 W.W.R. 1185.

*Offence committed entirely in one province not triable in another*—See sec. 888.

*Exception as to newspaper libel prosecutions*—See Code sec. 888.

*Single judge sitting for the court*—Secs. 577 and 580 contemplate trials by a single judge sitting as a court. *R. v. Burgess*, 23 Can. Cr. Cas. 424 at 431 (N.S.).

*Jurisdiction only in case of illness or absence of another judge*—The provincial law constituting the court may in some cases give a junior judge jurisdiction only in the event of the actual absence of the senior judge from the trial, or from the particular territorial jurisdiction. Whether it is the one or the other will depend upon the form of the statute. A commission under a statute of the province of Quebec (R.S. Que. article 3262 (a), 5. Geo. V (Que.), ch. 52, sec. 3), empowered another judge to hold the court of sessions of the peace "in case of the absence or inability to act of one or more of the judges of the court of sessions of the Peace" of a particular district, and it was held that he had jurisdiction if he began the trial in which the senior judge of sessions did not desire to sit, at a time when the latter was absent from the court room, and that his jurisdiction was not displaced by the casual appearance of the senior judge in the court room where there was no intention of intervening in the trial which it had been arranged between them should be held by the substitute judge, *Brunet v. The King* (1918), 57 S.C.R. 83, 30 Can. Cr. Cas. 16; and see *ex parte Cormier*, 17 Can. Cr. Cas. 179; *R. v. Perkin*, 7 Q.B. 165; *Byrne v. Arnold*, 24 N.B.R. 161; *Ashbury v. Ellis* [1893] A.C. 339. A statement of the absence on the record even of a court of record would probably not be conclusive. *Brunet v. The King* (1918), 57 S.C.R.

83, 30 Can. Cr. Cas. 16, 23; *Mayor of London v. Cox*, L.R. 2 H.L. 239, 262; *Falkingham v. Victorian Ry. Commissioner* [1900] A.C. 452.

*Juvenile Courts*—Where Juvenile Courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30 and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age.

*Supreme Court of Alberta*—The Supreme Court of Alberta has all the general jurisdiction of the former English courts of common law and equity of general jurisdiction. It consequently possesses the extraordinary jurisdiction of the former English court of King's Bench. *R. v. Hung Gee*, (1913) 4 W.W.R. 1133, 1134, 21 Can. Cr. Cas. 411, 24 W.L.R. 862 (Alta.).

*N.W.T. Act in Alberta and Saskatchewan*—Under sec. 9 of the Code, the application of the Code in Alberta and Saskatchewan is in effect made subject to the condition that if anything in the Code be inconsistent with anything in the North-West Territories Act the latter is to prevail. *R. v. Murray and Mahoney* (1915) 9 W.W.R. 804, 33 W.L.R. 148.

The North-West Territories Act, R.S.C. 1906, ch. 62, is a consolidation of the former N.W.T. Act as amended in 1905, contemporaneously with the Alberta Act and the Saskatchewan Act, whereby the two provinces of Alberta and Saskatchewan were constituted out of territory forming part of the then North-West Territories. *R. v. Dickey*, 9 W.W.R. 142 (Alta.).

The operation of this new N.W.T. Act of 1906 was expressly restricted as of necessity to the residue of the Territories. Being Dominion legislation it could, in any case, have no effect in the newly constituted provinces except so far as it deals with subjects over which the Parliament of Canada has jurisdiction. *R. v. Dickey*, 9 W.W.R. 142, 144 (Alta.).

The N.W.T. Act (Can.) as it stood immediately prior to the amendment of 1905 [Can.] (see Alberta Office Consolidation, 1915, of N.W.T. Ordinances, with which is printed the N.W.T. Act as of the time mentioned) was continued in force in Alberta to the extent to which the Alberta Act (Can. Stat. 1905, ch. 3; R.S.C. 1906, ch. 3, sec. 16) was not inconsistent with it, subject to the respective jurisdictions of the Federal Parliament and the provincial legislature over the several subject matters embraced in the N.W.T. Act. *R. v. Dickey*, 9 W.W.R. 142, 145 (Alta.).

**Certain persons not to try case under s. 501.**

**578.** No person who is a master, or the father, son or brother of a master in the particular manufacture, trade or business, in or in connection with which any offence under sec. 501 is charged

to have been committed, shall act as a magistrate or justice, in any case of complaint or information under that section, or as a member of any court for hearing any appeal in any such case.

*Origin*—R.S.C. 1886, ch. 173, sec. 12.

*Intimidation in labour strikes, etc.*—Sec. 501 relates to the offence of intimidation, including violence and threats in labour strikes, and watching and besetting for purposes of intimidation.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

### *Indictable Offences.*

**Questions raised at trial may be reserved for decision.**

**579.** Any judge or other person presiding at the sittings of a court at which any person is tried for an indictable offence under this Act, whether he is the judge of such court or is appointed by commission or otherwise to hold such sittings, may reserve the giving of his final decision on questions raised at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial.

*Origin*—Code of 1892, sec. 753; R.S.C. 1886, ch. 174, sec. 269.

*Postponing decision*—This section is to enable the trial judge to give his decision although the court, such as a court of assize, may be a temporary one held under commission and the session may have been concluded.

### **Jurisdiction of superior courts.**

**580.** Every superior court of criminal jurisdiction and every judge of such court sitting as a court for the trial of criminal causes, and every court of oyer and terminer and general gaol delivery has power to try any indictable offence.

*Origin*—Sec. 538, Code of 1892.

*Jurisdiction generally*—See note to sec. 577.

*Superior court of criminal jurisdiction*—See definition in Code sec. 2 (35).

*Criminal courts in Ontario*—The Judicature Act, R.S.O. 1914, ch. 56, sec. 120, declares that its provisions are not to affect the power to issue commissions for the discharge of criminal business on circuit or otherwise, or the authority of a judge or retired judge of any of the superior courts, or a judge of a county court, or one of His Majesty's counsel learned in the law, to preside without any commission at any

sittings for the trial of criminal matters and proceedings. It provides that such judge or counsel when so presiding with or without a commission shall be deemed to constitute the court. This enables a judge or King's counsel to be assigned to hold a sittings for trial on request from the government authorities without awaiting a formal commission. The services of another judge being usually available, it is not often necessary to ask a King's counsel to preside.

*Ontario courts and practice*—See secs. 599-601.

*Certiorari to remove case from Sessions Court*—Where difficult questions of law are shown to be involved, an indictment may, in Ontario, be removed into the Provincial Supreme Court from the Court of General Sessions, by *certiorari*. *R. v. Toronto Railway Co.* (1904) 4 O.L.R. 277; 5 O.W.R. 621.

#### Option for trial without jury in trade conspiracy cases.

**581.** Where an indictment is found against any person for any of the offences mentioned in sec. 498, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which the indictment is found, or the judge presiding at any subsequent sitting of such court, or at any court where the indictment comes on for trial, without the intervention of a jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated in so far as may be applicable by Part XVIII.

*Origin*—52 Vict., Can., ch. 41, sec. 4.

*Option for trial without jury*—The proceedings are to be regulated in so far as may be applicable by Part XVIII, which is the Speedy Trials Act. The procedure of the latter will apply *pro tanto*, although the trial may take place before a tribunal which is not within the Speedy Trials clauses, Part XVIII, of the Code.

*Special provision for appeal*—An appeal upon all issues of law and fact shall lie from any conviction by the judge without the intervention of a jury for any offence mentioned in sec. 498 to the court of appeal in the province where such conviction is made; and the evidence taken upon the trial shall form part of the record in appeal, and, for that purpose, the court before which the case is tried shall take note of the evidence, and of all legal objections thereto. Code sec. 1012.

*Trade conspiracies and combinations*—See Code sec. 2 (38), 496-503, 581, 590, 1012; Conciliation and Labour Act, R.S.C. 1906, ch. 96; Combines Investigation Act, Can. 1910, ch. 9; Industrial Disputes Investigation Act, 1907, Can., ch. 20, as amended 1910, Can., ch. 29; the Department of Labour Act, 1909, Can., ch. 22.



**Jurisdiction of sessions and certain other courts.**

**582.** Every court of general or quarter sessions of the peace, when presided over by a superior court judge, or a county or district court judge, or in the cities of Montreal and Quebec by a recorder or judge of the sessions of the peace, and in the province of New Brunswick every county court judge has power to try any indictable offence except as hereinafter provided.

*Origin*—Sec. 539, Code of 1892.

*Written opinions on disposal of cases not required*—There is no law compelling judges of the sessions to present in writing the reasons for their decisions at the time of their delivery. *R. v. Jacobs* (1917), 26 Que. K.B. 382. An appellate court may, therefore, take cognizance of the notes of judgment handed out by the sessions judge a considerable time after the judgment was pronounced. *R. v. Jacobs*, *supra*.

*General Sessions in Ontario*—The General Sessions Act, R.S.O. 1914, ch. 60, sec. 3, enacts as to Ontario that the courts of general sessions of the peace shall have jurisdiction to try "all criminal offences except homicide and the offences mentioned in sec. 583 of the Criminal Code." The sessions at Toronto and Hamilton, for the counties of York and Wentworth respectively, are held in March, May, September and December; in other counties in June and December; and in provisional judicial districts at the same time as the district courts trying civil cases, the same judge presiding over both. The judge of the county or district court, as the case may be, or in case of his death, illness, or absence, or at his request, the junior or deputy judge shall be the chairman of the court and shall preside at the sittings thereof. R.S.O. 1914, ch. 60, sec. 7. And where a judge is present it shall not be "necessary," in order to constitute the court, that an associate or other justice of the peace should be present. R.S.O. 1914, ch. 60, sec. 8. In practice these courts are held by the chairman alone as regards the criminal trials jurisdiction. The office of justice of the peace and the Court of General Sessions, or Court of General Quarter Sessions, as it was formerly called, were in existence in Upper Canada before the meeting of the first Parliament of the Province of Upper Canada, that is, prior to September 17th, 1792. On the 29th May, 1801, the statute, 41 George III, ch. 6, was passed. It recited that doubts had arisen with respect to the authority under which the Courts of General Quarter Sessions of the Peace, the District Courts, the Surrogate Courts and the Courts of Request had been created and were then holden in the several districts of the province, and also the authority under which commissions of the Peace, commissions of Assize and Nisi Prius, commissions of Oyer and Terminer, commissions to sheriffs and other persons concerned in the administration of justice had been issued in and for the said districts respectively, and then proceeds to enact: "That

the authority under which the said courts and commissions had been erected, holden and issued, and also all matters and things done by virtue of the same are, so far as relates to the authority under which the same have been so erected, holden, issued and done, good and valid to all intents and purposes whatsoever, and that the provisions of the Acts of the Legislature of the province respecting the said courts and commissions, or any of them, are hereby declared to extend and to be in force, except as hereinafter mentioned, in each and every the said districts respectively." This enactment, so far as it relates to the authority under which commissions had been issued and the courts of General Quarter Sessions of the Peace had been held, was embodied in the Consolidated Statutes of Upper Canada, ch. 17, sec. 1, and has been repeated in the various Revised Statutes of Ontario. *R. v. Malloy*, 4 Can. Cr. Cas. 116, 119 (Ont.).

The records of the general sessions courts in Ontario counties are public records and open to inspection. *Attorney-General v. Scully*, 2 O.L.R. 315, 6 Can. Cr. Cas. 167; *R. v. Scully*, 5 Can. Cr. Cas. 1 (Ont.).

It shall not be necessary for any court of general sessions in the province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do. Code sec. 801.

*County Court Judge's Criminal Court*—See Code sec. 823, applying the same limits of jurisdiction to the County (or District) Court Judge's Criminal Court.

*New Brunswick*—County courts in New Brunswick are not courts of oyer and terminer and general gaol delivery, as the circuits of the Supreme Court are. Criminal jurisdiction is given to the county courts by statute, but nothing is said to the effect that they are courts of general gaol delivery. *R. v. Wright*, 2 Can. Cr. Cas. 88 (N.B.).

*Juvenile Courts*—Where Juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30 and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age. See note to Code sec. 821.

*Officials with special power in Quebec*—See sec. 604.

### Exceptions.

**583.** No court mentioned in the last preceding section has power to try any offence under sections,—

- (a) 74. treason; 76, accessories after the fact to treason; 77, 78 and 79, treasonable offences; 80, assaults on the King; 81, inciting to mutiny; 85, unlawfully obtaining and communicating official information; 86, communicating information acquired in office; or,

- (b) 129, administering, taking or procuring the taking of oaths to commit certain crimes; 130, administering, taking or procuring the taking of other unlawful oaths; 134, seditious offences; 135, libels on foreign sovereigns; 136, spreading false news; or,
- (c) 137 to 140 inclusive, piracy; or,
- (d) 156, judicial, etc., corruption; 157, corruption of officers employed in prosecuting offenders; 158, frauds upon the government; 160, breach of trust by a public officer; 161, municipal corruption; 162 (a) selling offices; or,
- (e) 263, murder; 264, attempt to murder; 265, threat to murder; 266, conspiracy to murder; 267, accessory after the fact to murder; 268, manslaughter; or.
- (f) 299, rape; 300, attempt to commit rape; or,
- (g) 317 to 334, defamatory libel; or,
- (h) 498, combination in restraint of trade; or,
- (i) conspiring or attempting to commit, or being accessory after the fact to any of the offences in this section before mentioned; or,
- (j) any indictment for bribery or undue influence, personation or other corrupt practice under the Dominion Elections Act.

*Origin*—Sec. 540, Code of 1892; 57-58 Vict., Can., ch. 57, sec. 1; 62-63 Vict., Can., ch. 46, sec. 3; 8-9 Edw. VII, Can., ch. 9, sec. 2.

*Manslaughter excepted*—By the amendment of 1909, 8-9 Edw. VII, ch. 9, manslaughter was excepted as well as murder, and the necessary alteration made in sub-sec. (e), *supra*.

#### *Special Jurisdiction.*

**On water between jurisdictions.—Near boundary between jurisdictions.—In respect to mail or vehicle or vessel passing through several jurisdictions.**

**584.** For the purposes of this Act,—

- (a) where the offence is committed in or upon any water, tidal or other, or upon any bridge, between two or more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions;

- (b) where the offence is committed on the boundary of two or more magisterial jurisdictions, or within the distance of five hundred yards from any such boundary, or is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions;
- (c) where the offence is committed on or in respect to a mail, or a person conveying a post letter bag, post letter or anything sent by post, or on any person, or in respect of any property, in or upon any vehicle employed in a journey, or on board any vessel employed on any navigable river, canal or other inland navigation, the person accused shall be considered as having committed such offence in any magisterial jurisdiction through which such vehicle or vessel passed in the course of the journey or voyage during which the offence was committed; and where the centre or other part of the road, or any navigable river, canal or other inland navigation along which the vehicle or vessel passed in the course of such journey or voyage, is the boundary of two or more magisterial jurisdictions, the person accused of having committed the offence may be considered as having committed it in any one of such jurisdictions.

*Origin*—63-64 Vict., ch. 46, sec. 3; Code of 1892, sec. 553; Procedure Act, R.S.C. 1886, sec. 10; 32-33 Vict., ch. 29, sec. 8; 7 Geo. IV, Imp., ch. 64, sec. 12.

*"Within the distance of 500 yards from any boundary"*—The distance mentioned in sub-sec. (b) of the above clause is to be measured in a direct line from the border, and not by the nearest road; *R. v. Wood*, 5 Jur. 225.

Where an offence has been committed within 500 yards of the boundary between two magisterial jurisdictions, sec. 584 (b), will not enable the prosecutor to lay it in one jurisdiction and try it in another; but he may both lay and try the offence in either jurisdiction. *R. v. Jack* (1915) 24 Can. Cr. Cas. 385, 25 D.L.R. 700, 49 N.S.R. 238; *R. v. Mitchell*, 2 Q.B. 638.

*Sub-sec. (b)*—"Offence begun within one magisterial jurisdiction and completed within another"—The general rule is that the magistrate or

justice of the peace has jurisdiction either by reason of the residence or presence of the accused in his district, or by reason of the commission of the offence within its limits. There is, however, an enlargement of this general rule in sec. 584, whereby, when an offence is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in either of them. *R. v. Hogle* (1896), 5 Can. Cr. Cas. 53, 5 Que. Q.B. 59; *R. v. Leech*, 25 L.J.M.C. 77.

In *Rex v. Girdwood* (1776), 2 East P.C. 1120, 1 Leach's Crown Cases 169, it was held on a case reserved, that a person writing a threatening letter in one county and delivering it to another person in that county, by whom it was posted at the writer's request to an address in another county, was properly tried and convicted in the latter county.

In *R. v. Esser* (1767), 2 East P.C. 1125, Lord Mansfield held that the sending of a letter by post directed to a person in another county was sending also in the latter county, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county. 3 Russell on Crimes, 6th ed., 722.

If the accused person, "wherever he may be" (i.e., within Canada), is charged with having committed an indictable offence within the limits over which a justice of the peace has jurisdiction, the justice is empowered to issue a warrant or summons to compel the attendance of the accused person before him for the purpose of preliminary enquiry; Code sec. 653; and the accused may be arrested upon such warrant in any part of Canada upon the warrant being "endorsed" by a justice within whose jurisdiction the accused may be found; Code sec. 662. The "endorsement" is to be made only upon proof, by oath or affirmation, of the handwriting of the justice who issued the same, and when made is sufficient authority to the person bringing such warrant, to carry the person against whom the warrant is issued, when apprehended, before the justice who issued the warrant or before other justices at the place from which the warrant came. Code sec. 662.

The courts will take judicial notice of the local divisions, such as counties, municipalities and polling sections, into which their country is divided for purposes of political government. *Ex parte Macdonald*, (1896) 27 S.C.R. 686, 3 Can. Cr. Cas. 10.

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. *R. v. Gillespie* (No. 2) (1898), 2 Can. Cr. Cas. 309 (Que.). In such case, the courts of the Province of Quebec have jurisdiction to try the accused, on his being arrested there. *R. v. Gillespie*, *supra*; Code sec. 577.

The offence of fraudulent conversion of the proceeds of a valuable security may consist in a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly the failure to account for them; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be proceeded against in either district. *R. v. Hogle* (1896), 5 Que. Q.B. 59, 5 Can. Cr. Cas. 53.

A court of one province is not to try an offence committed *entirely* in another province. Code sec. 888.

Magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way. *White v. Feast* (1872), L.R. 7, Q.B. 353; *R. v. Davy* (1900), 27 A.R. 508 (Ont.), 4 Can. Cr. Cas. 28, 33.

A prohibition may issue to a court exercising criminal jurisdiction as well as to a civil court. Per Cockburn, C.J., in *R. v. Herford*, 3 El. & El. p. 136. And there is no doubt that prohibition can issue to a justice of the peace to prohibit him from exercising a jurisdiction which he has not. *Chapman v. Corporation of London* (1890), 19 Ont. R. 33.

*Libel in a newspaper circulated in another province*—Code sec. 888.

*Sub-sec. (c)—Offence during transportation*—Sec. 584 (c) provides that where the offence is committed upon any vehicle employed in a journey, the person accused shall be considered as having committed such offence in any magisterial jurisdiction through which such vehicle passed in the course of the journey or voyage during which the offence was committed. But where the formal charge in lieu of an indictment alleged that the railway journey on which the offence was committed was one from Swift Current to Parkbeg, both within the judicial district of Moose Jaw, and the train, while on the journey during which the offence was committed, did not pass through any judicial district other than the judicial district of Moose Jaw, there would be no sufficient basis for a trial in another judicial district. But if the charge had alleged and it were proved that the offence was committed on a train journey from Swift Current to Regina, there might be some force in the contention that this section enabled the Crown to proceed in the Regina district, because in that case the offence would be considered as having been committed in the judicial district of Regina, as well as in the judicial district of Moose Jaw. Where, however, the charge itself limits the course of the journey to one wholly within one judicial district, sub-sec. (c) will not apply. *R. v. Lynn*, 3 Sask. L.R. 339; 17 Can. Cr. Cas. 354, 15 W.L.R. 336.

**Offences in unorganized tracts in Ontario.—Provisional districts or new counties within.—Where committed to gaol.**

**585.** All offences committed in any of the unorganized tracts of country in the province of Ontario, including lakes, rivers

and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be inquired of, tried and punished within any county of such province; and such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such county, before which court such offences may be prosecuted; and such court shall proceed therein to trial, judgment and execution or other punishment for such offence, in the same manner as if such offence had been committed within the county where such trial is had.

2. When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such offences would have been inquired of, tried and punished if this section had not been passed.

3. Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the province of Ontario.

*Origin*—Code of 1892, sec. 555; R.S.C. 1886, ch. 174, sec. 147

*Offenders in Ontario provisional judicial districts*—By the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, sec. 36, the constable or other officer having charge of any person accused or convicted of any offence in any provisional judicial district in the province of Ontario committed to any common gaol in the province, and entrusted with his conveyance to any such common gaol, may pass through any county in the province with such person in his custody. The keeper of the common gaol of any county in the province of Ontario in which it is found necessary to lodge for safe keeping any such person so being conveyed through such county in custody, shall receive such person and safely keep and detain him in such common gaol for such period as is reasonable or necessary. The keeper of any common gaol in the province, to which any such person is committed as aforesaid, shall receive such person and safely keep and detain him in such common gaol under his custody until discharged in due course of law, or bailed in cases in which bail may be by law taken.

**Offences committed in unorganized territories.—Jurisdiction.—Procedure.**

**586.** All offences committed in any part of Canada not in a province duly constituted as such and not in the Yukon Territory may be inquired of and tried within any district, county or place in any province so constituted or in the Yukon Territory as may be most convenient.

2. Such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such district, county or place.

3. Such court shall proceed to trial, judgment and execution or other punishment for any such offence in the same manner as if such offence had been committed within the district, county or place where the trial is had.

*Origin*—6-7 Edw. VII, Can., ch. 8, sec. 2; 62-63 Vict., Can., ch. 47, sec. 1.

**Jurisdiction of Provincial courts and justices.**

**587.** The several courts of criminal jurisdiction in the provinces aforesaid, and in the Yukon Territory, including justices, shall have the same powers, jurisdiction and authority in case of such offences as they respectively have with reference to offences within their ordinary jurisdiction as provincial or territorial courts.

*Origin*—6-7 Edw. VII, Can., ch. 8, sec. 2; 62-63 Vict., ch. 47, sec. 2.

*Jurisdiction of courts and justices as to offences in unorganized territories of Canada not included in any province*—The offences here referred to are those mentioned in the preceding section 586, which formed a part of the same original enactment, 62-63 Vict., ch. 47.

*Juvenile courts*—Where juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30 and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age. See note to Code sec. 821.

**Offences committed in the district of Gaspé.**

**588.** Whenever any offence is committed in the district of Gaspé, the offender, if committed to gaol before trial, may be committed to the common gaol of the county in which the offence



was committed, or may, in law, be deemed to have been committed, and if tried before the Court of King's Bench, he shall be so tried at the sitting of such court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried.

*Origin*—Code of 1892, sec. 556; R.S.C. 1886, ch. 174, sec. 15.

*When bays and gulfs form part of adjacent county*—See note to sec. 591.

## PART XII.

### SPECIAL PROCEDURE AND POWERS.

#### *Offences Requiring Statute.*

##### **Offences against Imperial statutes.**

**589.** No person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain, or of the United Kingdom of Great Britain and Ireland, unless such Act is, by the express terms thereof, or of some other Act of such Parliament, made applicable to Canada or some portion thereof as part of His Majesty's dominions or possessions.

*Origin*—Code of 1892, sec. 5.

*Criminal offences declared by Imperial Statutes*—Notwithstanding the general legislative authority conferred by the British North America Act upon the Canadian Parliament to deal with the criminal law, there remains the jurisdiction of the British Parliament to legislate in matters of concern to the Empire at large, and with reference to such to declare that an Imperial statute shall be operative not only in Great Britain, but in all British possessions or colonies. Of this class are the Merchant Shipping Act, 1894, Imp., and its amendments, the Army Act, the Prisoners of War Escape Act, 52 Geo. III, ch. 156 (as amended, 54-55 Vict., Imp., ch. 69), and statutes relating to the jurisdiction of the Admiralty such as the Territorial Waters Jurisdiction Act, 1878, Imp.

Some of the Imperial Acts having an extended application throughout British territory are expressed to be subject to acceptance and adoption of same by the local legislature or parliament so far as concerns matters as to which a constitutional power to legislate has been conferred. See the Army Act, 44-45 Vict., Imp., ch. 58, secs. 176-177, the Army Amendment Acts, 1909, and 1912 Imp., and the Militia Act (Canada), R.S.C. 1906, ch. 41, secs. 74 and 99.

In other cases the form of the Imperial statute is to make the law expressly applicable to British possessions beyond the seas (thus including Canada) and to reserve to the Imperial Executive the right to suspend by Order-in-Council the operation of the statute in the self-governing colony when its parliament has passed a suitable statute along similar lines. See the Extradition Act, 1870, 38-34 Vict., Imp.,

ch. 52, secs. 17 and 18; the Patents, Designs and Trade Marks Act, 1883 (Imp.), sec. 103, and Code secs. 335 (s), 486, 495.

It is submitted that in provinces other than Ontario, Manitoba and British Columbia, sec. 589 has made it no longer necessary to consider whether an English criminal law statute in force in England at the time of the occupancy, conquest or cession of the province, was of such a nature as to be applicable to the newly acquired territory. See *Doe d. Anderson v. Todd*, 2 U.C.Q.B. 84; *Beasley v. Cahill*, 2 U.C.Q.B. 320; *Uniacke v. Dickson*, 1 James 300; *Smyth v. McDonald*, 1 Oldright, 274; *Shea v. Choat*, 2 U.C.Q.B. 11. And even as to the common law where generally adopted in a colony acquired by occupancy, the adoption may be a limited one excluding parts of the common law, incompatible with colonial conditions. *Uniacke v. Dickson*, 1 James (N.S.), 289; and see *R. v. Mercer*, 17 U.C.Q.B. 602; *R. v. Moodie*, 20 U.C.Q.B. 389; *Reid v. Inglis*, 12 U.C.C.P. 195.

As to the provinces named, Code secs. 10, 11 and 12 introduce the criminal law of England, whether statutory or common law, with the qualifications contained in those sections.

The object of the Colonial Laws Validity Act, 28-29 Vict., (Imp.), ch. 63, was to conserve the right of the Imperial Parliament to legislate for the colonies by enactment expressly made applicable to them, and where such legislation had taken place to invalidate any colonial legislation repugnant thereto; but it was not intended to invalidate colonial laws because they happened to be repugnant to English law, where no such express legislation by the Imperial Parliament had taken place. *R. v. Marais*, [1902] A.C. 51.

The Fugitive Offenders Act, 1881, Imp., dealing with the extradition of fugitive criminals from one part of the British Empire to another for trial, is from its nature expressly applicable to and in force in Canada.

The effect of sec. 589 of the Code is to declare that unless an Imperial statute creating an offence is made applicable to Canada by express terms contained in the same or some other Imperial statute, it is not of its own force to be considered effective in Canada as a ground for a criminal prosecution; but it will be effective in Canada if it has been expressly adopted by Canadian legislation; see secs. 10-12.

*English common law as applied to crimes*—

Sec. 589 must be read along with Code secs. 10-12, declaring that the criminal law of England as of the various dates therein mentioned as to the provinces of Ontario, British Columbia and Manitoba, shall be the criminal law of the province except as varied by provincial or Dominion law. See *Hopkins v. Smith*, 1 O.L.R. 659. It is to be noted, moreover, that sec. 589 deals only with the English statute law, and says nothing in regard to the English common law which has been held to be still operative as regards common law crimes as to which no provision has been made in the Code. *R. v. Cole* (1902), 3 O.L.R. 389,

5 Can. Cr. Cas. 330. And as many of the old English statutes have been held to be merely declaratory of the common law, it may still be possible to prosecute for some common law crime overlooked in the codification, although the prosecution in such case should not in terms be under the declaratory English statute in provinces other than Ontario, Manitoba and British Columbia; see secs. 10-12, and note to sec. 16.

As to British Columbia, see also *re Dean*, (1913) 3 W.W.R. 1037, 48 S.C.R. 235, 20 Can. Cr. Cas. 374; *R. v. Dean*, 18 B.C.R. 18.

*Repeal by Imperial Parliament of statute expressly applicable to Canada*—It would seem that the granting of a constitution and powers of self-government to a colony does not confer upon the colony the power to amend or repeal as to the colony a prior Imperial statute which "by express terms" had been made applicable to the colony, though the colony might repeal or amend the general English law, whether statutory or common law, which it had acquired by settlement or cession. *R. v. Schram*, 14 U.C.C.P. 318; *Clement's Canadian Constitution*, 3rd ed., 63. An Imperial Act expressly extending to Canada and to British Colonies is subject to amendment or repeal by the Imperial Parliament. *Bank of Upper Canada v. Bethune*, 4 U.C.Q.B. (Old series) 165.

If, after the grant of a constitution and independent powers of legislation, an English statute which had been introduced into a colony as a part of the general English law and not by statute expressly applicable to the colony, is repealed in England, it will continue to apply in the colony until there repealed so far as concerns such self-governing colony, because the provisions of the English repealing statute, which are substituted for the repealed statute, do not then extend to the colony. *Kerr v. Burns*, 4 Allen, N.B. 609; following *James v. McLean*, 3 Allen, N.B. 164.

#### Prosecutions for trade conspiracy.

**590.** No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute.

*Origin*—Code of 1892, sec. 518; 53 Vict., Can., ch. 37, sec. 19.

*Conspiracy of workmen*—See the exception as to combines of workmen for their reasonable protection as such contained in Code secs. 497 and 498 (2).

"*Trade combination*"—See definition in sec. 2 (38).

*Trade conspiracies and combinations*—See Code secs. 2 (38), 496-503, 581, 590, 1012; Conciliation and Labour Act, R.S.C. 1906, ch. 96;

Combines Investigation Act, Can., 1910, ch. 9; Industrial Disputes Investigation Act, 1907, Can., ch. 20 as amended, 1910, Can., ch. 29; the Department of Labour Act, 1909, Can., ch. 22.

*Cases Requiring Consent.*

**Offences within the jurisdiction of the Admiralty.**

**591.** Proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within the jurisdiction of the Admiralty of England, shall not be instituted in any court in Canada except with the leave of the Governor General and on his certificate that it is expedient that such proceedings should be instituted.

*Origin*—Sec. 542, Code of 1892; Territorial Waters Jurisdiction Act, 1878, Imp., 41-42 Vict., ch. 78.

*Governor-General*—“Governor-General” means the Governor-General for the time being of Canada, or other the chief executive officer or administrator for the time being carrying on the government of Canada on behalf and in the name of the Sovereign, by whatever title he is designated. Code sec. 2 (6).

*Indictment not bad for omission to state the consent*—See sec. 855 (h).

*Jurisdiction in Canada over admiralty offences*—The jurisdiction of the Admiralty extends over British ships, not only on the high seas, but also in foreign rivers, below the bridges, where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction. *R. v. Anderson*, L.R. 1 C.C.B. 161; 38 L.J.M.C. 12. As to jurisdiction when a ship is in dock, see *U.S. v. Hamilton*, 1 Mason, 152. If great ships go to the place, proof that the tide ebbs and flows is unnecessary. *R. v. Allen* (1837), 1 Moody C.C. 494. The jurisdiction extends to all persons on board the ship whether British subjects or foreigners. *R. v. Lopez*, Dears. & B. 525; 27 L.J.M.C. 48; *R. v. Lesley*, Bell, 220; 29 L.J.M.C. 97.

The provisions of sec. 591 of the Canadian Code were taken originally from sec. 3 of the Imperial Statute known as the “Territorial Waters Jurisdiction Act, 1878,” c. 73, which was passed following the decision in *R. v. Keyn*, L.R. 2 Ex. D. 63. Sec. 2 of that statute is as follows:—

“An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty’s dominions, is an offence within the jurisdiction of the Admiralty, although it may have been committed on board or by means

of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly."

Sec. 7 of the Territorial Jurisdictions Act (Imp.) defines "the territorial waters of Her Majesty's dominions" in reference to the sea as meaning—"such part of the sea adjacent to the coast of the United Kingdom or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

*Offences on foreign ships while within the three-mile limit*—In the *Franconia* case (R. v. Keyn, 2 Ex. D. 63) arising out of a collision within three miles of the coast of England between a foreign and a British ship, and resulting in the death of a British subject on the British ship, the master of the foreign ship was indicted for manslaughter; and the question arose whether a foreigner on a foreign ship was amenable to the laws of England for an offence committed on a British subject within the territorial waters of the realm. The majority of the court held that he was not within the jurisdiction of the Admiralty and was not answerable in the English courts for the offence complained of. R. v. Keyn, *supra*. In consequence of this decision the Territorial Waters Jurisdiction Act, 1878, was passed; and it dealt and dealt only with offences committed on board foreign ships, whether by foreigners or by British subjects on board such ships, within the territorial waters of Her Majesty's dominions, that is, within one marine league of the coast measured from low water mark. Parliament in passing this Act was assuming a new jurisdiction: that over foreigners on foreign ships in territorial waters, a claim of jurisdiction to which other nations might not assent, and, doubtless to prevent misunderstanding with other nations, if possible, a restriction was placed upon the institution of proceedings for trial and punishment in the case of such offences by making it necessary, before instituting the proceedings, to obtain the consent of one of Her Majesty's principal Secretaries of State, together with a certificate that the institution of such proceedings is expedient. In the Dominions out of the United Kingdom such consent and certificate are to be obtained from the Governor of the Dominion. R. v. Neilson (1918) 30 Can. Cr. Cas. 1 (N.S.).

The view has been expressed that, in copying into the Criminal Code sec. 3 of the English Act, almost verbatim, the Parliament of Canada intended that it should be adopted with the interpretation, the definitions, and the application to which it is subject in the original Act; and that, in consequence, it applies only to offences committed within territorial waters and by persons on board a foreign ship; and has no application to offences committed on board British ships on the high

seas. *R. v. Neilson*, (1918) 30 Can. Cr. Cas. 1 (N.S.), per Chisholm, J.; see, contra, *R. v. Adolph*, 12 Can. Cr. Cas. 413, in which it was held that a foreign seaman on a Canadian ship cannot be summarily convicted for insubordination on the high seas under the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, unless leave to lay the information has been granted by the Governor-General under sec. 591 of the Criminal Code. *R. v. Adolph*, 12 Can. Cr. Cas. 413.

*Offences on the sea outside the three-mile limit*—It is a generally accepted principle of international law that every sovereign state has exclusive jurisdiction over its public and private ships in all places outside the jurisdiction of a foreign state. All ships, with the persons and cargoes carried by them—leaving aside questions of contraband, etc., arising in times of war—are considered, while on the high seas, to be under the exclusive dominion of the state whose flag such ships legally carry. Westlake International Law, 3rd ed., p. 185, sec. 154; *The Queen v. Kinsman* (1853) James (2 N.S.R.) 62; *Wilson v. McNamee*, 102 U.S. 572; *R. v. Keyn*, 2 Ex. D. 63; *R. v. Neilson* (1918) 30 Can. Cr. Cas. 1; and see *R. v. Adolph*, 12 Can. Cr. Cas. 413.

*Prosecutions under the Merchant Shipping Acts, Imp.*—The Merchant Shipping Act, 1894, Imp., 57-58 Vict., ch. 60, (secs. 684 and 686), confers power on Canadian courts of criminal jurisdiction to try a person "found" within the jurisdiction of the court for an offence committed on board a British ship in like manner as if the offence had been committed within its territorial limits, if the court would in that event have had jurisdiction. The accused is "found" within the jurisdiction although forcibly brought there as a prisoner. *R. v. Lopez, Dears. & B.* 525.

The jurisdiction so conferred on Canadian courts by sec. 686 of the Merchant Shipping Act, Imp., is not subject to the requirement of a certificate under Code sec. 591. *R. v. Neilson*, (1918) 30 Can. Cr. Cas. 1 (N.S.); *R. v. Heckman*, 5 Can. Cr. Cas. 242 (N.S.), per Ritchie, J. By the same Act (sec. 687), all offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's Dominions by any master, seaman, or apprentice, who, at the time when the offence is committed, is, or within three months previously has been, employed in any British ship, shall be deemed to be of the same nature respectively, and be liable to the same punishments respectively, and be enquired of, heard, tried, determined, and adjudged in the same manner, and by the same courts, in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offences may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England. See *R. v. Dudley*, 14 Q.B.D. 273, 54 L.J.M.C. 32, and 12-13 Vict., Imp., ch. 96.

The punishment for the offence so tried in Canada committed outside of its territorial jurisdiction is to be that which might have been imposed if committed in Canada, and, if such crime is not made punishable under Canadian law, the penalty (other than capital punishment) shall correspond as nearly as may be to that which would have applied on a trial in England. Courts (Colonial) Jurisdiction Act, 1874, 37 Vict., Imp., ch. 27.

*The Great Lakes*—Those portions of the great lakes to the east of the international boundary line form part of the Province of Ontario and are under its legislative authority and control. *R. v. Mickleham*, 10 Can. Cr. Cas. 382, 11 O.L.R. 366.

In *Regina v. Sharp* (1869), 5 P.R. 135, the contention on the part of the accused was that the offence being stated to have been committed on Lake Erie, if committed in Canadian waters, the police magistrate for Toronto, who had committed the accused to the common gaol of the county of York, had no jurisdiction because the jurisdiction belonged "to the townships respectively fronting on the lakes," and if committed in United States waters there was equally no jurisdiction in the police magistrate, because the Imperial Acts under which he assumed to act did not extend to the great lakes.

In *R. v. Sharpe*, *supra*, the judge in remanding the accused into custody said nothing to lead to the conclusion that if it had been shown that the offence was committed within the territorial limits of the province, there would not have been jurisdiction in the magistrate of the county in which it was committed. He, however, held that the great lakes form part of the high seas, and were, therefore, even though the offence had been committed in American waters, under the jurisdiction of the Admiralty, and that, by the Imperial statutes to which he referred, that jurisdiction had been conferred upon certain persons, and, amongst others, upon the magistrate who had committed the prisoner to gaol. *R. v. Mickleham*, 10 Can. Cr. Cas. 382, at 386, distinguishing *R. v. Keyn*, 13 Cox C.C. 403; and see *United States v. Grush* (1829), 5 Mason's Reports 290.

*Arrests for offences committed on the high seas*—As to the issue of warrants of arrest, see sec. 656; *R. v. Neilson* (1918), 30 Can. Cr. Cas. 1 (N.S.).

*Certificate of Governor-General granting leave to prosecute*—Sec. 4 of the Territorial Waters Jurisdiction Act (Imp.) enacts that "On the trial of any person who is not a subject of Her Majesty, for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver, in any indictment on such trial, that such consent or certificate of the . . . Governor, as is required by this Act, has been given; and the fact of the same having been given shall be presumed, unless disputed by the defendant at the trial; and the production of a document purporting to be signed by . . . the Governor, and containing such consent and certificate, shall be sufficient



evidence, for all purposes of this Act, of the consent or the certificate required by this Act."

In British Columbia, Morrison, J., held that a preliminary enquiry may be begun in respect of an indictable offence committed by a foreigner on a British ship within the three-mile limit without first obtaining the leave of the Governor-General under Code sec. 591, and the accused may be remanded for the purpose of obtaining the leave of the Governor-General for the trial and punishment of the accused. *R. v. Tano* (1909) 14 B.C.R. 200, 14 Can. Cr. Cas. 440. The Territorial Waters Jurisdiction Act, 1878 (Imp.), from which Code sec. 591 is derived, was held applicable to the offence, and Morrison, J., held that the phrase "proceedings for the trial" used in Code sec. 591 must be construed in accordance to the statutory limitation which sec. 4 of the Imperial statute (quoted above) provides. *R. v. Tano*, supra; compare *R. v. Neilson* (1918), 30 Can. Cr. Cas. 1 (N.S.); *R. v. Adolph*, 12 Can. Cr. Cas. 413 (N.S.); *R. v. Heckman*, 5 Can. Cr. Cas. 242 (N.S.).

Code sec. 656 gives express authority to arrest in Canada a person charged with crime on the high seas, and such right is independent of the certificate for which sec. 591 provides. *R. v. Neilson* (1918), 30 Can. Cr. Cas. 1 (N.S.).

*Admiralty offences*—See Code secs. 8, 137-140, 335 (b), 591, 656, 855 (h).

*Canadian Jurisdiction over extra-territorial Admiralty offences*—See 12-13 Vict., Imp., ch. 96, secs. 1 and 2; 18-19 Vict., Imp., ch. 91, secs. 21; 23-24 Vict., Imp., ch. 122; 28-29 Vict., Imp., ch. 63; Merchant Shipping Amendment Act, 30-31 Vict. (Imp.), ch. 124, sec. 11; Courts (Colonial) Jurisdiction Act, 1874, 37 Vict., Imp., ch. 27; Territorial Waters Jurisdiction Act, 1878, 41-42 Vict., Imp., ch. 73; 53-54 Vict., Imp., ch. 37; Merchant Shipping Act, 57-58 Vict., Imp., ch. 60, secs. 687 and 688; Merchant Shipping Acts, 1894-1914, Imp.

*When bays, gulfs, etc., form part of adjacent county*—On the sea-coast it is only the land not covered by the sea which forms part of the adjoining county and therefore the jurisdiction of the courts of the county does not extend below low water mark. Bays, gulfs, mouths of rivers, harbours, ports, roadsteads, or waters between jaws of land where one can see from one bank to another form part of the neighbouring or adjacent counties, and, therefore, an offence committed in these waters is within the territorial jurisdiction and not that of the admiralty. *Duguay v. North American Transportation Co.*, 22 Que. S.C. 517; *R. v. Schwab*, (1907) 12 Can. Cr. Cas. 539 (N.S.); *The Wavelet* Young's Admiralty Decisions, 34 (N.S.); *R. v. Bruce*, 2 Leach 1093.

A charge against a foreigner for theft committed upon and from a foreign ship while it was lying in a Canadian harbour within the body of the county may be prosecuted without the leave of the Governor-General, under sec. 591. *R. v. Schwab*, 12 Can. Cr. Cas. 539.

**Disclosing official secrets.**

**592.** No person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, without the consent of the Attorney General or of the Attorney General of Canada.

*Origin*—Sec. 543, Code of 1892; 53 Vict., Can., ch. 10, sec. 4.

*Disclosing official secrets*—See Code secs. 85 and 86.

*Consent of Attorney-General*—The consent may include more than one offence; *R. v. Thompson*, 5 W.W.R. 157, 22 Can. Cr. Cas. 78; and several offences may be included in an indictment with a separate count as to each, subject to an order being made for separate trial upon one or more counts. Secs. 856-858.

In an English case the appellant was convicted at the Central Criminal Court of an offence under sec. 1 of the Trading with the Enemy Act, Imp., 1914. Sec. 1, sub-sec. 4, of that Act provides that: "A prosecution for an offence under this section shall not be instituted except by or with the consent of the Attorney-General." It was proved at the police court that the consent of the Attorney-General to the prosecution of the appellant had been obtained, but no proof of the consent was given at the trial. No objection was taken at the trial that the consent had not been proved. The Court of Appeal dismissed the appeal, distinguishing *Rex v. Bates* [1911] 1 K.B. 964, and following *Rex v. Waller* [1910] 1 K.B. 364; *Rex v. Metz*, 84 L.J.K.B. 1462, 11 Cr. App. R. 164; and see notes to secs. 85 and 86. But it would seem that a conviction cannot stand if the consent has not in fact been obtained; *R. v. Bates*, supra; and if the indictment is dependent upon a magistrate's order of committal, the consent must be obtained before the preliminary proceedings before the magistrate. *R. v. Barnett* (1889), 17 Ont. R. 649.

The absence of the consent is a matter of defence. *Rex v. Thompson*, 22 Can. Cr. Cas. 78, 5 W.W.R. 157. Stuart, J., there said: "The case of *Rex v. Canadian Pacific Railway*, (1907) 12 Can. Cr. Cas. 549, is clearly distinguishable. In that case the judgment went specifically upon the ground that the magistrate, before taking the information, had no communication of any kind from the Attorney-General indicating that his consent had been given. A careful examination of that case will show that the exact effect of the decision is, that before receiving an information, the magistrate must have had communicated to him in some way or other, the consent of the Attorney-General. The case does not decide what would or would not be a sufficient communication. It merely decides, that where there is no communication at all there is no jurisdiction in the magistrate to proceed."

Compare *Thorpe v. Prestnall*, [1897] 1 Q.B. 159; *R. v. Neilson*, (1918) 30 Can. Cr. Cas. 1 (N.S.).

"Attorney-General"]—See definition in sec. 2, sub-sec. (2).

*Powers of Deputy Attorney-General*—The Interpretation Act, R.S.C. 1906, ch. 1, sec. 31, enacts that, unless the contrary intention appears, words empowering certain public officers to do any act include deputy officers. But see *re* the Criminal Code, 16 Can. Cr. Cas. 459, decided under Code sec. 873A, and the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 17. It would seem to follow from that decision that the Deputy Attorney-General of a province cannot give the consent required by sec. 592, but that the deputy of the Attorney-General of Canada may do so. The public officers or functionaries referred to in sub-sec. (m) of sec. 31 of the Federal Interpretation Act would thus be limited to those appointed under federal statutes and whose removal or suspension is dealt with by sub-sec. (k) of the same section. But an "acting Attorney-General" of a province is the Attorney-General *pro tem.* and could give the consent. *R. v. Faulkner*, 19 Can. Cr. Cas. 47, 16 B.C.R. 229, decided under Code sec. 873.

*Indictment not bad for omission to state the consent*—See sec. 855 (h).

#### Judicial corruption.

**593.** No one holding any judicial office shall be prosecuted for the offence of judicial corruption, without the leave of the Attorney General of Canada.

*Origin*—Sec. 544, Code of 1892.

"Holding any judicial office"—This phrase is used in sec. 156 as to bribery or corrupt practices. Sec. 156 also deals with bribery of members of Parliament or of a legislature, but the limitations of sec. 593 apply only to the judiciary.

*Leave of Attorney-General of Canada*—See notes to secs. 85, 592 and 594. Sec. 593 requires the consent of the Attorney-General of Canada (the Minister of Justice). Where, as in secs. 592, 594, *et seq.*, the consent of the "Attorney-General" is required, it refers to the Attorney-General or Solicitor-General of the province, or in the case of a territory under federal administration, the Attorney-General of Canada. Sec. 2, sub-sec. (2).

*Indictment not bad for omission to state the consent*—See sec. 855 (h).

#### Making explosive substances.

**594.** If any person is charged under section 113, before a justice with the offence of making or having explosive substances, no further proceeding shall be taken against such person without the consent of the Attorney General except such as the justice

thinks necessary, by remand or otherwise, to secure the safe custody of such person.

*Origin*—Sec. 545, Code of 1892; R.S.C. 1886, ch. 150, sec. 5.

*Making or possessing explosives with intent*—See sec. 113 (b).

*Omission of consent*—The appellant was convicted under sec. 2 of the Explosive Substances Act, 1883 (Imp.), for feloniously causing an explosion of a nature likely to endanger life, or of a nature to cause serious injury to property. The consent of the Attorney-General to the prosecution required by sec. 7 of the Act had not in fact been given. Held, that as the Attorney-General's consent had not been obtained to the proceedings, the conviction must be quashed. The court could not treat the absence of the consent as involving no substantial miscarriage of justice. *R. v. Bates* [1911] 1 K.B. 964, 27 Times L.R. 964, and see *R. v. Metz* (1915) 11 Cr. App. R. 164, 84 L.J.K.B. 1462. See also notes to secs. 85 and 592. The failure to state the consent in the indictment itself is not fatal. Sec. 855 (h).

#### **Sending unseaworthy ship to sea.**

**595.** No person shall be prosecuted for the offence of sending an unseaworthy ship to sea on a voyage without the consent of the Minister of Marine and Fisheries.

*Origin*—Sec. 546, Code of 1892.

*Proof of consent*—See notes to secs. 85, 592 and 594.

*Indictment not bad for omission to state the consent*—See sec. 855 (h).

*Sending out unseaworthy ships*—See sec. 288.

*Shipping Act*—Prosecutions under Part XV of the Shipping Act may be proceeded with under Part XV of the Code, but the consent of the Minister of Marine and Fisheries is essential. R.S.C. 1906, ch. 113, sec. 948.

#### **Criminal breach of trust.**

**596.** No proceeding or prosecution against a trustee for a criminal breach of trust shall be commenced without the sanction of the Attorney General.

*Origin*—Sec. 547, Code of 1892; R.S.C. 1886, ch. 164, sec. 65.

*Proof of consent*—See notes to secs. 85, 592 and 594.

*Indictment not bad for omission to state the consent*—See sec. 855 (h).

*Criminal breach of trust*—This offence is dealt with by sec. 390.

**Fraudulent acts of vendor or mortgagor.**

**597.** No prosecution for concealing any settlement, deed, will, or other instrument material to any title, or any encumbrance, or falsifying any pedigree upon which any title depends, shall be commenced without the consent of the Attorney General, given after previous notice to the person intended to be prosecuted of the application to the Attorney General for leave to prosecute.

*Origin*—Sec. 548, Code of 1892; R.S.C. 1886, ch. 164, sec. 91.

*Vendor concealing deed or encumbrance*—See Code sec. 419.

*Falsifying pedigree material to title*—See sec. 419.

*Attorney-General*—See sec. 2 (2).

*Proof of consent*—See notes to secs. 85, 592 and 594.

*Indictment not bad for omission to state the consent*—See sec. 855 (h).

**Uttering defaced coin.**

**598.** No proceeding or prosecution for the offence of uttering any coin defaced by having stamped thereon any names or words, shall be taken without the consent of the Attorney General.

*Origin*—Sec. 549, Code of 1892.

*Attorney-General*—See sec. 2 (2).

*Proof of consent*—See notes to secs. 85, 592 and 594.

*Indictment not bad for omission to state the consent*—See sec. 855 (h).

**Provisions as to Ontario and Nova Scotia.****Practice in High Court of Justice in Ontario.**

**599.** The practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario which are not provided for by this Act, shall be the same as the practice and procedure in similar cases and matters heretofore.

*Origin*—Code of 1892, sec. 754; 46 Vict., Can., ch. 10, sec. 2.

*Ontario practice*—Sec. 599 preserves (*inter alia*) the Ontario practice of *certiorari* for the review of a conviction under Part XVI, as to which there is no jurisdiction to hear an appeal on a case reserved by the magistrate. *R. v. Booth*, (1914) 23 Can. Cr. Cas. 224, 31 O.L.R. 539.

It is held in Ontario that, if the summary trial being under sec. 777, a case might have been reserved or stated, *certiorari* will not lie; *R. v.*

Sinclair, 38 O.L.R. 149, 11 O.W.N. 131, 28 Can. Cr. Cas. 350; but a different rule is applied in several other provinces. See note to sec. 777.

*Supreme Court of Ontario*—The High Court of Justice has, by provincial legislation, been merged in the Supreme Court of Ontario.

*Ontario Rules of Court in criminal matters*—See sec. 576.

**Commission of court of assize, etc.—Who shall preside.**

**600.** If any general commission for the holding of a court of assize and *nisi prius*, oyer and terminer or general gaol delivery is issued by the Governor General for any county or district in the province of Ontario, such commission shall contain the names of the justices of the Supreme Court of Judicature for Ontario, and may also contain the names of the judges of any of the county courts in Ontario, and of any of His Majesty's counsel learned in the law duly appointed for the province of Upper Canada, or for the province of Ontario, and if any such commission is for a provisional judicial district such commission may contain the name of the judge of the district court of the said district.

2. The said courts shall be presided over by one of the justices of the said Supreme Court, or in their absence by one of such county court judges or by one of such counsel, or in the case of any such district by the judge of such district court.

*Origin*—Code of 1892, sec. 755; R.S.C. 1886, ch. 174, sec. 271.

*Commissions of assize, etc. in Ontario*—Sec. 600 is a restriction upon the prerogative powers exercisable by the Governor-General of Canada in respect of the issue of commissions of assize and of oyer and terminer and general gaol delivery in the province of Ontario. It is supplementary also to the legislation contained in the Judges' Act, R.S.C. 1906, ch. 138, having a general application throughout Canada, which declares or confirms the concurrent power of provincial lieutenant-governors as to the issue of similar commissions for trial of criminal cases. See *R. v. Amer* (1878) 42 U.C.Q.B. 391.

The Judicature Act, R.S.O. 1914, ch. 56, sec. 3, continues the Supreme Court of Ontario as a superior court of record, having civil and criminal jurisdiction; and sec. 49 of the same Act enacts that commissions of assize or any other commissions either general or special may be issued by the "Lieutenant Governor in Council" for the trial of matters in that court, "or for the exercise of any civil or criminal jurisdiction capable of being exercised by the court."

A provincial legislature having legislative power over the constitution of criminal courts may dispense with the issue of commissions of

assize without concurrent legislation by the Dominion Parliament being obtained in respect of the incidental change in practice whereby the reading of a commission at the opening of the court is omitted. *R. v. Walker*, 16 Can. Cr. Cas. 77, 15 B.C.R. 100.

*Provisional judicial districts in Ontario*—See sec. 585.

#### Gaol delivery by court of General Sessions.

**601.** It shall not be necessary for any court of general sessions in the province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do.

*Origin*—Code of 1892, sec. 756; R.S.C. 1886, ch 174, sec. 272.

*Jurisdiction of Sessions of the Peace in Ontario*—By R.S.O. 1914, ch. 60, sec. 3, "The Courts of General Sessions of the Peace shall have jurisdiction to try all criminal offences except homicide, and the offences mentioned in sec. 583 of the Criminal Code of Canada." Code sec. 582 also affirms the power of the Sessions to "try any indictable offence" except those mentioned in sec. 583, which includes treason, murder, manslaughter and various other crimes.

The judge of the county or the district court, as the case may be, or, in case of his death, illness or absence or, at his request the junior or deputy judge shall be the chairman of the court and shall preside at the sittings thereof. *Ibid.* sec. 7

As to what constitutes "absence," see *Brunet v. The King* (1918) 57 S.C.R. 83, 30 Can. Cr. Cas. 16; *ex parte Cormier*, 17 Can. Cr. Cas. 179 (N.B.); *Byrne v. Arnold*, 24 N.B.R. 161.

Where a judge is present it shall not be necessary, in order to constitute the court, that an associate or other justice of the peace should be present. *Ibid.* sec. 8.

Where a judge is unable to hold the sittings at the time appointed the sheriff or his deputy may, by proclamation, adjourn the court to any hour on the following day to be by him named, and so from day to day until he received other directions from the judge or from the Attorney-General. The sheriff shall forthwith give notice of such adjournment to the Attorney-General. *Ibid.* sec. 9.

The court of general sessions is not properly an inferior court; it is a court of oyer and terminer. *R. v. McDonald* (1871), 31 U.C.Q.B. 337; *Campbell v. R.*, 11 Q.B. 799, 814. It is, however, a court which does not possess any greater powers than are conferred upon it by statute. It has a general jurisdiction over offences attended with a

breach of the peace, and has also such other powers as are conferred upon it by statute. *R. v. Dunlop*, 15 U.C.Q.B. 118; *R. v. McDonald* (1871), 31 U.C.Q.B. 337.

#### Calendar of criminal cases in Nova Scotia.

**602.** In the province of Nova Scotia a calendar of the criminal cases shall be sent by the Clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses.

*Origin*].—Sec. 760, Code of 1892; 63-64 Vict., Can., ch. 46, sec. 3,

*Nova Scotia practice*].—To a similar provision of the Code of 1892 was added a clause directing that "the indictments shall not be made out (except in Halifax) until the grand jury so directs." This prohibition was dropped on the amendment contained in 63-64 Vict., ch. 46. Before any witnesses were examined by the grand jury in Nova Scotia, they were furnished by the clerk of the Crown, with the calendar, the depositions and the names of the witnesses. In England they are furnished by the prosecutor with a bill of indictment, with the names of the witnesses indorsed thereon. The witnesses are then sent before the grand jury. The jurors learn the charge and the names of the witnesses—in the one case from the calendar, depositions and the list of witnesses, and in the other from the bill and the indorsement of the witnesses' names. See *R. v. Townsend*, 3 Can. Cr. Cas. 29 at 36, 28 N.S.R. 468.

The grand jury come into court and report that in certain cases they are prepared to find bills.

The grand jury, under this section, has the power to direct that indictments shall be prepared in all cases upon the calendar furnished to them, even though they may not be prepared to find them, and may intend not to do so. Assuming they do not so direct, it is nevertheless competent for them, through their foreman, to indorse the words "no bill," or other equivalent expression, upon the depositions in each case, or upon the calendar, opposite to the title of each cause, which they return to the court. *R. v. Townsend*, 3 Can. Cr. Cas. 29, at 52, 28 N.S.R. 468.

The omission to send to a grand jury the depositions along with the calendar in Nova Scotia will not invalidate an indictment found without such depositions. *R. v. Turpin* (1904), 8 Can. Cr. Cas. 59 (N.S.).

*Terms and sessions in Nova Scotia*].—Sec. 27 of the Nova Scotia Judicature Act, R.S.N.S. 1900, ch. 155, is not *ultra vires* of the Nova Scotia legislature in respect of the change it purports to make in the times at which fixed sessions of certain provincial courts of criminal jurisdiction are to take place. *R. v. Cook*, 48 N.S.R. 150, 23 Can. Cr. Cas. 50.



**Sentences in Nova Scotia.**

**603.** A judge of the Supreme Court of Nova Scotia may sentence convicted criminals on any day of the sittings at Halifax, as well as in term time.

*Origin*—Code of 1892, sec. 761; R.S.C. 1886, ch. 174, sec. 277.

*Sentence out of term of court*—As to fixed sessions of court, see R.S.N.S. 1900, ch. 155; R. v. Cook, 48 N.S.R. 150, 23 Can. Cr. Cas. 50.

**Powers General of Certain Officials.****Officials with powers of two justices.**

**604.** The Judge of the Sessions of the Peace for the city of Quebec, the Judge of the Sessions of the Peace for the city of Montreal, and every recorder, police magistrate, district magistrate or stipendiary magistrate appointed for any territorial division, and every magistrate authorized by the law of the province in which he acts to perform acts usually required to be done by two or more justices, may do alone whatever is authorized by this Act to be done by any two or more justices.

*Origin*—Code of 1892, sec. 541; R.S.C. 1886, ch. 174, sec. 7.

*Limited jurisdiction of Court of Sessions*—See secs. 582 and 583.

*Magistrate "appointed for any territorial division"*—The jurisdiction of a stipendiary magistrate appointed for an entire county is not ousted as to a town within the county by the appointment of a stipendiary magistrate for the town; but both may have concurrent jurisdiction, unless the town magistrate's appointment is specifically made to confer exclusive jurisdiction within the town limits. R. v. Giovanetti, 34 N.S.R. 505, 5 Can. Cr. Cas. 157; R. v. Coady (1915) 48 N.S.R. 255, 23 Can. Cr. Cas. 434.

*Courts of Sessions of the Peace at Montreal and Quebec*—The court of general sessions of the peace at Montreal, sometimes called the court of quarter sessions, has power to hear and determine all matters relating to the preservation of the peace, and its jurisdiction may be exercised by the other court known as the "Court of the Sessions of the Peace" established by article 3259 R.S.Q.; there is in strictness no "police magistrate's court," the acts of the magistrate are not acts of "a court" although the place of hearing is by Code sec. 714 to be deemed an open court. R. v. Walker, (1913) 23 Can. Cr. Cas. 179.

The wording of art. 3351, R.S.Q., is such as to imply that the old common law powers of justices of the peace in the province of Quebec are preserved, and are to be taken as conferred upon them by the fact of their appointment. R. v. Walker, 23 Can. Cr. Cas. 179, at 185.

*Substitute judges of the Sessions Court*—See Brunet v. The King (1918) 57 S.C.R. 83, 30 Can. Cr. Cas. 16, and notes to secs. 777, 824-827.

**Clerk of the Peace, Montreal.**

**605.** In the district of Montreal the Clerk of the Peace or Deputy Clerk of the Peace shall have all the powers of a justice under Parts XIII and XIV, and under secs. 629 to 643, inclusive.

*Origin*—58-59 Vict., Can., ch. 40, sec. 1.

*Search warrants and orders for search*—See secs. 626-643, inclusive.

*Compelling appearance of accused before justices*—See secs. 646-667 (Part XIII).

*Preliminary inquiry into indictable offence*—See secs. 668-704 (Part XIV).

**Jurisdiction as to prize fights.**

**606.** Every judge of a superior court or of a county court, judge of the sessions of the peace, stipendiary magistrate, police magistrate, and commissioner of police of Canada, shall, within the limits of his jurisdiction as such judge, magistrate or commissioner, have all the powers of a justice with respect to offences against provisions of this Act as to prize fights.

*Origin*—R.S.C. 1886, ch. 153, sec. 10.

*Prize fight offences*—These are dealt with in secs. 2 (31), 104 to 108, inclusive, and in secs. 627, 628 and 1059.

**Preserving order in court.**

**607.** Every judge of the sessions of the peace, chairman of the court of general sessions of the peace, police magistrate, district magistrate or stipendiary magistrate, shall have such and like powers and authority to preserve order in courts held by them during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any court in Canada, or by the judges thereof, during the sittings thereof.

*Origin*—Code of 1892, sec. 908, R.S.C. 1886, ch. 178, sec. 109.

*"To preserve order"*—The authority conferred is for the purpose of preserving order in the court. This may ordinarily be effected by directing that the offender be removed.

The power given by sec. 607 to police magistrates and other named officials does not extend to proceedings for contempts committed out of court. *Re Scaife*, 5 B.C.R. 153. As to contempt of court by improper newspaper comment, see sec. 322.

A summary trial court under Part XVI of the Code is an "open public court." Sec. 787. A county court judge's criminal court holding a "speedy trial" under Part XVIII over which a judge of the sessions of the peace may preside in Ontario or Quebec (sec. 823) is a "court of record." Sec. 824. A magistrate trying a charge under the Summary Convictions Act (Part XV of the Code) is not a court of record, but by sec. 714 the place where the trial takes place is to be deemed "an open and public court to which the public generally may have access so far as the same can conveniently contain them." Code sec. 714.

*Ways and means as now are or may be exercised, etc.*—The word "now" was included in the corresponding sec. 109 of the former Code from which this section is derived, but the effect of the re-enactment may be to make applicable the law as it stood at the time when the Revised Statutes of Canada, 1906, came into effect (31 January, 1907).

*Commitment in writing*—The commitment should be in writing and for a definite period. *Armstrong v. McCaffrey*, 12 N.B.R. 525; *R. v. Scott*, 2 C.L.J. 323; *ex parte Porter*, 5 B. & S. 209.

#### Resistance to execution of process.

**608.** Every judge of the sessions of the peace, chairman of the court of general sessions of the peace, recorder, police magistrate, district magistrate or stipendiary magistrate, whenever any resistance is offered to the execution of any summons, warrant of execution or other process issued by him, may enforce the due execution of the same by the means provided by the law for enforcing the execution of the process of other courts in like cases.

*Origin*—Code of 1892, sec. 909 and 56 Vict., ch. 32, sec. 1; R.S.C. 1886, ch. 178, sec. 110.

*Assault on person executing process*—See sec. 296.

#### *Special Powers and Duties of Certain Officials.*

##### **Persons carrying weapon in proclaimed district.—Arrest.—Committal.**

**609.** Any commissioner, or justice, constable or peace officer, or any person acting under a warrant, in aid of any constable or peace officer, may arrest and detain any person employed on any public work, found carrying any weapon, within any place in which Part III is, at the time, in force, at such time and in such manner as, in the judgment of such commissioner, justice, constable or peace officer, or person acting under a warrant,

afford just cause of suspicion that it is carried for purposes dangerous to the public peace.

2. The justice or commissioner arresting such person, or before whom he is brought, may commit him for trial unless he gives sufficient bail for his appearance at the next term or sitting of the court before which the offence can be tried, to answer to any indictment to be then preferred against him.

*Origin*—R.S.C. 1886, ch. 151, sec. 7.

*Carrying weapon in proclaimed district*—See secs. 142 to 149, inclusive.

*Commissioner's return to Government as to weapons received*—See sec. 1136.

*Defects of form*—By Code sec. 1132 no action or other proceeding, warrant, judgment, order or other instrument or writing authorized by any provisions of Part XII relating to Part III, or necessary to carry out its provisions, shall be held void or be allowed to fail for defect of form.

*Search and seizure of weapons*—See secs. 610-612.

#### Search warrant for weapons.

**610.** Any commissioner or any justice having authority within any place in which Part III is at the time in force, upon oath before him of belief of the deponent that any weapon is in the possession of any person or in any house or place contrary to the provisions of Part III, may issue his warrant to any constable or peace officer to search for and seize the same.

2. Such constable or peace officer, or any person in his aid, may search for and seize the same in the possession of any person, or in any such house or place.

*Origin*—R.S.C. 1886, ch. 151, sec. 8.

*Warrant to search for weapons in proclaimed districts*—See secs. 144 to 149 inclusive and secs. 1132 and 1136.

*Defects of form*—See Code sec. 1132.

#### Right of entry for search.—Confiscation of weapon.

**611.** If admission to any such house or place is refused after demand, such constable or peace officer and any person in his aid, may enter the same by force, by day or by night, and seize any such weapon and deliver it to such commissioner or justice.

2. Unless the person in whose possession or in whose house or premises the same is found, within four days next after the seizure, proves to the satisfaction of such commissioner or justice that the weapon so seized was not in his possession or in his house or place contrary to the provisions of Part III, such weapon shall be forfeited to the use of His Majesty.

*Origin*—R.S.C. 1886, ch. 151, sec. 9.

*Warrant to search for weapons in proclaimed districts*—See secs. 144 to 149 inclusive and secs. 1132, 1136.

*Return by Commissioner to Secretary of State*—See sec. 1136.

#### **Disposal of forfeited arms.**

**612.** All weapons declared forfeited under Part III, shall be sold or destroyed under the direction of the commissioner or justice by whom or by whose authority the same are seized, or before whom the same are brought, and the proceeds of such sale, after deducting necessary expenses, shall be received by such commissioner and paid over by him to the Minister of Finance for the public uses of Canada.

*Origin*—R.S.C. 1886, ch. 151, sec. 10.

*Forfeiture of weapons not delivered up*—See secs. 145, 611 (2).

*Defects of form*—See Code sec. 1132.

#### **Search for and seizure of liquors in proclaimed district.—Seized liquor securely kept.—Information when there is no shop or bar.**

**613.** If any person makes oath or affirmation before any such commissioner or justice, that he has reason to believe, and does believe, that any intoxicating liquor with respect to which a violation of the provisions of sec. 150 has been committed or is intended to be committed is on board of any steamboat, vessel, boat, canoe, raft, or other craft, or in any railway carriage or freight car, or in any carriage, vehicle or other conveyance, or in any railway station, freight shed or other railway building, or in or about any other building or premises, or in any other place within the limits specified in any proclamation under the said Part, the commissioner or justice shall issue a search warrant to any sheriff, police officer, constable or bailiff, who shall forthwith proceed to search the steamboat, vessel, boat, canoe,

raft or other craft, or the railway carriage, freight car, or the carriage, vehicle or conveyance, or the railway station, freight shed, or other railway building, or the other building or premises, or the place described in such search warrant.

2. If any intoxicating liquor is found therein or thereon the person executing such search warrant shall seize the intoxicating liquor and the barrels, casks, jars, bottles or other packages in which it is contained and shall keep it and them secure until final action is had thereon.

3. No dwelling house in which, or in part of which, or on the premises whereof, a shop or bar, is not kept, shall be searched, unless the said informant also makes oath or affirmation that some offence in violation of the provisions of the said section has been committed therein or therefrom within one month next preceding the time of making his said information for a search warrant.

*Origin*—6 and 7 Edw. VII, ch. 9, sec. 4; R.S.C. 1886, ch. 151, sec. 16.

*Additional power to seize on view*—“Every officer appointed under Part III of the Criminal Code, and every constable appointed under any law of Canada, may seize upon view anywhere upon the limits specified in any proclamation under said Part any intoxicating liquors in respect of which he has reason to believe that a violation of the provision of the said Part is intended, and he shall forthwith convey any liquor so seized together with the owner or person in possession thereof, before a commissioner or justice, who shall thereupon proceed as is provided by sec. 614.” Can. Statutes, 1907, 6-7 Edw. VII, ch. 9, sec. 6.

*Informant executing warrant as chief of police*—The fact that the informant as chief of police laid the information for and executed a search warrant under the Canada Temperance Act was held not to invalidate a summary conviction for keeping liquor for sale, although based upon the result of the search under the warrant. *Ex parte Dewar*, 39 N.B.R. 143, 15 Can. Cr. Cas. 273, distinguishing *Ex parte McCleave*, 35 N.B.R. 100, 5 Can. Cr. Cas. 115; *R. v. Swarts*, 27 Can. Cr. Cas. 90, 37 O.L.R. 103, and see *Ex parte Wilson*, 15 Can. Cr. Cas. 270, *Stone v. Vallee*, 18 Can. Cr. Cas. 223; *Gaul v. Ellice*, 6 Can. Cr. Cas. 15, 3 O.L.R. 438; *R. v. Le Blanc*, 21 Can. Cr. Cas. 221, 41 N.B.R. 99.

*“Intoxicating liquor”*—See definition in sec. 2 (17), as amended 6-7 Edw. VII, Can., ch. 9.

*Liquors in proclaimed district in vicinity of public work*—See Code secs. 150-154, 613-618, 639, 651.

*Defects of form*—See Code sec. 1132.

**Bringing the owner to answer.—Liquor forfeited and to be destroyed.—Attestation of destruction.**

**614.** The owner, keeper or person in possession of the intoxicating liquor so seized, if he is known to the officer seizing it, shall be brought forthwith before the commissioner or justice who issued the search warrant, and if it appears to the satisfaction of the commissioner or justice that a violation of the provisions of the said section has been committed, or was intended to be committed, with respect to such intoxicating liquor, it shall be declared forfeited, with any package in which it is contained, and shall be destroyed by authority of the written order to that effect of the commissioner or justice, and in his presence or in the presence of some person appointed by him to witness the destruction thereof.

2. (Repealed by Canada Statutes, 1907, chap. 9.)

3. Such commissioner or justice, or the person so appointed by him, and the officer by whom the said intoxicating liquor has been destroyed, shall jointly attest, in writing upon the back of the said order, the fact that it has been destroyed.

*Origin*].—6 and 7 Edw. VII, ch. 9, secs. 5 and 6; R.S.C. 1886, ch. 151, sec. 16.

*Seizure and destruction of liquors in proclaimed district*].—A commissioner of police appointed under R.S.C. 1906, ch. 92, was held to be a person "fulfilling a public duty" within the terms of the Ontario statute, R.S.O. 1897, ch. 88, and is entitled to notice of action thereunder before suit is brought against him for a return of a fine and costs alleged to have been irregularly levied upon the plaintiff by the commissioner in virtue of his office in respect of plaintiff's possession of intoxicating liquor within a prohibited district in alleged contravention of Criminal Code, secs. 150 and 151. Where an order for the forfeiture and destruction of intoxicating liquor seized was made by a commissioner of Dominion police assuming to act under the authority of Code sec. 614 in the presence of the owner of the liquor brought before him by the seizing officer, and the commissioner had, by statute, jurisdiction over the subject-matter and over the owner in respect thereof, a notice of action must be given within six months under R.S.O. 1897, ch. 88, even if the forfeiture was irregularly made or was wholly void or contrary to natural justice, and was not reduced to writing; and *semble* the action itself must be brought within six months under Criminal Code, sec. 1149. *Geller v. Loughrin*, 18 Can. Cr. Cas. 461, 24 O.L.R. 18, 19 O.W.R. 318; and see *R. v. Mitchell*, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588, as to waiver of the irregularity.

*Defects of form*].—See Code sec. 1132.

*Same proceedings when seizure is on view*].—See note to sec. 613.

**Owner, keeper or possessor may be convicted at once.**

**615.** The owner, keeper or person in possession of any intoxicating liquor so seized and forfeited may be convicted of an offence against the said section without any further information laid or trial had, and shall be liable to the penalties mentioned in sec. 151.

*Origin*].—R.S.C. 1886, ch. 151, sec. 17.

*Defects of form*].—See Code sec. 1132.

**Procedure if owner is unknown.—When liquor may be delivered to owner.—Forfeiture and destruction in other cases.**

**616.** If the owner, keeper or possessor of intoxicating liquor seized as aforesaid, is unknown to the officer seizing the same, it shall not be condemned and destroyed until the fact of such seizure, with the number and description of the packages, as near as may be, has been advertised for two weeks by posting up a written or a printed notice and description thereof, in at least three public places, in the place where it was seized.

2. If it is proved within such two weeks to the satisfaction of the commissioner or justice by whose authority such intoxicating liquor was seized, that with respect to such intoxicating liquor no violation of the provisions of sec. 150 has been committed or is intended to be committed, it shall not be destroyed, but shall be delivered to the owner, who shall give his receipt therefor in writing upon the back of the search warrant, which shall be returned to the commissioner or justice who issued the same.

3. If after such advertisement as aforesaid, it appears to such commissioner or justice that a violation of the provisions of the said section has been committed or is intended to be committed, then such intoxicating liquor, with any package in which it is contained, shall be forfeited and destroyed as hereinbefore provided.

*Origin*].—R.S.C. 1886, ch. 151, sec. 17.

*Liquor forfeited and destroyed in proclaimed district*].—See Code secs. 150-154, 614, 615, 617, 618.

*Defects of form*].—See Code sec. 1132.



**Evidence of precise description of liquor not necessary.**

**617.** In any prosecution under this Act for any offence with respect to intoxicating liquor, it shall not be necessary that any witness should depose directly to the precise description of the liquor with respect to which the offence has been committed, or to the precise consideration therefor, or to the fact of the offence having been committed with his participation or to his own personal and certain knowledge; but the commissioner or justice trying the case, so soon as it appears to him that the circumstances in evidence sufficiently establish the offence complained of, shall put the defendant on his defence, and in default of such evidence being rebutted, shall convict the defendant accordingly.

*Origin*—R.S.C. 1886, ch. 151, sec. 19.

*When onus of proof is shifted*—Compare with Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 141.

*Defects of form*—See Code sec. 1132.

**Summary convictions.—Part XV to apply.—Commissioner a justice under Part XV.**

**618.** Any commissioner or justice may hear and determine, in manner provided by Part XV, any case arising within his jurisdiction.

2. All the provisions of Part XV, shall, in so far as they are not inconsistent with this Part, apply to every commissioner or justice mentioned in this Part or empowered to try offenders against Part III.

3. Every such commissioner shall be deemed a justice within the meaning of Part XV, whether he is or is not a justice for other purposes.

*Origin*—R.S.C. 1886, ch. 151, secs. 20 and 21.

*Commissioners of police*—The statute, R.S.C. 1906, ch. 92, "An Act respecting the Police of Canada," provides for the appointment of commissioners of police and confers upon them "all the powers and authority, rights and privileges by law appertaining to justices of the peace generally and within any province all the powers and authority, rights and privileges by law appertaining to police magistrates of cities in the same province."

The Act also provides that "every such commissioner shall be subject in all respects except as otherwise provided by this Act, to the law of

the province, district or territory in which he is acting, respecting police magistrates and the office of justice of the peace."

\* A mistake by mis-description of the official capacity of the magistrate in the proceedings before the final adjudication whereby a "commissioner of police" having the authority of two justices of the peace was wrongly described in the preliminary proceedings as a "justice of the peace" will not invalidate a summary conviction made by him as a commissioner of police if he was correctly designated as such both in the memorandum of adjudication and in the formal conviction. *R. v. Fitzgerald* (1911), 1 W.W.R. 109, 19 Can. Cr. Cas. 39, 19 W.L.R. 462 (Alta.).

*Any commissioner or justice*—As to the appointment of commissioners for the purposes of Part III, see Code sec. 144.

*Under Part XV*—Part XV is known as the Summary convictions clauses, and includes Code secs. 705 to 770 inclusive.

*Defects of form*—By Code sec. 1132 no action or other proceeding, warrant, judgment, order or other instrument or writing authorized by any provisions of Part XII relating to Part III, or necessary to carry out its provisions, shall be held void or be allowed to fail for defect of form.

#### **Justices may disarm persons attending meeting.**

**619.** Any justice within whose jurisdiction any public meeting is appointed to be held may demand, have and take of and from any person attending such meeting, or on his way to attend the same, without his consent and against his will, by such force as is necessary for that purpose, any offensive weapon, such as firearms, swords, staves, bludgeons, or the like, with which any such person is so armed, or which any such person has in his possession.

*Origin*—R.S.C. 1886, ch. 152, sec. 1.

*Penalty for refusing to deliver up weapon*—See sec. 126.

*Return of weapons on following day*—See secs. 620 and 621.

*Confiscation of weapons on conviction*—See secs. 622, 120-124.

#### **Restitution of weapons.**

**620.** Upon reasonable request to any justice to whom any such weapon has been peaceably and quietly delivered as aforesaid, made on the day next after the meeting has finally dispersed, and not before, such weapon shall, if of the value of one

**Officer of Customs may seize the coin.**

**626.** Any officer of Customs may seize any copper coin imported or attempted to be imported into Canada in violation of this Act, and may detain the same as forfeited, to await the disposal of the Governor General, for the public uses of Canada.

*Origin*—R.S.C. 1886, ch. 167, sec. 32.

*Unlawful importation of copper coin*—See sec. 554.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

**Proceedings when prize-fight anticipated.—Arrest.—Recognizance.—Commitment in default.**

**627.** If, at any time, the sheriff of any county, place or district in Canada, any chief of police, any police officer, or any constable or other peace officer has reason to believe that any person within his bailiwick or jurisdiction is about to engage as principal in any prize-fight within Canada, he shall forthwith arrest such person and take him before a justice, and shall forthwith make complaint in that behalf, upon oath, before such justice.

2. Such justice shall inquire into the charge, and if he is satisfied that the person so brought before him was, at the time of his arrest, about to engage as a principal in a prize-fight, he shall require him to enter into a recognizance, with sufficient sureties, in a sum not exceeding five thousand dollars and not less than one thousand dollars, conditioned that he will not engage in any such fight within one year from and after the date of such arrest.

3. In default of such recognizance, the justice before whom the accused has been brought shall commit the accused to the gaol of the county, district or city within which such inquiry takes place, or if there is no common gaol there, then to the common gaol nearest to the place where such inquiry is had, there to remain for the space of one year or until he gives such recognizance with such sureties.

*Origin*—R.S.C. 1886, ch. 153, sec. 6.

*Prize fight offences*—See secs. 2 (31), 104-108, 606, 627, 628, 1059.

*Consideration of release following imprisonment in default for two weeks*—See sec. 1059.

**Sheriff may summon posse.—Prevent the fight and arrest persons present.**

**628.** If any sheriff has reason to believe that a prize-fight is taking place or is about to take place within his jurisdiction as such sheriff, or that any persons are about to come into Canada at a point within his jurisdiction, from any place outside of Canada, with intent to engage in, or to be concerned in, or to attend any prize-fight within Canada, he shall forthwith summon a force of the inhabitants of his district or county sufficient for the purpose of suppressing and preventing such fight.

2. Such sheriff shall with their aid, suppress and prevent the same, and arrest all persons present thereat, or who come into Canada as aforesaid, and shall take them before a justice to be dealt with according to law.

*Origin*—R.S.C. 1886, ch. 153, sec. 7.

*Prize fight offences*—Code sec. 2, sub-sec. (31), 104-108, 627, 628, 1059.

**Information for search warrant.—Form.**

**629.** Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building, receptacle, or place,—

- (a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed; or,
- (b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or,
- (c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant;

may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law.

*Origin*—Code of 1892, sec. 569; R.S.C. 1886, ch. 174, secs. 51 and 52.

*Search warrants generally*—The Criminal Code (sec. 629 *et seq.*) provides for the issue of search warrants in a variety of cases. The common law authorized the issue of a search warrant only in the case of larceny or suspected larceny: Encyclopædia of the Laws of England, 2nd ed., vol. 13, tit. "Search Warrants," p. 199; Jones v. German [1896] 2 Q.B. 418 and [1897] 1 Q.B. 374; Ho Quong v. Cuddy, (1914) 7 W.W.R. 797 (Alta.).

It would seem that the effect of sec. 629 upon the common law warrant for stolen goods must be either to supersede entirely the common law warrant or to make it subject to the same requirements as the Code demands for a search warrant in respect of any offence.

A search warrant issued under sec. 629 is a judicial proceeding, and may be removed by *certiorari*. R. v. Kehr, 11 Can. Cr. Cas. 52, 11 O.L.R. 517; R. v. Frain (1915), 24 Can. Cr. Cas. 389 (Sask.); R. v. Bender (1916), 36 O.L.R. 378, 26 Can. Cr. Cas. 393, 10 O.W.N. 102.

A search warrant for liquors may be issued under the Canada Temperance Act without first laying a charge against the custodian of the liquors for keeping them for sale. Townsend v. Cox, 12 Can. Cr. Cas. 509, [1907] A.C. 514.

See as to warrants to search for intoxicating liquor under various liquor laws: Townsend v. Beckwith, 42 N.S.R. 307, 14 Can. Cr. Cas. 353; R. v. Heffernan, 13 Ont. R. 616; *Ex parte* Dewar, 39 N.B.R. 143; *Ex parte* McCleave, 35 N.B.R. 100; R. v. Le Blanc, 41 N.B.R. 99, 21 Can. Cr. Cas. 221, 12 E.L.R. 66, *Ex parte* Doyle, R. v. Lawlor, 27 Can. Cr. Cas. 60, 42 N.B.R. 244; R. v. Swarts, 37 O.L.R. 103, 27 Can. Cr. Cas. 90; R. v. McGarry, 24 Ont. R. 52.

*Form of information to obtain search warrant*—See Code form 1, following sec. 1152.

*Information for search warrant*—The information on oath for the purpose of getting a search warrant is distinct from that required under Code sec. 654 for a warrant to arrest the suspected person. *Ex parte* Cavanagh, 34 N.B.R. 1, 2 Can. Cr. Cas. 267.

If the information discloses no criminal offence, the search warrant issued upon it will be set aside. R. v. Frain (1915), 24 Can. Cr. Cas. 389 (Sask.). So also if the information does not state the causes of suspicion (Code form 1); R. v. Kehr, 11 O.L.R. 517, 11 Can. Cr. Cas. 52; R. v. Frain (1915) 24 Can. Cr. Cas. 389; R. v. Bender (1916) 36 O.L.R. 378, 26 Can. Cr. Cas. 393; Roux v. Hewat [1919] 1 W.W.R. 530 (B.C.)

*"May" issue a warrant*—By the Interpretation Act, R.S.C. 1906, ch. 1, the word "may" is to be construed as permissive and the word "shall" as imperative, but this statutory direction is subject to the express qualification that the context does not otherwise require. Interpretation Act, R.S.C. 1906, ch. 1, sec. 34. The word "may" does not give an arbitrary power of refusal where what is to be done is in the

nature of a public duty, but it rather imports a judicial discretion; the official empowered is to consider and decide upon an application for a search warrant, and if he finds the contingency exists for which the statute provides the remedy, it is his duty to apply it and a mandamus will lie for his refusal to hear the application. *Cameron v. Wait*, 3 A.R. (Ont.) 193; *Bernardin v. Dufferin*, 19 Can. S.C.R. 581; *Dwyer v. Port Arthur*, 21 Ont. R. 175. But a mandamus will not lie to correct an erroneous decision of the justices upon a matter of judicial discretion as distinguished from a merely ministerial duty. *R. v. Middlesex Justices*, 9 A. & E. 546; *Re White and Galbraith*, 12 P.R. (Ont.) 513; *Ex p. Cook*, 3 Can. Cr. Cas. 72; *R. v. Ettinger*, 3 Can. Cr. Cas. 387. He must exercise his discretion *bona fide* and not arbitrarily. *R. v. Adamson*, 1 Q.B.D. 201. He must not have based his decision upon considerations not recognized by the law or have so misconstrued the statute as to have practically declined a jurisdiction conferred upon him, or he will be subject to a mandamus order from a superior court. *Fournier v. De Montigny*, 10 Que. S.C. 292; *Re Parke*, 3 Can. Cr. Cas. 122, 30 Ont. R. 498; *Re Holland*, 37 U.C.Q.B. 214; *R. v. Connolly*, 20 Ont. R. 220; *R. v. Sanderson*, 15 Ont. R. 106; *Thompson v. Deenoyers*, 3 Can. Cr. Cas. 68.

*Form of search warrant*—A statutory form of search warrant (Code form No. 2) follows Code sec. 1152.

A search warrant signed by a justice acting in the illness, or absence, or at the request of a police magistrate, and having no jurisdiction otherwise, should include, in its designation of the justice, such fact, otherwise the warrant is invalid. *R. v. Lyons*, 2 Can. Cr. Cas. 218.

A search warrant directing the constable to search a particular house "or any other house at — if there is any suspicion that the said goods, etc., be in such house," is bad, as it delegates to the constable the duties of the justice, by enabling him to act on suspicions arising in his mind after the issue of the warrant, and it is also void for uncertainty. *McLeod v. Campbell* (1894), 26 N.S.R. 458.

*Search warrant to state the offence*—The search warrant must disclose on its face the alleged offence in respect of which it was issued. *R. v. Le Vesque* (1918), 42 D.L.R. 120 (N.B.); *R. v. Frain* (1915), 24 Can. Cr. Cas. 389 (Sask.). The warrant may be invalidated by material defects in the information. *R. v. Frain*, *supra*; *R. v. Kehr*, 11 O.L.R. 517, 11 Can. Cr. Cas. 52.

*Execution of search warrant*—The search warrant is to be executed by day unless it shows on its face that the justice has authorized that it be executed at night. Code sec. 630. "Day" is from 6 a.m. to 9 p.m., and night is from 9 p.m. to 6 a.m. See Code sec. 2, sub-sec. (23).

If a constable is the aggrieved person, and not merely an informant in his official capacity, the search warrant should not be executed by him in his own case. *Condell v. Price*, 1 Hannay (N.B.) 333; *Powell v. Williamson* (1843), 1 U.C.Q.B. 154; *R. v. Belyea* (1915), 43 N.B.R. 375, 24 Can. Cr. Cas. 395.

In *Hamilton v. Calder*, 23 N.B.R. 373, it is said that where the search warrant is for stolen goods, some one (the owner, if he is complainant), who can point the goods out, usually accompanies the officer in the execution of the warrant for the purpose that on his pointing and declaration the officer may judge whether or not they are the goods mentioned in the warrant; the constable's duty is to judge and determine them to be such goods before he takes or removes them.

*Launock v. Brown* (1819), 2 B. & Ald. 593, 106 E.R. 482, was a case of a search warrant under a statute (22-23 Car. II, ch. 25, sec. 2) which empowered game keepers and other persons, authorized by warrant under the hand and seal of any justice of the peace for the county in the day time to search the houses, outhouses, or other places of certain persons for guns, bows, greyhounds, etc., and to seize, detain and keep the same, etc. The court *en banc* of four judges, affirming the decision of the trial judge, held that a search warrant under the statute was unlawfully executed, inasmuch as no demand of admittance had been made before breaking open the outer door of the dwelling-house of the plaintiff's house. This rule is applicable to all search warrants or orders for search of a dwelling-house unless it is clear from the statute authorizing the search warrant that a demand to open is not necessary. *Wah Kie v. Cuddy* (No. 2), 23 Can. Cr. Cas. 383, 387, 7 W.W.R. 797 (Alta.).

In *Hodder v. Williams* [1895] 2 Q.B. 663, the statement made in *Smith's Leading Cases* in the notes to *Semayne's Case*, 5 Coke 91, is approved: "The maxim that 'a man's house is his castle' only extends to his dwelling-house; therefore a barn or outhouse, not connected with the dwelling-house, may be broken open in order to levy an execution (*Penton v. Brown*, 1 Sid. 181, 186), but not to make a distress for rent: *Brown v. Glenn*, 16 Q.B. 254."

In the execution of a search warrant or order for search, where the place is not a dwelling-house, or a room or other place—"parcel of a house" (*Penton v. Brown*, 1 Keb. 698, 1 Sid. 186)—the police officer executing it must have the search warrant with him, in order to exhibit it for inspection if it is asked, and in that case produce it and permit inspection of it (Code sec. 40), but he need not under all circumstances first demand an entrance or signify the cause of his coming. *Wah Kie v. Cuddy* (No. 2), 23 Can. Cr. Cas. 383, 7 W.W.R. 797, 8 A.L.R. 111; *R. v. Sloan*, 18 Ont. App. R. 482.

The law is careful to protect the rights and liberty of the subject, and if a peace officer or any other person invades a house or home without authority he is a trespasser, and the occupant is justified in using force to either eject or prevent him from carrying out what he may claim to be a privilege, but which he has not the proper authority to exercise. *R. v. Lyons*, 2 Can. Cr. Cas. 218.

An action will lie for wrongfully issuing and executing a search warrant. See cases cited in *Stephen on Malicious Prosecution*, pp. 7,

8 and 24; Clerk & Lindsell's Law of Torts, 4th ed., pp. 642-3; and particularly *Elsee v. Smith* (1822), 1 D. & R. 97; *Grainger v. Hill* (1838), 4 Bing. N.C. 212; *Hope v. Evered*, 17 Q.B.D. 338. See also *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674; *Willinsky v. Anderson* (1909), 10 O.L.R. 437; *Matthews v. Jenkins* (1907), 3 E.L.R. 577; *Codd v. Cabe*, L.R. 1 Ex. D. 352; *Sleeth v. Hurburt*, 3 Can. Cr. Cas. 197.

In an action for malicious prosecution, in which the plaintiff was nonsuited, it appeared that a magistrate, upon the information of the defendant that the plaintiff unlawfully had and kept in his possession a dog belonging to the defendant, has issued a search warrant to a constable, who took the dog, against plaintiff's protest. An information was then laid by the constable to the same effect, and a summons issued against plaintiff, on the return of which, on plaintiff's counsel objecting that no offence was shown, the information was amended, and the plaintiff was charged with stealing the dog, which charge was dismissed: Held, that the matter having been fairly stated to the magistrate by defendant, he was not liable for the erroneous view of the magistrate as to his jurisdiction in issuing the warrant and summons; but, held, also, that there being evidence that the defendant had assented to the amendment, he was not justified in charging the plaintiff with theft, because he believed the dog was his own; the real question being, not whether the defendant believed the dog to be his, but whether he believed that the plaintiff had stolen him, and that the case should have been left to the jury. *Pring v. Wyatt*, 5 O.L.R. 505, 7 Can. Cr. Cas. 60.

*Justifying under erroneous or irregular warrant*—See secs. 24-29, 39, 40.

*Montreal*—The Clerk of the Peace or Deputy Clerk of the Peace at Montreal has all the powers of a justice under sec. 629 to 643 inclusive. Code sec. 605.

*Jurisdiction of Ontario police magistrates as to search warrants*—See Ont. statutes 1916, ch. 24, sec. 15.

#### Execution of search warrants outside of jurisdiction.

**629A.** If the building, receptacle, or place in which such thing as aforesaid is reputed to be is in some other county or territorial division, the justice may nevertheless issue his warrant in like form modified according to the circumstances, and such warrant may be executed in such other county or territorial division upon being endorsed by some justice of that county or territorial division, such endorsement to be in form 2A, or to the like effect.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2.

*Endorsement of search warrant from another county*—This section



enables a search warrant to be executed outside of the jurisdiction of the magistrate by whom it is issued on being endorsed by a justice of the county in which it is to be executed in accordance with the new form 2A, added in 1909.

**Search warrant.—Form.—Execution.**

**630.** Every search warrant shall be executed by day, unless the justice shall by the warrant authorize the constable or other person to execute it at night.

2. Every search warrant may be in form 2, or to the like effect.

*Origin*—Code of 1892, sec. 569; R.S.C. 1886, ch. 50, sec. 101.

*Form of warrant to search*—Code form 2 following sec. 1152.

**Detention of things seized.—Restoration.**

**631.** When any such thing is seized and brought before a justice, he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial.

2. If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases next hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise.

*Origin*—Code of 1892, sec. 569; R.S.C. 1886, ch. 50, sec. 101.

*Goods in custodia legis*—Liquor consigned to McK. was seized under a search warrant issued under Part II of the Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 136, on information of C., a liquor license inspector, and given into C.'s custody for safe keeping. The warrant was issued by the proper officer and was regular and valid on its face. McK. replevied the goods from C., who put in a claim of property under C.S.N.B. 1903, ch. iii, sec. 361: Held, that the replevin was not maintainable and that C. was entitled to retain possession of the liquor until it should be disposed of according to law, such possession being necessary to the carrying out of the Act. *McKeen v. Colpitts*, 39 N.B.R. 256, 14 Can. Cr. Cas. 488. But replevin has been maintained where the claimant was a stranger to the search warrant proceedings and proved ownership of the goods which were in possession of another when seized under a search warrant for liquors. *Fraser v. Watters*, 41 N.S.R. 201.

And see *O'Neil v. Attorney-General*, 26 S.C.R. 122.

**Forged bank note, etc., found may be destroyed.—Counterfeit coin to be defaced.**

**632.** If under any such warrant there is brought before any justice any forged bank note, bank note-paper, instrument or other thing, the possession whereof in the absence of lawful excuse is an offence under any provision of this or any other Act, the court to which any such person is committed for trial or, if there is no commitment for trial, such justice may cause such thing to be defaced or destroyed.

2. If under any such warrant there is brought before any justice, any counterfeit coin or other thing the possession of which with knowledge of its nature and without lawful excuse is an indictable offence under any provision of Part IX, every such thing so soon as it has been produced in evidence, or so soon as it appears that it will not be required to be so produced, shall forthwith be defaced or otherwise disposed of as the justice or the court directs.

*Origin*—Code of 1892, sec. 569; R.S.C. 1886, ch. 174, secs. 55 and 56.

*Possession of forged bank notes*—See sec. 550.

*Possession of counterfeit coins*—See secs. 561, 563.

**Seizure of explosives.—Forfeiture.—Application of proceeds.**

**633.** Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object, and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a superior court to restore it to the person who claims the same.

2. Any explosive substance so seized shall, in the event of the person in whose possession the same is found, or of the owner thereof, being convicted of any offence under any provision of Part II, relating to explosive substances, be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted.

3. In the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance, for the public uses of Canada.

*Origin*—Code of 1892, sec. 569; R.S.C. 1886, ch. 50, secs. 11 and 12.

*Offences relating to explosive substances*—See secs. 2 (14), 111-114, 279, 280, 594, 633.

**Offensive weapons seized.—Restoration or safe custody.**

**634.** If offensive weapons believed to be dangerous to the public peace are seized under a search warrant the same shall be kept in safe custody in such place as the justice directs, unless the owner thereof proves, to the satisfaction of such justice, that such offensive weapons were not kept for any purpose dangerous to the public peace.

2. Any person from whom any such offensive weapons are so taken may, if the justice upon whose warrant the same are taken, upon application made for that purpose, refuses to restore the same, apply to a judge of a superior or county court for the restitution of such offensive weapons, upon giving ten days' previous notice of such application to such justice; and such judge shall make such order for the restitution or safe custody of such offensive weapons as upon such application appears to him to be proper.

*Origin*—Code of 1892, sec. 569; R.S.C. 1886, ch. 149, secs. 2 and 3.

**Suspected goods, instruments or things seized.—When owner cannot be found.—Forfeiture.**

**635.** If goods or things by means of which it is suspected that an offence has been committed against any provision of Part VII relating to forgery of trade marks and fraudulent marking of merchandise, are seized under a search warrant, and brought before a justice, such justice and one or more other justice or justices shall determine summarily whether the same are or are not forfeited under the said Part.

2. If the owner of any goods or things which, if the owner thereof had been convicted, would be forfeited under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and the said justice may cause notice to be advertised stating

that unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be declared forfeited.

3. At such time and place the justice, unless the owner, or some person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may declare such goods or things, or any of them, forfeited.

*Origin*—Code of 1892, sec. 569; 51 Viet., Can., ch. 41, sec. 14.

*Forgery of trade marks and fraudulent marking of merchandise*—See secs. 335-337, 341, 342, 486-495, 635, 1039, 1040.

**Search for public stores by peace officer deputed.—When deemed deputed.**

**636.** Any constable or other peace officer, if deputed by any public department, may, within the limits for which he is such constable or peace officer, stop, detain and search any person reasonably suspected of having or conveying in any manner any public stores, stolen or unlawfully obtained, or any vessel, boat or vehicle in or on which there is reason to suspect that any public stores stolen or unlawfully obtained may be found.

2. A constable or other peace officer shall be deemed to be deputed within the meaning of this section if he is deputed by any writing signed by the person who is the head of such department, or who is authorized to sign documents on behalf of such department.

*Origin*—Code of 1892, sec. 570.

"Public stores"—See definition in sec. 2 (28).

"Public department"—See definition in sec. 2 (27).

*Offences relating to unlawful possession of public stores*—See secs. 2 (28), 432-437, 636, 991.

**Search warrant for gold, silver, ore or quartz.—Restoration.—Appeal.**

**637.** On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of

stolen goods, including any number of places or persons named in such complaint.

2. If, upon search, any such gold or gold-bearing quartz or silver or silver ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right.

3. The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part XV.

*Origin*—Code of 1892, sec. 571; R.S.C. 1886, ch. 174, sec. 53.

*Appeal from restoration order*—See sec. 649 *et seq.*

*Security on appeal from restoration order*—In case of an appeal from the order of a justice pursuant to sec. 637 for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the proper sittings of the court, and to pay such costs as are awarded against him. Code sec. 750 (d) as amended Can. Statutes, 1909.

*Montreal*—The Clerk of the Peace or Deputy Clerk of the Peace at Montreal has all the powers of a justice under secs. 629 to 643 inclusive. Code sec. 605.

*Unlawful possession of unmanufactured gold or silver ore*—See secs. 353, 378, 424, 424A, 637, 750 (d), 866, 893.

#### **Search for timber, etc., unlawfully detained.**

**638.** If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belonging to any lumberman or owner of lumber, and bearing the registered trade mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or other peace officer may enter into or upon such saw-mill, mill-yard, boom or raft, and search or examine for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge or consent.

*Origin*—Code of 1892, sec. 572; R.S.C. 1886, ch. 174, sec. 54.

*Fraudulent appropriation of drift timber*—See sec. 394.

*Theft generally*—See secs. 347, 386.

*Receiving stolen property*—See secs. 399-403.

**Search for liquor near His Majesty's vessels.—Forfeiture.**

**639.** Any officer in His Majesty's service, any warrant or petty officer of the navy, or any non-commissioned officer of marines, with or without seamen or persons under his command, may search any boat or vessel which hovers about or approaches, or which has hovered about or approached, any of His Majesty's ships or vessels mentioned in sec. 141, and may seize any intoxicating liquor found on board such boat or vessel; and the liquor so found shall be forfeited to the Crown.

*Origin*—Sec. 573, Code of 1892; 50-51 Vict., Can., ch. 46, sec. 3.

*Illegally conveying liquor to H.M. ships*—See sec. 141.

**Search for women in house of ill-fame.—Warrant to search house.**

**640.** Whenever there is reason to believe that any woman or girl mentioned in sec. 216 of this Act, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master or guardian in the place in which the offence is alleged to have been committed, by any other person, to any justice, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice or judge may issue a warrant to enter, by day or night, such house of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her and the person or persons in whose keeping and possession she is, before such justice or judge, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require.

*Origin*—Code of 1892, sec. 574; R.S.C. 1886, ch. 157, sec. 7.

*Search of house of ill-fame*—Secs. 640 and 643 of the Code authorize the issue of a warrant for search of houses suspected of being bawdy-houses and the arrest without further warrant of offenders found therein. *R. v. Miller* (1913), 25 W.L.R. 296 (Alta.); *R. v. Marceau*, 7 W.W.R. 1174 (Alta.); and since the amendment of sec. 641, in 1913, the latter section also applies to common bawdy-houses and other classes of disorderly houses as defined by sec. 228. *R. v. Shaak* [1918] 3

W.W.R. 889 (Alta.). There may be cases within sec. 640 which are not within sec. 641, and *vice versa*.

*Procuring for immoral purposes*—See sec. 216.

*Order to search disorderly house and arrest all persons found therein*—See sec. 641.

*Obstructing peace officer entering disorderly house*—See secs. 230, 169.

*Montreal*—The Clerk of the Peace or Deputy Clerk of the Peace at Montreal has all the powers of a justice under secs. 629 to 643 inclusive. Code sec. 605.

**Search in disorderly houses.—Order for search.—Destruction of property seized.**

**641.** If a constable or other peace officer of any city, town, incorporated village or other municipality or district, organized or unorganized, or place, reports in writing to the mayor or chief magistrate, or to the police, stipendiary or district magistrate of such city, town, incorporated village or other municipality, district or place, or to any police or stipendiary magistrate having jurisdiction there, or, if there be no such mayor or chief magistrate, or police stipendiary or district magistrate, to any justice having such jurisdiction, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town, incorporated village or other municipality, district or place is kept or used as a disorderly house as defined by sec. 228; or for betting, wagering or pool selling contrary to the provisions of sec. 235, or for the purpose of carrying on a lottery or for the sale of lottery tickets, or for the purpose of conducting or carrying on of any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of sec. 236, whether admission thereto is limited to those possessed of entrance keys or otherwise; such mayor, chief magistrate, police, stipendiary or district magistrate or justice, may, by order in writing, authorize the constable or other peace officer to enter and search any such house, room or place with such other constables or peace officers as are deemed requisite by him, and such peace officer or peace officers may thereupon enter and search all parts of such house, room or place and if necessary may use force for the purpose of effecting such entry, whether

by breaking open doors, or otherwise, and may take into custody all persons who are found therein, and may seize all tables and instruments of gaming, wagering or betting and all moneys and securities for money and all instruments or devices for the carrying on of a lottery, or of any scheme, contrivance or operation for determining the winners in any lottery, and all lottery tickets and all intoxicating liquors and all opium and devices, pipes or apparatus for preparing or for smoking or inhaling opium and all circulars, advertisements, printed matter, stationery and things which may be found in such house or premises which appear to have been used or to be intended for use for any illegal purpose or business, and shall bring the same before the person issuing such order or any justice, to be by him dealt with according to law.

2. The person issuing such order, or the justice before whom any person is taken by virtue of an order under this section, may direct that any money or securities for money so seized shall be forfeited to the Crown for the public uses of Canada, and that any other thing seized shall be destroyed or otherwise disposed of: Provided that nothing shall be destroyed or disposed of pending any appeal or any proceeding in which the right of seizure is questioned or before the time within which such appeal or other proceeding may be taken has expired.

*Origin*—3-4 Geo. V, Can., ch. 13, sec. 21; 58-59 Vict., Can., ch. 40, sec. 1; Code of 1892, sec. 575.

*Order for search of disorderly house*—The order may specify the time of the search as between a certain hour on one date and another certain hour on the second day following. *R. v. Shaak* [1918] 3 W.W.R. 889 (Alta.). In the case of a common bawdy-house it may recite that it appears on the oath of the informant (naming him) that there is reason to suspect that the keeper and inmates of a common bawdy-house are concealed in the house or premises (giving the street address or other identification), and may authorize and require the officers to whom it is addressed to enter the premises between the stated hours and to search for the said persons and bring them before the justice issuing the order or before some other justice. *R. v. Shaak* [1918] 3 W.W.R. 889 (Alta.). On the arrest of the keepers and inmates they may be held until a charge is laid. Their names may not be known until after the arrest, but when the identity of the persons who are keepers or inmates is then disclosed, information should be laid at once against them; it is not, however, necessary to issue personal warrants of arrest



against each before calling on the accused persons in custody to answer the charge, their arrest and appearance under the general search order being sufficient for that purpose. *R. v. Shaak* [1918] 3 W.W.R. 889 (Alta.).

Until the year 1913 the authority to enter and search as given by the sections corresponding to the present sec. 641 had been confined to gaming and betting houses. There had been authority to "take into custody all persons who are found therein," as well as to seize tables and instruments of gaming, etc. One of the things which could be done with the persons so arrested was shown by the provisions of sec. 642, which authorized the magistrate before whom they were brought to examine them under oath in regard to "any unlawful gaming in the house," and there is a provision in sub-sec. 2 for their protection. Then in 1913 the wording of sec. 641 was changed so as to give the authority to search in the case of suspicion of the existence of a "disorderly house" generally as defined by sec. 228 which covers gaming and betting houses but also includes houses of ill-fame. But while this in consequence authorized the arrest of all persons found in such a house no change was made in sec. 642, so that the authority to examine under oath is still confined to evidence of gaming. Thus the purpose of arresting persons found in a house searched in consequence of suspicion that it is a bawdy-house is left rather obscure. They cannot be examined under oath for evidence that the place was being kept as a bawdy-house. Yet there is undoubtedly authority to take them into custody. While there no doubt is a possibility that there was an oversight in not at the same time amending sec. 642, still the court must endeavour to attribute some sensible purpose to the provision for arrest; and it was said in *R. v. Shaak*, *supra*, that there would seem to be no other than that they may be held pending the laying of a charge against them, and no reason why this should not also apply to persons arrested in a gaming house, although a special additional action by way of examination is provided in their case. A charge should be laid promptly, otherwise there would be a way open for oppression. If there were delay *habeas corpus* would undoubtedly lie. *R. v. Shaak*, *supra*.

*Justification of search—Execution of search under a search order*—A search "order" under sec. 641 is probably a "warrant" so as to justify the person authorized in its execution, although the suspected offence may not be proved, if the order was legal on its face. See secs. 25-29. But no more force is to be used than is reasonably necessary. Code sec. 66; *Ho Quong, et al. v. Cuddy* (1914), 7 W.W.R. 797, *sub nom.* *Wah Kie v. Cuddy*, 8 Alta. L.R. 111, 23 Can. Cr. Cas. 383. The officer must have the search order with him to show if inspection is asked for. *Ibid.*; Code sec. 40; but he need not, under all circumstances, first demand an entrance or signify the cause of his coming unless the place is a dwelling-house. *Ho Quong v. Cuddy*, 7 W.W.R. 797, at 801; *Hodder v. Williams* [1895] 2 Q.B. 663. If the premises to be searched are a

dwelling-house, much more circumspection would be called for than in the case of another class of building. *Ho Quong v. Cuddy*, 7 W.W.R. 797, 801 (Alta.), per Beck, J.

Furthermore, the doctrines of English law require that when the place to be searched is a "dwelling-house" a demand to open must be made before breaking in, and this applies to all search warrants or orders for search unless it is clear from the authorizing statute that such demand is not necessary. *Ho Quong v. Cuddy*, 7 W.W.R. 797 (Alta.), applying *Semayne's case*, 1 Smith's L.C. 11th ed., 105; *Hodder v. Williams* [1895] 2 Q.B. 663, 65 L.J.Q.B. 70. And where the place is not a dwelling-house, still it is the duty of the police officer executing the search order or warrant to have it with him in order to exhibit it for inspection if asked and in that event to produce it and permit inspection of it. *Ho Quong v. Cuddy*, 7 W.W.R. 797, 801 (Alta.), citing *Penton v. Browne*, 1 Keb. (Eng.), 698.

*Time of search*—The search order should be executed promptly for it never was intended that after a complaint made and an order for search given, the order should be filed away without any attempt to enforce it for years, and yet it remain operative. The premises may no longer be used for an improper purpose and "it would be contrary to justice that the stringent provisions of this section should be put in force when or how the police thought proper." Per Drake, J., in *R. v. Ah Sing* (1892), 2 B.C.R. 167.

*Penalty for being "found in" a disorderly house*—See sec. 229.

*Form of search order on a gaming charge*—"I hereby authorize you, the chief constable, or inspector or sergeant of the (Calgary) police force, to enter the premises (specifying street address or other description), with such constables as are deemed requisite by you or him, and if necessary, to use such force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein and to seize all tables and instruments of gaming and all money and security for money found on such premises and to bring the same before me or such other justice as may be presiding in my stead, to be by me or him dealt with according to law."

*Municipal by-law as to search without warrant*—It has been held that, having regard to the provisions of sec. 641 of the Criminal Code, a police officer is not justified in forcibly entering a gaming house without warrant or permission from proper authority, notwithstanding the provisions of a municipal by-law purporting to authorize him so to do. *Win Gat v. Johnson*, 1 Sask. L.R. 81, affirmed on this point on varying the judgment. *Win Gat v. Johnson*, 1 S.L.R. 476.

*Penalty for obstructing officer entering disorderly house*—See secs. 230, 169.

*Equipment found for games of chance to be prima facie evidence*—See sec. 985, 986.

*Obstruction of search is prima facie evidence in gaming and opium joint cases*—See sec. 986.

*Confiscation of gaming and lottery equipment*—In a case under the Ontario Liquor License Act, which contained a similar power to order the destruction of liquor seized, it was held that the goods being in the custody of the law, and under the jurisdiction of the magistrate, and the destruction being a ministerial act, there was no necessity, in the absence of statutory requirement or other authority, for the direction to the police officers to be in writing. *Ing Kon v. Archibald*, 17 O.L.R. 484, 14 Can. Cr. Cas. 201.

The constitutional right to provide for confiscation, as in sec. 641, was upheld even as against a claimant of moneys seized who was not a party to the proceedings before the magistrate, the process being *in rem*. *O'Neil v. Attorney-General of Canada*, 26 Can. S.C.R. 122, 1 Can. Cr. Cas. 303.

*Finding of opium joint equipment to be prima facie evidence*—See sec. 986.

*Confiscation of equipment of opium joint*—See secs. 642A, 227A, 228.

*Montreal*—The Clerk of the Peace or Deputy Clerk of the Peace at Montreal has all the powers of a justice under secs. 629 to 643 inclusive. Code sec. 605.

**Magistrate may require any person apprehended under the search order to be examined on oath.—Punishment of persons refusing to give evidence.—Persons making a full discovery to be free from all penalties, on certificate.**

**642.** The person issuing such order or the justice before whom any person who has been found in any house, room or place, entered in pursuance of any order under the last preceding section, is taken by virtue of such order may require any such person to be examined on oath and to give evidence touching any unlawful gaming in such house, room or place, or touching any act done for the purpose of preventing, obstructing or delaying the entry into such house, room or place, or any part thereof, of any constable or officer authorized to make such entry; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any question, shall be subject to be dealt with in all respects as any person appearing as a witness before any justice or court in obedience to a summons or subpoena and refusing without lawful cause or excuse to be sworn or to give evidence, may, by law, be dealt with.

2. Every person so required to be examined as a witness, who, upon such examination, makes true disclosure, to the best of his knowledge, of all things as to which he is examined shall receive from the judge, justice, magistrate, examiner or other judicial officer before whom such proceeding is had, a certificate in writing to that effect, and shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures and punishments to which he has become liable for anything done before that time in respect of any act of gaming regarding which he has been so examined, if such certificate states that such witness made a true disclosure in respect to all things as to which he was examined; and any action, indictment or proceedings pending or brought in any court against such witness in respect of any act of gaming regarding which he was so examined, shall be stayed, upon the production and proof of such certificate, and upon summary application to the court in which such action, indictment or proceeding is pending, or any judge thereof, or any judge of any of the superior courts of any province.

*Origin*].—R.S.C. 1886, ch. 158, secs. 8 and 9.

*Examination under oath of person apprehended under search order is limited*].—The persons arrested in a bawdy-house case are not subject to the examination under oath, at least as regards the offence of keeping or being an inmate of the house; R. v. Shaak [1918] 3 W.W.R. 889 (Alta.); there having been no corresponding amendment to sec. 642 when the preceding sec. 641 was amended in 1913, so as to apply to disorderly houses generally instead of being limited to gaming and betting houses. See note to sec. 641. But it would seem that if there had been any obstruction of the officer in entering, there may be an examination as to that, and a certificate of immunity on full disclosure under sec. 642 (2). Sub-sec. (2) specifies gaming, but is not in terms restricted to gaming cases when read along with sec. 641.

*Incriminating answers*].—It would seem advisable that the witness should formally object to answer before making the disclosure demanded by this section, and so obtain the benefit of sec. 5 of the Canada Evidence Act in case it applies, a point which does not appear to have been decided.

*Refusal to answer on examination*].—See sec. 678 as to witnesses on a preliminary enquiry, sec. 711 as to witnesses in a summary conviction proceeding, sec. 788 as to witnesses on a summary trial under Part XVI, and secs. 971-977 as to witnesses upon the trial of an indictment.

*Opium joints*].—The procedure of secs. 641 and 642 is made applicable by sec. 642A on the raid of an opium joint and the persons "found in" may be compelled to make disclosure under oath.

**Search and seizure in opium joints.**

**642A.** The provisions of secs. 641 and 642 shall apply to searches in opium joints and to the seizure of devices, pipes or apparatus for preparing for smoking or inhaling, or for smoking or inhaling opium, and all couches, beds and chairs in such joints, and to the proceedings thereupon.

*Origin*].—8-9 Edw. VII, Can., ch. 9, sec. 2.

"*Opium joints*"].—For definition see sec. 227A; and see secs. 228, 228A, 229, 229A, 230, for offences relating to them.

**Search warrant for vagrant concealed.**

**643.** Any stipendiary or police magistrate, mayor or warden, or any two justices, upon information before them made, that any person described in Part V as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices, every person found therein so suspected as aforesaid.

*Origin*].—Code of 1892, sec. 576; R.S.C. 1886, ch. 157, sec. 8.

*Vagrancy*].—See secs. 238, 239.

*Boarding-house*].—Query whether a lodging house as distinguished from a boarding-house is included.

*Trials under Special Provisions.*

**Trial of juveniles.**

**644.** The trials of young persons apparently under the age of sixteen years, shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

*Origin*].—Sec. 550, Code of 1892, as amended, 57-58 Vict., Can., ch. 58, sec. 1.

*Juvenile courts*].—Where Juvenile courts have been established under the Juvenile Delinquents Act, 1908, 7-8 Edw. VII, ch. 40, as amended

by 1912, ch. 30, and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age. That Act is in force only in such places as may be designated by proclamation in the *Canada Gazette*, and when the Act is proclaimed, any provisions of the Criminal Code inconsistent therewith are repealed as to such place. 7-8 Edw. VII, ch. 40, sec. 33. It provides for the appointment of probation officers, the establishment of a Juvenile Court by either Provincial or Federal authority to deal with "juvenile delinquents" defined by sec. 2 to be boys or girls "apparently or actually under the age of sixteen years," who violate any provision of the Criminal Code, chap. 146, of the Revised Statutes, 1906, or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, for which violation punishment by fine or imprisonment may be awarded; or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory, under the provisions of any Dominion or provincial statute.

The commission by a child of any of the acts so enumerated shall constitute an offence to be known as a delinquency and shall be dealt with as hereinafter provided. 7-8 Edw. VII, Can., ch. 40, sec. 3.

See *R. v. Huffman* [1919] 1 W.W.R. 625 (Sask.).

Except as provided in that Act, prosecutions and trials under the Act shall be summary and shall, *mutatis mutandis*, be governed by the provisions of Part XV of the Criminal Code, in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily; provided that whenever in such provisions the expression "justice" occurs, it shall be taken in the application of such provisions to proceedings under this Act to mean "judge of the Juvenile Court, or justice specially authorised by Dominion or provincial authority to deal with juvenile delinquents." 7-8 Edw. VII, Can., ch. 40, sec. 5.

When any child is arrested, with or without warrant, such child shall, instead of being taken before a justice, be taken before the Juvenile Court; and, if a child is taken before a justice, upon a summons or under a warrant or for any other reason, it shall be the duty of the justice to transfer the case to the Juvenile Court, and of the officer having the child in charge to take the child before that court, and in any such case the Juvenile Court shall hear and dispose of the case in the same manner as if such child had been brought before it upon information originally laid therein; but this shall not apply to any justice who is a judge of the Juvenile Court or who has power to act as such, under the provisions of any Act in force in the province. 7-8 Edw. VII, Can., ch. 6, sec. 6.

Where the act complained of is, under the provisions of the Criminal Code or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the Criminal Code

In that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it; and the court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made. But subject to this provision, the Juvenile Court has exclusive jurisdiction in cases of delinquency. 7-8 Edw. VII, Can., ch. 6, secs. 4 and 7.

The trials of children under the Juvenile Delinquents Act shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

Such trials may be held in the private office of the judge or in some other private room in the court house or municipal building, or in the detention home, or if no such room or place is available, then in the ordinary court room, provided that when held in the ordinary court room an interval of half an hour must be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.

No report of the trial or other disposition of a charge against a child, in which the name of the child or of its parent or guardian is disclosed, shall, without the special leave of the judge, be published in any newspaper or other publication. 7-8 Edw. VII, Can., ch. 6, sec. 10.

*Fining parent for delinquency in respect of child's offence*—

Where a child under sixteen is proved to have been guilty of an offence for the commission of which a fine, damages or costs might, in the case of an adult, be imposed, and the Juvenile Court is of the opinion that the case would be best met by the imposition of a fine, damages or costs, whether with or without any other action, the court shall order that the fine, damages or costs awarded be paid by the parent or guardian of the child, instead of by the child, unless the court is satisfied that the parent or guardian cannot be found, or that he has not concurred to the commission of the offence by neglecting to exercise due care of the child or otherwise. 7-8 Edw. VII, Can., ch. 6, sec. 18.

*Ordering parent to give security for child's good behaviour*—

Where a child under sixteen is charged with any offence the Juvenile Court may order its parent or guardian to give security for its good behaviour. But no such order is to be made without giving the parent or guardian an opportunity of being heard; but a parent or guardian who has been duly served with notice of the hearing pursuant to the Act shall be deemed to have had such opportunity, notwithstanding the fact that he has failed to attend the hearing. Any sum imposed and ordered to be paid by a parent or guardian under sec. 18 of that Act may be recovered from him by distress or imprisonment in like manner as if the order had been made on the conviction of the parent or guardian of the offence in question. A parent or guardian shall have the same right of appeal from an order made under

the provisions of this section as if the order had been made on the conviction of the parent or guardian. 7-8 Edw. VII, Can., ch. 6, sec. 18.

*Contributing to child's delinquency*—Any person who knowingly or wilfully encourages, aids, causes, abets or connives at the commission by a child under sixteen of a delinquency, or who knowingly or wilfully does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent, whether or not such person is the parent or guardian of the child, or who, being the parent or guardian of the child and being able to do so, wilfully neglects to do that which would directly tend to prevent a child's being or becoming a juvenile delinquent, or to remove the conditions which render a child a juvenile delinquent, shall be liable, on summary conviction before a Juvenile Court or a justice, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding one year, or to both fine and imprisonment. The court or justice may impose conditions upon any person found guilty under this section, and suspend sentence subject to such conditions; and on proof at any time that such conditions have been violated may pass sentence on such person. 7-8 Edw. VII, Can., ch. 6, sec. 29. But the justice must be one authorized to administer the Juvenile Delinquents Act. 7-8 Edw. VII, ch. 40, sec. 5. The delinquency of the child must be within the statutory definition. *R. v. Huffman* [1919] 1 W.W.R. 625.

Prosecutions against adults for offences against any provisions of the Criminal Code in respect of a child under sixteen may be brought in the Juvenile Court without the necessity of a preliminary hearing before a justice, and may be summarily disposed of where the offence is triable summarily, or otherwise dealt with, as in the case of a preliminary hearing before a justice. 7-8 Edw. VII, Can., ch. 6, sec. 30.

No legal offence is disclosed in an information charging a woman with knowingly and wilfully "keeping company with" a man and thereby depriving him from keeping his children under proper parental control and contributing to their being or becoming juvenile delinquents; sec. 29 of the Juvenile Delinquents Act, 1908, 7 and 8 Edw. VII, Can., ch. 40, does not support such a charge. *R. v. Curry* (1915), 24 Can. Cr. Cas. 340, 8 O.W.N. 512.

*Delinquency in respect of provincial statutory offences*—Nothing in the Juvenile Delinquents Act contained shall be construed as having the effect of repealing or over-riding any provision of any provincial statute; and when a juvenile delinquent who has not been guilty of an act which is, under the provisions of the Criminal Code an indictable offence, comes within the provisions of a provincial statute, it may be dealt with either under the provincial Act or under this Act as may be deemed to be in the best interests of such child. 7-8 Edw. VII, Can., ch. 6, sec. 32.

*Proclamation of Juvenile Delinquents Act*—This Act has been proclaimed in the following places, and the various proclamations are



set out in the Annual Statutes of Canada amongst the orders of Council, etc., for the years which appear after the names of places which here follow:—Province of Alberta, 1915; County of Perth, Ont., 1914; County of Pictou, N.S., 1916; County of Waterloo, Ont., 1915; County of Brant, Ont., 1916; District of Temiskaming, 1915; and the following cities—Kitchener, 1915; Charlottetown, 1911; Halifax, 1911; Montreal, 1912; Ottawa, 1910; Stratford, 1914; Toronto, 1912; Vancouver, 1911; Victoria, 1911; Winnipeg, 1909; Brantford, 1916.

**Trials may be held in private in certain cases.—Orders for exclusion of public.—Saving of common law power.**

**645.** At the trial of any person charged with an offence under any of the following sections, that is to say:—202, 203, 204, 205, 206, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 228 in so far as it relates to common bawdy-houses, 239 in so far as it relates to paragraphs (i), (j) or (k) of secs. 238, 292, 293, 299, 300, 301, 302, 303, 304, 305, 306, 313 and 314, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge or justice may order that the public be excluded from the room or place in which the court is held during such trial.

2. Such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals.

3. Nothing in this section shall be construed by implication or otherwise as limiting any power heretofore possessed at common law by the presiding judge or other presiding officer of any court of excluding the general public from the court-room in any case when such judge or officer deems such exclusion necessary or expedient.

*Origin*—Sec. 550A, Code of 1892, as amended, 63-64 Vict., Can., ch. 46.

*Exclusion of public*—The sections referred to are some of those found in Part V of the Code under the sub-divisions "offences against morality," "seduction" and "nuisances," and in Part VI, under the sub-divisions of "assaults," "unlawful carnal knowledge," "abortion," and "abduction."

As to exclusion of the public on the trial of juveniles under sixteen, see sec. 644. Where juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30, and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age. See note to Code sec. 644. A preliminary

enquiry is not a "trial," but is subject to a wider power of exclusion contained in sec. 679, sub-sec. (d).

*Vagrancy offences*—Vagrancy is defined by sec. 238, and as to same the above sec. 645 is expressly limited to paragraphs (i), (j) and (k). Sub-division (i) relates to night-walkers; sub-divisions (j) and (k) were repealed by Can. Statutes, 1915, Geo. V, ch. 12, sec. 7, on the enactment of Code sec. 229A, without any corresponding alteration being made in sec. 645.

*Open court at common law*—It is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings, and provided there is no special reason why they should be removed, have a right to be present for the purpose of hearing what is going on. *Daubney v. Cooper*, 10 B. & C. 240; *Scott v. Scott* [1913] A.C. 417.

The decision in *Scott v. Scott* [1913] A.C. 417 was distinguished in another divorce case, *Moosbrugger v. Moosbrugger*, 29 Times L.R. 658; and see *Cleland v. Cleland*, 30 Times L.R. 169; but was applied in *Reid v. Aull*, 5 O.W.N. 964, same case, 32 O.L.R. 68, 6 O.W.N. 372.



## PART XIII.

### COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICES.

#### *Arrest without Warrant.*

#### **Arrest without warrant by any person in certain cases.**

**646.** Any person may arrest without warrant any one who is found committing any of the offences mentioned in sections,—

- (a) 74, treason; 76, accessories after the fact to treason; 77, 78 and 79, treasonable offences; 80, assaults on the King; 81, inciting to mutiny; 85 and 86, information illegally obtained or communicated;
- (b) 92, offences respecting the reading of the Riot Act; 96, riotous destruction of property; 97, riotous damage to property;
- (c) 129, administering, taking or procuring the taking of oaths to commit certain crimes; 130, administering, taking or procuring the taking of other unlawful oaths;
- (d) 137, piracy; 138, piratical acts; 139, piracy with violence;
- (e) 185, being at large while under sentence of imprisonment; 187, breaking prison; 189, escape from custody or from prison; 190, escape from lawful custody;
- (f) 202, unnatural offence;
- (g) 263, murder; 264, attempt to murder; 267, being accessory after the fact to murder; 268, manslaughter; 270, attempt to commit suicide;
- (h) 273, wounding with intent to do bodily harm; 274, wounding; 276, stupefying in order to commit an indictable offence; 279 and 280, injuring or attempting to injure by explosive substances; 282, intention-

- ally endangering persons on railways; 283, wantonly endangering persons on railways; 286, preventing escape from wreck;
- (i) 299, rape; 300, attempt to commit rape; 301, defiling children under fourteen;
- (j) 313, abduction of a woman;
- (k) 358, theft by agents and others; 359, theft by clerks, servants and others; 360, theft by tenants and lodgers; 361, theft of testamentary instruments; 362, theft of documents of title; 363, theft of judicial or official documents; 364, 365 and 366, theft of postal matter; 367, theft of election documents; 368, theft of railway tickets; 369, theft of cattle; 371, theft of oysters; 372, theft of things fixed to buildings or land; 379, stealing from the person; 380, stealing in dwelling-houses; 381, stealing by picklocks, etc.; 382, stealing from ships, docks, wharfs or quays; 383, stealing wreck; 384, stealing on railways; 386, stealing things not otherwise provided for; 387, stealing where value over two hundred dollars; 388, stealing in manufactories; 390, criminal breach of trust; 391, public servant refusing to deliver up chattels, money valuables, security, books, papers, accounts or documents; 396, destroying, cancelling, concealing or obliterating any documents of title; 398, bringing stolen property into Canada;
- (l) 399, receiving property obtained by crime;
- (m) 410, personation of certain persons;
- (n) 446, aggravated robbery; 447, robbery; 448, assault with intent to rob; 449, stopping the mail; 450, compelling execution of documents by force; 451, sending letter demanding with menaces; 452, demanding with intent to steal; 453, extortion by certain threats;
- (o) 455, breaking place of worship and committing an indictable offence; 456, breaking place of worship with intent to commit an indictable offence; 457,

- burglary; 458, housebreaking and committing an indictable offence; 459, housebreaking with intent to commit an indictable offence; 460, breaking shop and committing an indictable offence; 461, breaking shop with intent to commit an indictable offence; 462, being found in a dwelling-house by night; 463, being armed, with intent to break a dwelling-house; 464, being disguised or in possession of housebreaking instruments;
- (p) 468, 469 and 470, forgery; 467, uttering forged documents; 472, counterfeiting seals; 478, using probate obtained by forgery or perjury; 550, possessing forged bank notes;
- (q) 471, making, having or using instrument for forgery or having or uttering forged bond or undertaking; 479, counterfeiting stamps; 480, injuring or falsifying registers;
- (r) 112, attempt to damage by explosives; 510, mischief; 511, arson; 512, attempt to commit arson; 513, setting fire to crops; 514, attempting to set fire to crops; 517, mischief on railways; 520, mischief to mines; 521, injuries to electric telegraphs, magnetic telegraphs, electric lights, telephones and fire alarms; 522, wrecking; 523, attempting to wreck; 526, interfering with marine signals;
- (s) 552, counterfeiting gold and silver coin; 556, making instruments for coining; 558, clipping current coin; 560, possessing clippings of current coin; 562, counterfeiting copper coin; 563, counterfeiting foreign gold and silver coin; 567, uttering copper coin not current.

*Origin*—Sec. 552, Code of 1892, as amended, 58-59 Vict., Can., ch. 40; 8-9 Edw. VII, Can., ch. 9; 3-4 Geo. V, Can., ch. 13, sec. 22.

*Person "found committing" the offence*—See secs. 32, 35, 36, 47, 640-643, 646, 648, 650, 651, and as to the offence of being "found in a disorderly house," see sec. 229, as amended in 1913.

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47, 649, 652, 652A.

*Arrest without warrant by peace officer*—The person who “has committed” any of the offences mentioned in secs. 646 and 647 may be arrested by a peace officer without a warrant. Sec. 647.

*Arrest to prevent continued breach of the peace*—See secs. 46, 47.

**By peace officer in the above and other cases.**

**647.** A peace officer may arrest, without warrant, any one who has committed any of the offences mentioned in the sections in the last preceding section mentioned or in sections,—

- (a) 405, obtaining by false pretense; 406, obtaining execution of valuable securities by false pretense;
- (b) 525, injuring dams, etc., or blocking timber channel; 536, attempting to injure or poison cattle;
- (c) 542, cruelty to animals; 543, keeping cock-pit;
- (d) 555, exporting counterfeit coin; 561, possessing counterfeit current coin; 563, paragraph (b), bringing into Canada or possessing counterfeit foreign gold or silver coin; 563, paragraph (d), counterfeiting foreign copper coin.

*Origin*—Sec. 552, Code of 1892, as amended 58-59 Vict., Can., ch. 40.

*Arrest by peace officer without warrant*—See also secs. 37-47.

*Offence committed anywhere in Canada*—Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is *justified* in arresting such person without warrant, whether such person is guilty or not. Code sec. 30. By the common law, any person (whether a peace officer or not) might arrest any one on probable suspicion of felony, and a peace officer under such circumstances was protected, even if it should turn out that no such felony had been committed by anyone, provided he could show that he had reasonable ground for suspecting the party arrested: Stephen's Commentaries on the Laws of England, 14th ed., 310; 2 Hale's History of the Pleas of the Crown, 78; Allen v. L. & S. W. Ry. Co. (1870) L.R. 6 Q.B. 65; 40 L.J.Q.B. 55.

On such an arrest the common law rule applies to require that the person arrested should be brought before a justice of the peace within a reasonable time. Anderson v. Johnston, [1918] 3 W.W.R. 620 (Sask.), affirming Anderson v. Johnston, [1917] 3 W.W.R. 353, 10 Sask. L.R. 352; R. v. Cloutier, 12 Man. R. 183, 2 Can. Cr. Cas. 43.

*Arrest on police request from another city or place*—

Where the chief of police in one city notifies the police in another city that a warrant has been issued for the arrest of a certain man and forwards a description and photograph of the accused and the police so notified, relying on such description and photograph, arrest a man, in the honest and reasonable belief that he is the one wanted, they are protected by sec. 30 of the Criminal Code from liability in civil or criminal proceedings, even though the man arrested is not in fact the one for whom the warrant had been issued. If he be not in fact the man wanted, the arresting officer may be liable in damages for detaining him longer than is reasonably necessary to determine his identity, and he must use diligence in communicating with the officer who requested the arrest. *Anderson v. Johnston*, *supra*.

The offence must be one for which an arrest without warrant would have been justified at the place where the crime was committed; Code secs. 30, 33, 647; or may be justified under sec. 649, where the accused is believed to be escaping and is taken in fresh pursuit; *R. v. Shyffer*, 15 B.C.R. 338, 15 W.L.R. 323, 17 Can. Cr. Cas. 191; or in the special case of a suspected procurer where the circumstances bring it within sec. 652A.

And if the arrest is made on the faith of a telegram from the police of another province and the belief of the arresting officer that the offence was committed and that a warrant had been issued in the other province, the accused will not be released on habeas corpus in the district where he was arrested because of the offence not being one for which an arrest without warrant is justified, if the original warrant arrives in time to be endorsed for execution and returned to the habeas corpus as the cause of detention. *R. v. Lee Chu*, 14 Can. Cr. Cas. 322.

**Person found committing offence.—Arrest by peace officer.—By any person by night.**

**648.** A peace officer may arrest, without warrant, any one whom he finds committing any criminal offence.

2. Any person may arrest, without warrant, any one whom he finds committing any criminal offence by night.

*Origin*—Sec. 552 (3), Code of 1892; 58-59 Vict., Can., ch. 40, sec. 1.

*Person "found committing" the offence*—See secs. 32, 35, 36, 47, 646, 648, 650, 651, and as to the offence of being "found" in a disorderly house, see secs. 229 as amended in 1913; *Altman v. Majury*, (1916) 37 O.L.R. 608, 11 O.W.N. 21, 27 Can. Cr. Cas. 398.

A peace officer is "justified" in arresting without warrant any person whom he finds committing any offence against the Criminal Code, whether punishable on summary conviction or indictable. Code sec. 35. The word "justified" in this connection is taken from the English



Draft Code from which sec. 35 of the Canadian Code was derived. The English Commissioners reported that in the sections dealing with justification they used the word "justified" when there was no change in the law as it previously existed, but that where they submitted an enactment in the draft Code which extended the prior law, or as to which there was some doubt whether the prior law was being extended or not, they used the words "protected from criminal responsibility," so as clearly not to prejudice the person injured as to any right of damages which he might have for the act for which protection against criminal proceedings was being recommended. *Plested v. McLeod* (1910) 3 Sask. L.R. 375, 15 W.L.R. 533, 535. The majority of the court in that case held that Code sec. 35 is not for the purpose of "authorizing" the arrest, but is for the protection of the officer making the same from the consequences of his act either in a criminal or civil proceeding; and that it would protect him only in cases in which the officer was authorized to make the arrest, *e.g.*, in the case of a person found committing a criminal offence. (Code sec. 648.) *Plested v. McLeod*, *supra*.

*Peace officer receiving in custody person detained for breach of the peace*—See secs. 46, 47.

*Arrest of person found committing breach of the peace*—See secs. 46, 47.

#### **Arrest by any person on fresh pursuit.**

**649.** Any one may arrest without warrant a person whom he, on reasonable and probable grounds, believes to have committed a criminal offence and to be escaping from, and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person.

*Origin*—Sec. 552 (4), Code of 1892.

*Arrest on suspicion of person believed to be freshly pursued*—See sec. 37.

*Arrest without warrant on fresh pursuit*—The fact that a police officer came from another province several weeks afterwards upon the arrest of the accused to take him back to answer the charge does not constitute a fresh pursuit under Code sec. 649. *R. v. Shyffer*, 17 Can. Cr. Cas. 191, 15 B.C.R. 338, 15 W.L.R. 323.

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47. 649, 652, 652A.

#### **By owner of property affected.**

**650.** The owner of any property on or with respect to which any person is found committing any criminal offence, or any

person authorized by such owner, may arrest, without warrant, the person so found, who shall forthwith be taken before a justice to be dealt with according to law.

*Origin*—Sec. 552, Code of 1892, as amended, Can. statutes, 1895, ch. 40, sec. 1.

*Person "found committing" the offence*—See secs. 32, 35, 36, 47, 646, 650, 651, and as to the offence of being "found" in a "disorderly house," see sec. 229 as amended in 1913.

*"Property"*—See sec. 2, sub-sec. (32).

**Conveying liquor on board His Majesty's ships.—Arrest by officer in His Majesty's service.**

**651.** Any officer in His Majesty's service, any warrant or petty officer in the navy, and any non-commissioned officer of marines may arrest without warrant any person found committing any of the offences mentioned in sec. 141.

*Origin*—Sec. 552 (6), Code of 1892, as amended 1895.

*Unlawfully taking liquor on board H.M. ships*—See Code secs. 2 (17) and 141.

**Suspected loiterer.—Arrest by peace officer.**

**652.** Any peace officer may, without a warrant, take into custody any person whom he finds lying or loitering in any highway, yard or other place during the night, and whom he has good cause to suspect of having committed or being about to commit, any indictable offence, and may detain such person until he can be brought before a justice to be dealt with according to law.

2. No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice.

*Origin*—Sec. 552, Code of 1892.

*Loitering at night*—Sub-sec. 2 applies only to cases coming within the preceding part of sec. 652, and it is not necessary in other cases to bring the person arrested before a justice of the peace before noon of the day following the arrest; *R. v. Cloutier*, (1898) 2 Can. Cr. Cas. 43, 12 Man. L.R. 183; but, by the common law, the person arrested without warrant in other cases must be brought before a justice within a reasonable time. *R. v. Cloutier*, supra; *Anderson v. Johnston* [1918] 3 W.W.R. 620 (Sask.), affirming *Anderson v. Johnston* [1917] 3 W.W.R. 353, 10 Sask. L.R. 352.

Vagrancy under secs. 238 and 239 being the subject of summary conviction proceedings and not of indictment, Code sec. 652 does not apply to justify an arrest on suspicion by a peace officer without warrant where the peace officer did not find the accused committing the particular act relied upon as constituting statutory vagrancy (Code sec. 648). *R. v. Lachance* (1915) 24 Can. Cr. Cas. 421 (Que.).

*Arrest without warrant on suspicion*—See secs. 30, 31, 33, 37, 47, 649, 652, 652A.

*Justifying an arrest without warrant*—See secs. 30-47.

#### **Arrest for procuring.—Without a warrant.**

**652A.** Any peace officer may arrest without a warrant any person whom he has good cause to suspect of having committed or being about to commit any of the offences mentioned in sec. 216.

*Origin*—Can. Statutes, 1913, ch. 13.

*Procuring; man living on earnings of prostitution*—See sec. 216 as amended 1913, Can., ch. 13; *R. v. Quinn* (1918) 43 O.L.B. 385.

#### ***Procedure—Summons or Warrant.***

#### **Summons or warrant by justice in what cases.**

**653.** Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:—

- (a) If such person is accused of having committed in any place whatever an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits;
- (b) If such person, wherever he may be, is accused of having committed an indictable offence within such limits;
- (c) If such person is alleged to have anywhere unlawfully received property which was unlawfully obtained within such limits;
- (d) If such person has in his possession, within such limits, any stolen property.

*Origin*—Sec. 554, Code of 1892.

*May issue a warrant or summons*—The Interpretation Act declares that the word "may" is to be construed as permissive unless the context otherwise requires. R.S.C. 1906, ch. 1, sec. 34, sub-sec. 24. The power here conferred is that the justice shall determine whether further proceedings are warranted or not upon a consideration of the complaint and of any evidence adduced under sec. 655. The direction of sec. 653 is that the justice *may* issue a warrant or summons "*as hereinafter mentioned*," but sec. 655 directs that if he is of opinion that a case for so doing is made up he *shall* issue a summons or warrant. The consideration of the information for this purpose is a judicial act. *R. v. Ettinger*, 3 Can. Cr. Cas. 387 (N.S.). Compare, as to this, the wording of sec. 629, relating to the issue of search warrants.

*Montreal*—In the district of Montreal the clerk of the peace or deputy clerk of the peace has all the powers of a justice under Parts XIII and XIV.

*Special jurisdiction as to offences near boundaries or in transit between counties, etc.*—See sec. 583.

*Special jurisdiction in certain remote districts*—See secs. 585, 586, 588.

"*Warrant or summons as hereinafter mentioned*"—See secs. 654-666.

*Territorial limits as affecting jurisdiction to commit for trial*—Where persons are brought by process from one county to another upon a conspiracy charge and committed for trial therein, but the Crown fails to prove against them any overt act committed within the county in which the proceedings are taken, although charged as committed in both counties, the court of that county has no jurisdiction to convict for a conspiracy committed wholly within the county from which the accused were brought. *R. v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427.

An election of speedy trial without a jury in the County Court Judge's Criminal Court does not confer jurisdiction in a case in which there would be no jurisdiction over the accused if the trial were upon indictment before a jury. *Seemle*, had the charge in the preliminary enquiry for conspiracy not included both counties as the locality of the conspiracy and had no evidence been proven before the committing magistrate of overt acts in his county by some of the persons charged, the committal for trial and the indictment of charge which followed might have been quashed; but if the evidence of an overt act within the county upon which the committal order was founded is discredited at the subsequent trial the fact of the committal having been made does not aid the jurisdiction. *The King v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427; and see *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113.

The presence of the accused, whether transitory or not, in any part

of the province in which the offence was committed, will justify the exercise of jurisdiction by the magistrate of the place where the accused is found, to the same extent as if the offence had been there committed; but the magistrate has a discretion to send the prisoner for further preliminary enquiry before the magistrate of the place where the offence was committed. *Re Seeley*, 14 Can. Cr. Cas. 270, 41 S.C.R. 5.

"*Indictable offence*"—Whether specifically declared an indictable offence or not, the offence is included if it be a statutory one under Dominion law for which the offender may be prosecuted by indictment. Interpretation Act, R.S.C. 1906, ch. 1, sec. 28.

*Transfer of inquiry to a justice of place where offence committed*—See secs. 665, 666.

*Mandamus and prohibition in respect of preliminary inquiries*—See notes on Mandamus and Prohibition following sec. 576.

#### Information or complaint.—Form.

**654.** Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence under this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

2. Such complaint or information may be in form 3, or to the like effect.

*Origin*—Sec. 558, Code of 1892.

*Form of information and complaint for an indictable offence*—Code form 3, following sec. 1152.

*Affirmation in lieu of oath*—See secs. 14 and 15 of the Canada Evidence Act.

*Purpose of information or complaint*—A written information on a preliminary enquiry is for the protection of the accused so that he may know the charge laid against him, but if the magistrate, on being verbally informed of the offence by the accused himself, issues a summons and the accused attends on its return a committal for trial may be made on the depositions taken upon the preliminary enquiry, without an information in writing. The committing justices had jurisdiction over the accused on his attending in answer to the summons although objection was taken to the want of an information. *R. v. Thompson*, 15 Can. Cr. Cas. 162; same case, *re Thompson*, 14 B.C.R. 314.

In a criminal case the preliminary hearing before the magistrate of an offence punishable on indictment, is not, properly speaking, the *enquete* of the informant, but that of the magistrate. *Belanger v. Mulvena*, 22 Que. S.C. 37.

An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence. The statement of the offence may be in the words of the enactment describing it or declaring the transactions charged to be an offence. *R. v. France*, 1 Can. Cr. Cas. 321.

If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on *certiorari* because it is afterwards shown that the information was not in fact sworn at such time and place. *Ex parte Sonier*, 2 Can. Cr. Cas. 121, 34 N.B.R. 84.

*Withdrawal of complaint*—The person who has laid the complaint in a summary proceeding for keeping a disorderly house and who thereafter declares under oath before the magistrate that she laid the charge without understanding it and under duress of detectives may be permitted to withdraw it and so terminate the proceedings. *Baxter v. Gordon Ironsides and Fares Co.*, 13 O.L.B. 598; *R. v. Rousseau* (1915) 24 Can. Cr. Cas. 390; *Tamblyn v. Westcott*, 23 Can. Cr. Cas. 391, 7 W.W.B. 1037.

*Amending the information*—It seems that in no case is it necessary to re-swear an information after an amendment, if the amendment is of such a nature only as that it merely gives greater particularity or certainty to the charge and does not amount to the laying of a new charge, i.e., a charge of a different kind of offence or of a similar offence at a time or place materially different from that first alleged. *R. v. Tally*, 23 Can. Cr. Cas. 449; 7 W.W.B. 1178 (Alta.).

Even if the accused had a right to insist upon the information being re-sworn, he waives the irregularity by refraining from taking the objection: *R. v. Lewis*, 6 Can. Cr. Cas. 499; *R. v. Tally*, *supra*.

Leave to amend a clerical error in a complaint being heard under Part XV may be granted even after the conclusion of the evidence for the prosecution. *Bell v. Parent*, 7 Can. Cr. Cas. 465.

Where a condensed form of describing the offence is authorized by statute as regards a summary conviction, the same form will be valid in an information or in a summons or warrant. Code sec. 1124 (2).

*Objection to form of information*—See secs. 669, 670, 753, 754, 1120, 1121, 1124, 1125.

*Ontario*—The Police Magistrates' Act, B.S.O. 1914, ch. 88, sec. 18, limits the jurisdiction of justices in cases where there is a police magistrate competent to act. A justice shall not admit to bail or discharge a prisoner, or adjudicate upon, or otherwise act until after judgment in a case arising in a city or town for which there is a "police magistrate," or where the initiatory proceedings were taken before a police magistrate, except at the request of the police magistrate or in case of his illness or absence or except at the general sessions; but such restric-

tion is declared not to prevent a justice "acting within his territorial jurisdiction" from taking an information or issuing a summons or warrant returnable before the proper police magistrate, or from acting with a police magistrate at the latter's request. R.S.O. 1914, ch. 88, secs. 18 and 19.

*Montreal*—In the district of Montreal the clerk of the peace or deputy clerk of the peace has all the powers of a justice under Parts XIII and XIV.

*Preliminary enquiry*—See sec. 668 *et seq.*

*Summary convictions*—See sec. 705 *et seq.*

*Summary trials*—See sec. 771 *et seq.*

*Malicious prosecution*—The liability of the informant for maliciously laying in information without reasonable or probable cause is regulated by the civil and not the criminal law. Reference may be had to *Abrath v. North Eastern Ry. Co.*, 11 A.C. 247; *Cox v. English etc. Bank* [1905] A.C. 168; *Hetu v. Dixville etc. Assoc'n*, 40 Can. S.C.R. 128; *Metropolitan Bank v. Pooley*, 10 A.C. 210; *Lister v. Perryman*, L.R. 4 H.L. 521; *McMullen v. Wettlaufer*, 32 O.L.R. 178; *Hirtle v. Knox*, 47 N.S.B. 219; *Lachance v. Casault*, 12 Que. K.B. 179; *Wainwright v. Villetard*, 6 Terr. L.R. 189; *Ford v. Canadian Express Co.*, 21 O.L.R. 585; *Tamblen v. Westcott*, 7 W.W.R. 1037; *Mortimer v. Fisher*, 4 W.W.R. 454; *Darling v. Flater*, 4 W.W.R. 1002; *Momsen v. Rudolph*, 3 W.W.R. 710; *Collins v. Gould*, 3 W.W.R. 811; *Flora v. Shandro*, 1 A.L.R. 252; *Wood v. Newby*, 2 W.W.R. 409; *Harris v. Hickey*, 1 W.W.R. 679; *Geers v. Westman*, 1 W.W.R. 861; *Curry v. Calof*, 1 W.W.R. 233; *Budyk v. Shandro*, 7 W.W.R. 415; *Benton v. Gallagher*, 14 W.L.R. 60, 19 Man. L.R. 478; *Dennison v. C.P.R.*, 36 N.B.R. 250; *Rosenfield v. Bernstein*, (1917) 27 Rev. Leg., 475 (Que.); *Lyone v. Long* [1917] 3 W.W.R. 139, 10 Sask. L.R. 343; *Laundry v. Bathurst Lumber Co.*, 44 N.B.R. 374.

The instituting of criminal proceedings for the purpose of establishing a civil right amounts to the malice which must be proven in an action for malicious prosecution. *Ibbotson v. Berkley*, [1918] 3 W.W.R. 1018 (B.C.); *Olds v. Paris*, [1918] 2 W.W.R. 682 (B.C.).

In *Cox v. English, Scottish and Australian Bank*, [1905] A.C. 168, 74 L.J.P.C. 62, Lord Davey in delivering the judgment of the Judicial Committee said at p. 170: "The principles applicable to these cases have been laid down for the English courts in the case of *Abrath v. North-Eastern Railway* (1883) 11 Q.B.D. 440, 52 L.J.Q.B. 620, in which *Bowen, L.J.*, said (p. 455) 'in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution . . . ; and lastly, that the proceedings of which he complains, were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice.'"

Although the absence of reasonable and probable cause is some evidence from which malice may be inferred, the jury by their finding as to the honest belief of the defendant, negatives any inference which depended solely on such evidence; and in the absence of any other evidence of indirect motive, an additional finding of the jury that the defendant was actuated by malice could not be supported. *Brown v. Hawkes*, [1891] 2 Q.B. 718, 61 L.J.Q.B. 151; and see *Watson v. Smith* (1899) 15 Times L.R. 473.

Absence of reasonable and probable cause is some evidence from which malice may be inferred but it is something entirely distinct and different. The latter is entirely a state of mind; the former is at least partly an extraneous condition arising by reason of the non-existence of certain facts. *Scott v. Harris* [1918] 3 W.W.R. 1028, 1032 (Alta.).

The making of enquiry is something to be considered in determining the existence of reasonable cause, but it is not a state of mind, as the malice which is necessary to support an action of malicious prosecution is. *Scott v. Harris*, supra. If a person, honestly believing in the guilt of another and desiring only the enforcement of the law, lays a charge without making any enquiry whatever he is not liable to an action even though the result of enquiries would have shown him his mistake. *Scott v. Harris*, supra; but his failure to do so presumably may be considered by the jury in finding for or against malice.

That the defendant acted on the advice of counsel, is some evidence of reasonable and probable cause, but not necessarily a complete answer. *Olds v. Paris* [1918] 2 W.W.R. 682 (B.C.); *Harris v. Hickey* (1912) 17 B.C.R. 21, 1 W.W.R. 679, 19 W.L.R. 948; *Abrath v. N.-E. Ry.* (1883) 11 Q.B.D. 79; 52 L.J.Q.B. 352, and on appeal, 11 App. Cas. 247; 52 L.J.Q.B. 620.

A person seeking to shelter himself behind his counsel must take proper care to inform himself of all the facts. See *St. Denis v. Shoultz* (1898) 25 A.R. 131 (Ont.); *Momsen v. Rudolph* (1913) 18 B.C.R. 631; 3 W.W.R. 710; *Abrath v. N.-E. Ry.*, supra; *Olds v. Paris* [1918] 2 W.W.R. 682 (B.C.).

The advice of counsel, after disclosure of all facts, is cogent evidence of the existence of reasonable and probable cause; but, if the complainant does not believe in the guilt of the accused, there is no reasonable and probable cause for him: *Connors v. Reid*, 25 O.L.R. 44; *McMullen v. Wettlaufer*, 33 O.L.R. 177, 7 O.W.N. 697; *Schaal v. Reeves* [1918] 2 W.W.R. 442.

No presumption of reasonable and probable cause arises from taking the advice of a police sergeant or of a police constable. *Schaal v. Reeves* [1918] 2 W.W.R. 442, 447.

*Information in summary conviction matter*—See sec. 710.



**Summons or warrant thereon.—Evidence on oath.**

**655.** Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant and, if the justice considers it desirable or necessary, the evidence of any witness or witnesses; and if the justice is of opinion that a case for so doing is made out he shall issue a summons, or warrant, as the case may be, in manner hereinafter provided.

2. Such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant.

3. The justice shall in connection with such hearing have the same power of procuring the attendance of witnesses and of compelling them to testify as under Part XIV.

4. The evidence of witnesses, if any, at such hearing shall be given upon oath, and the evidence of each witness shall be taken down in writing in the form of a deposition, and, subject to the provisions of sec. 683, which, so far as applicable, shall apply to such hearing, shall be read over to and signed by the witness and signed by the justice.

*Origin*—Sec. 559, Code of 1892, R.S.C. 1886, ch. 174, sec. 30; 32-33 Vict., Can., ch. 30, sec. 9.

*Where an arrest may be made without warrant*—Sub-sec. 2 of sec. 655 originates with the English Draft Code, sec. 440, and was necessary for the proposed English Code, because of rulings made by some English justices that in cases of felony the complainant might himself arrest the offender and therefore required no warrant. Commissioners' report, pp. 32 and 33.

*Witnesses to support application for warrant or summons*—The addition of the power to hear the complainant's witnesses, if any, made by the Code Amendment of 1909, was thought to be a desirable amendment in ordinary cases inasmuch as the justice may sometimes not feel justified in granting a summons or warrant without some further evidence than that of the applicant. Furthermore, it was designed to give express authority for compelling the attendance of witnesses and for the taking of their evidence upon oath upon application for warrant in extradition cases. The extradition judge is by sec. 10 of the Extradition Act, R.S.C. 1906, ch. 155, to issue a warrant of arrest on such evidence as would justify the issue of a warrant if the crime had been committed in Canada.

Although by the amendment of 1909 a magistrate is directed to hear

the complainant and "the evidence of his witnesses, if any" in support of the application for a summons or warrant, in respect of an indictable offence, the Crown may, upon the trial, call witnesses whose evidence was not offered on the application for the summons or warrant. The object of the amendment is to prevent the magistrate from refusing to issue process, because in his view the complainant's own unaided statement might be insufficient to make out a case, although supplementary evidence was available and was tendered. *R. v. Johnston* (N.S.), 17 Can. Cr. Cas. 369, 44 N.S.R. 468; *Re Broom* (1911) 3 O.W.N. 51. It would seem, however, that before the amendment was passed, the magistrate had a discretion to examine other witnesses than the complainant if produced, though possibly no power as now to compel their attendance. *Ex parte Tierney*, 17 Que. K.B. 486, 14 Can. Cr. Cas. 194; *Ex parte Boyce*, 24 N.B.R. 347.

If any witnesses are produced to satisfy the justice that he should issue process, which, for any good reason, he is not convinced he should do on the oath of the complainant alone, such witnesses are to give their evidence upon oath and their deposition is to be taken in writing. *White v. Dunning*, (1915) 7 W.W.R. 1210, 8 Sask. L.R. 76, 24 Can. Cr. Cas. 85; *ex parte Archambault*, 16 Can. Cr. Cas. 433; *R. v. Mitchell*, 24 O.L.R. 324, 19 Can. Cr. Cas. 113; *ex parte Boyce*, 24 N.B.R. 347.

The depositions are to be reduced to writing or may be taken in shorthand, following the directions "so far as applicable" of sec. 683, but as they are *ex parte* statements, they cannot be used as part of the evidence on the preliminary enquiry to support a committal for trial; for the latter purpose the witnesses must again attend and give evidence, and be subject to cross-examination. See sec. 682; *Weir v. Choquet*, 6 Rev. de J. 121.

If the justice is satisfied by the information itself that there is sufficient ground to issue a summons without any preliminary examination under oath, either of the complainant or of his witnesses, he need not examine the complainant or his witnesses under oath, *ex parte Kane* (1915) 26 Can. Cr. Cas. 166 (N.B.); *R. v. Neilson*, 44 N.S.R. 488, 17 Can. Cr. Cas. 298; *Ex parte Archambault*, 16 Can. Cr. Cas. 433, *ex parte Dolan*, 26 Can. Cr. Cas. 171 (N.B.); *ex parte O'Began*, (1909) 39 N.B.R. 378; *ex parte O'Neill*, (1910) 40 N.B.R. 339; *R. v. Mitchell*, 19 Can. Cr. Cas. 113, 24 O.L.R. 324; (contra, see *R. v. Smith*, 16 Can. Cr. Cas. 425).

*Application to summary conviction proceedings under Part XV*—The provisions of Part XIII for compelling the appearance of the accused are, "so far as applicable," to apply to summary conviction proceedings, except as varied in Part XV. See Code sec. 711. Whether the provision of sec. 655 for hearing additional witnesses in support of the application for a summons or warrant applies in any case under Part XV is an open question. In *ex parte Dolan* (1911), 26 Can. Cr. Cas. 171, 174 (N.B.) the court found it unnecessary to decide the

point, but intimated that in a summary conviction matter, the duty of the justice remains "as it always has been," that is, that he should reasonably satisfy himself that there is sufficient cause for his interference by summons. Ordinarily, a written and signed information is sufficient for that purpose. But if, with such an information before him, his mind is still unsatisfied or in doubt, he may, if he desires, "as he heretofore could have done," take the evidence under oath of any witness in support of the information. *Ex parte Dolan* (1911) 26 Can. Cr. Cas. 171, 174.

If the proceedings were under Part XV (summary convictions) and a warrant of arrest was not asked, but a summons only, it would seem that the provisions as to taking evidence would not apply, as the information in that event need not be under oath (sec. 710). *R. v. Neilson* (1910) 44 N.S.R. 488, 17 Can. Cr. Cas. 298; *R. v. Sweeney*, 45 N.S.R. 494, 19 Can. Cr. Cas. 222.

*Refusal to issue process*—Mandamus will not lie to compel a magistrate to issue a warrant for the arrest on a criminal charge of conspiracy of persons resident out of Canada who are temporarily therein solely for the purpose of giving evidence before a committee of a provincial legislature in respect of the very matter which is sought to be made the subject of the criminal charge, while such non-residents are under the protection of a safe-conduct granted to them by the legislature. *Marsil v. Lanctot* (1914) 25 Can. Cr. Cas. 223.

The refusal of a summons or warrant is not a discharge of the accused within sec. 688 permitting the prosecutor to have himself bound over to prosecute for an indictable offence. *Ex parte Reid*, 49 J.P. 600.

In Ontario a magistrate who refuses to issue either a summons or a warrant upon an information laid before him for a criminal offence may be called upon by order *nisi* from the Supreme Court of Ontario to show cause why the information had not been proceeded upon. The person accused by such information may also be made a party to the proceedings against the magistrate that he may also show cause why the magistrate should not issue process against him. *R. v. Graham*, 17 Can. Cr. Cas. 264; *R. v. Meehan* (No. 1), 3 O.L.R. 361; *R. v. Meehan* (No. 2), 3 O.L.R. 567, 5 Can. Cr. Cas. 312; *Re Broom*, 18 Can. Cr. Cas. 255 (Ont.), 2 O.W.N. 306.

Where justices entertained an application for a summons for a criminal offence, and have considered the material on which the application is based, and refused to hear more, or to grant the summons, the High Court will not interfere by mandamus to order them to hear again: *Ex parte MacMahon*, 48 J.P. 70. That was an application for a mandamus to a magistrate to exercise his jurisdiction in granting summonses against five persons for the crime of wilful and corrupt perjury. In giving judgment Lord Coleridge said: "If he, the magistrate, has not exercised his jurisdiction, this court will compel him to do so, for parties have a right to his exercise of that jurisdiction, and he has no right

to refuse to do so. But if it has been exercised, however erroneously, this court, which is not a court of appeal from the magistrate, has no power whatever to correct or review his exercise of his jurisdiction."

The court will not grant to the prosecutor a mandamus to compel a re-hearing by the magistrate of an application for process in respect of an indictable offence, if the magistrate has exercised his discretion (although erroneously) in refusing the process after being put in possession of the facts on which he can exercise discretion. But, if the magistrate on an application for process erroneously holds that the offence is not indictable, and that he therefore has no jurisdiction to hold a preliminary enquiry in respect thereof, a mandamus will lie to compel him to do so. *The King v. Meehan* (No. 2), 3 O.L.R. 567, 5 Can. Cr. Cas. 312 (Ont.); *Thompson v. Desnoyers*, 16 Que. S.C. 253, 3 Can. Cr. Cas. 68; and see *re McLeod and Amiro*, 25 Can. Cr. Cas. 230 (Ont.). So, where process has been granted, the accused is not entitled to restrain further proceeding by applying to a superior court for prohibition upon material showing a good ground of defence. *Beaudry v. Lafontaine*, 17 Que. S.C. 398.

*Delay for consideration*—It is only if the magistrate is "of opinion that a case for so doing is made out" that he is directed to issue a summons. That consideration may require time. In most cases the course of duty is plain, and no prolonged consideration is needed. It is therefore to be expected that the form of summons should read as it does to meet the ordinary case. But the presence of the words "this day" in form 5, having regard to the language of sec. 655, by no means warrants a construction of that section which would compel the magistrate in every case in which he takes an information to issue a summons forthwith or not at all. *R. v. Hudgins* (1907) 12 Can. Cr. Cas. 223, 14 O.L.R. 139, per Anglin, J.

*Ministerial and Judicial Acts*—The issue of a warrant for arrest upon a sworn information is in itself a ministerial act of the magistrate, but his preliminary decision under Cr. Code sec. 655 on the question whether a warrant or summons is the more appropriate, or whether in fact any offence is disclosed in the information, is a judicial act. *Marsil v. Lanctot* (1914), 25 Can. Cr. Cas. 223 (Que.).

Without an information properly laid a justice has no jurisdiction to issue a warrant and if he does so he is liable in trespass. *Appleton v. Lepper*, 20 U.C.C.P. 138; *McGuinness v. Defoe*, 23 A.R. (Ont.), 704; *Kingston v. Wallace*, 25 N.B.R. 573; *Murfin v. Sauve*, 19 Que. S.C. 51.

*Discretion of magistrate*—The discretion vested in a magistrate to refuse a warrant of arrest will not be interfered with by mandamus; nor will a mandamus be granted where a warrant had been granted, but on re-consideration had been withdrawn by the magistrate before it was executed. *R. v. Biddinger* (1914) 22 Can. Cr. Cas. 217; and see *re Parke*, 30 Ont. R. 498; *Ex parte McMahon*, 48 J.P. 70.

The magistrate may well decline to permit a witness whom he has

believed on the trial of an assault case to be prosecuted for perjury, at the instance of a witness whom he did not believe, and where, upon the perjury charge, there could be no further evidence than that given upon the trial of the assault. It is not in the public interest that the retrial of a trivial assault case should be had in this indirect way. *Re Broom*, 3 O.W.N. 51.

It was objected in *R. v. Graf*, 15 Can. Cr. Cas. 193, 19 O.L.R. 238, upon a charge under sec. 207 of selling obscene pictures, that, before the actual trial of the case, the magistrate had looked at the books and pictures found in the defendant's possession, and had thereby necessarily become prejudiced against the defendant. Held, that, as the magistrate was at liberty to look at the productions before issuing a summons or warrant, in order to form his opinion as to whether or not a case was made out, he was entitled to do so after the defendant was in custody, or at any time. A warrant ought never to be issued when a summons will be equally effectual, except when the charge is of a serious nature. *O'Brien v. Brabner*, 49 J.P. 227, 78 L.T.N. 409.

When an information is laid before a justice he should use some discretion and common sense in deciding whether he should issue a warrant or a summons to secure the attendance of the accused. *Beck, J.*, in *Carruthers v. Biesiegel* (1908), 1 Alta. L.R. 390, 391.

*Preliminary inquiry where accused under remand for sentence on another charge*—A prisoner convicted by a magistrate on a summary trial and remanded for sentence to a fixed date may be brought up in the meantime for preliminary enquiry upon another criminal charge by means of a writ of habeas corpus *ad respondendum* ordered by a Superior Court on the prosecutor's application. *R. v. Henry* (1915) 25 Can. Cr. Cas. 86; *Ex parte Griffiths*, 5 B. & A. 730, followed.

*Limitation of time for certain prosecutions*—See secs. 1140-1142.

*Cases requiring official consent*—See secs. 591-598.

*Formalities of warrant*—See secs. 655, 659, 660, 661 (3), 669, 670, 1120.

*Formalities of summons*—See secs. 658, 669, 670.

*Summons or warrant in summary conviction matter*—See secs. 711, 712.

#### **Warrant in cases of offence committed on the seas, etc.**

**656.** Whenever any indictable offence is committed on the high seas, or in any creek, harbour, haven or other place in which the Admiralty of England have or claim to have jurisdiction, and whenever any offence is committed on land beyond the seas for which an indictment may be preferred or the offender may be arrested in Canada, any justice for any territorial division

in which any person charged with, or suspected of having committed any such offence is, or is suspected to be, may issue his warrant, in form 4, or to the like effect, to apprehend such person to be dealt with as herein and hereby directed.

*Origin*—Sec. 560, Code of 1892, R.S.C. 1886, ch. 174, sec. 32.

*Admiralty offences*—See Code secs. 137-141, sec. 591, and Code sec. 591, as to the Governor-General's consent to the prosecution being instituted.

*Where there is concurrent jurisdiction with the U.S.A. on the Great Lakes*—There may be a concurrent jurisdiction of the U.S.A. in respect of an offence committed on board an American vessel on a part of the Great Lakes constituting the high seas, under R.S.U.S., sec. 5346. *United States v. Rodgers*, 150 U.S. 249, 37 L. Ed. 1071, or on any river connecting two of the boundary lakes and within navigable waters. *Ibid.* So the U.S. Courts assume jurisdiction, under R.S.U.S., sec. 5346, to try a person who commits, on board a vessel belonging in whole or in part to the U.S.A. or to an American citizen, an assault on another with a dangerous weapon, when such vessel is in the Detroit river out of the jurisdiction of the State of Michigan and within the territorial limits of Canada. *United States v. Rodgers*, *supra*. This jurisdiction is exercised when the vessel and parties are brought again into U.S. territory. By comity between nations it is generally understood that disorder which disturbs only the peace of the ship or those on board is to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb public peace may be suppressed and, if need be, the offenders punished by the proper authorities of the local jurisdiction. *Wildenhuss' case*, 120 U.S. 1, 30 L. Ed. 565.

*Warrants for admiralty offences committed out of Canada*—See Code sec. 656 and Code form No. 4.

*Canadian jurisdiction over extra-territorial Admiralty offences*—See 12-13 Vict., Imp., ch. 96, secs. 1 and 2; 18-19 Vict., Imp., ch. 91, sec. 21; 23-24 Vict., Imp., ch. 122; 28-29 Vict., Imp., ch. 63; Merchant Shipping Amendments Act, 30-31 Vict. (Imp.), ch. 124, sec. 11; Courts (Colonial) Jurisdiction Act, 1874, 37 Vict., Imp., ch. 27; Territorial Waters Jurisdiction Act, 1878, 41-42 Vict., Imp., ch. 73; 53-54 Vict., Imp., ch. 37; Merchant Shipping Act, 57-58 Vict., Imp., ch. 60, secs. 687 and 688; Merchant Shipping Acts, 1894-1914, Imp.

**Arrest of suspected deserter.—Breaking open buildings on warrant for deserter.—Resisting warrant.**

**657.** Every one who is reasonably suspected of being a deserter from His Majesty's service may be apprehended and brought for examination before any justice, and if it appears

that he is a deserter he shall be confined in gaol until claimed by the military or naval authorities or proceeded against according to law.

2. No one shall break open any building to search for a deserter unless he has obtained a warrant for that purpose from a justice, founded on affidavit that there is reason to believe that the deserter is concealed in such building, and that admittance has been demanded and refused.

3. Every one who resists the execution of any such warrant shall incur a penalty of eighty dollars, recoverable on summary conviction, before two justices.

*Origin*—Sec. 561, Code of 1892; R.S.C. 1886, ch. 169, sec. 7; compare sec. 154 of the Army Act (Imp.).

*Prosecutor's share of fine on a conviction for resisting warrant*—See sec. 1042.

*Persuading to desert from military or naval service*—See secs. 81-84.

**Summons.—Form.—Service.—Proof of service.**

**658.** Every summons issued by a justice under this Act shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned.

2. Such summons may be in form 5, or to the like effect.

3. No summons shall be signed in blank.

4. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

5. The service of any such summons may be proved by the oral testimony of the person effecting the same or by the affidavit of such person purporting to be made before a justice.

*Origin*—Sec. 562, Code of 1892; 32-33 Vict., Can., ch. 30, secs. 14 and 15.

*Form of summons to a person charged with an indictable offence*—Code form 5, following sec. 1152.

*Procedure on appearance of accused*—See sec. 668 *et seq.* Part XIV as to preliminary enquiry and sec. 771 *et seq.* Part XVI as to summary trial of indictable offences in certain cases.

*Application of summons procedure to summary conviction matters*—See sec. 711. Sub-sec. (5) of sec. 658 requires the affidavit or proof of service of the summons to be sworn before a justice and cuts out the application of any general provision as to the power of a commissioner to take affidavits for use in courts generally. *R. v. Pelley*, (1915) 27 Can. Cr. Cas. 405 (N.S.). Without this proof there would be no jurisdiction to proceed in the defendant's absence in a summary conviction matter. *R. v. Pelley*, supra.

Service made by a *de facto* constable, one serving after his term has run out and before a re-appointment, would not invalidate a summary conviction on *certiorari*. *R. v. Pelley*, supra; *R. v. Gibson*, 29 N.S.R. 4, 3 Can. Cr. Cas. 451.

*Warrant may follow summons either before or after default*—See sec. 660 (4).

#### Warrant for apprehension.

**659.** The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid as provided in sec. 654, may be in form 6, or to the like effect.

2. No such warrant shall be signed in blank.

*Origin*—Sec. 563, Code of 1892; R.S.C. 1886, ch. 174, secs. 43, 44, 46.

*Form of warrant in the first instance to apprehend a person charged with an indictable offence*—Code form 6, following sec. 1152.

*Formalities of warrant*—See secs. 655, 659, 660, 661 (3), 669, 670, 1120.

*Warrant may be endorsed in another territorial division*—See secs. 662, 663.

*Admission to bail pending hearing*—See secs. 664, 668, 681.

*Similar process on non-appearance to summons under Part XV*—Code sec. 718.

**Formalities of warrant.—Statement of offence.—No return day.—Summons not to prevent warrant.—Warrant in default.—Form.**

**660.** Every warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

2. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and



it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices, to answer to the charge contained in the information or complaint, and to be further dealt with according to law.

3. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing a warrant at any time before or after the time mentioned in the summons for the appearance of the accused.

5. In case the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, a warrant in form 7 may issue.

*Origin*—Sec. 563, Code of 1892; R.S.C. 1886, ch. 174, secs. 43, 44, 46.

*Form of warrant when the summons is disobeyed*—Code form 7, following sec. 1152.

*Warrant may issue on Sunday*—See sec. 661 (3).

*Duty of officer executing warrant*—See secs. 661-664.

*The Fugitive Offenders Act*—The Imperial Parliament, and it alone, has the power to pass a law of general application to the whole of the British Empire dealing with the question of apprehending a fugitive offender in one portion of the Empire and returning him to the part where the offence was committed, in order that he may be tried and punished. *R. v. Simpson, (re Whitla)* 9 W.W.R. 1461, affirming 9 W.W.R. 986. This legislation is contained in the Fugitive Offenders Act, 44-45 Vict., Imp., ch. 69 (1881). The Act contemplates that when an offence to which the Act applies has been committed in one British possession and the party accused has taken refuge in another British possession, the ordinary law prevailing in the place where the offence was committed may be set in motion, but with this distinction that the magistrate may proceed with the taking of depositions in the absence of the accused, but otherwise in a manner similar to that of a preliminary enquiry, for the purpose of determining whether or not an order for the fugitive's return should be made. Fugitive Offenders Act, 1881, Imp., sec. 29; *R. v. Simpson*, 9 W.W.R. 1461. This includes the power to compel witnesses to attend. *Ibid.*

*Procedure applies also on non-appearance to summons under Part XV*—Code sec. 718.

**Where and how executed.—By whom.—On holiday.**

**661.** Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or, in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division.

2. Every such warrant may be executed by any constable named therein or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is a constable.

3. Every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday.

*Origin*].—Sec. 564, Code of 1892; R.S.C. 1886, ch. 174, secs. 47, 48.

*"Within seven miles"*].—The distance is to be measured in a straight line on a horizontal plane. *Mouflet v. Cole*, L.R. 8 Ex. 32.

*Admission to bail pending hearing*].—See secs. 664, 668, 681.

*Statutory holiday*].—The effect of a statutory provision, such as is contained in the Interpretation Act of the Dominion and many provinces, defining the word "holiday" to include New Year's Day, etc., naming the days commonly observed as holidays, relates only to the interpretation of the word "holiday" where used in a statute. *Upton v. Phelan*, 18 N.B.R. 192; *Ex parte Cormier*, 12 Can. Cr. Cas. 339.

As regards the interpretation of the Code, the word "holiday" includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints' Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, the first Monday in September, designated *Labour Day*, and any day appointed by proclamation for a general fast or thanksgiving. R.S.C. 1906, ch. 1, sec. 34 (Interpretation Act).

*Every warrant authorized by this Act*].—This phraseology is wide enough to include all warrants under the Criminal Code. Compare secs. 8-12, containing similar references to "this Act," although certain parts of the Code may be referred to as separate Acts if designated by the former titles of the Acts from which they were consolidated. R.S.C. 1906, ch. 1, sec. 29.

*Warrants for offences under other statutes*].—

Where the prosecution is not for a Code offence, but is under some other statute, federal or provincial, to which some of the Code practice has been made applicable, the exact extent of its adoption must be enquired into for the purpose of ascertaining whether this provision for issuing and executing a warrant on Sunday will extend to such offence or not. The Code does not, of its own force, impose its system of

legal procedure upon the provinces in respect of offences created by the provincial legislatures; but these legislatures have very generally adopted the summary convictions procedure of Part XV of the Code by declaring in provincial statutes regulating summary convictions for provincial offences that except where otherwise provided Part XV of the Code shall apply *mutatis mutandis* as if embodied in the provincial law. See in Ontario, R.S.O. 1914, ch. 90, sec. 4. Sec. 661, not being in Part XV, but in Part XIII, would, in such cases, apply as if included in Part XV only to the extent to which Part XV itself makes it applicable. A reference to sec. 711 in Part XV shows that the provisions of Parts XIII and XIV, relating to compelling the appearance of the accused before the justice for trial are to apply "so far as applicable" and "except as varied, etc." (sec. 711). A warrant of arrest to answer a charge in a summary conviction matter is issued under the authority of sec. 711; and sec. 661 (as well as secs. 654, 655 and 660) would apply by virtue of sec. 711 in all cases to which Part XV had been made applicable. *R. v. McGillivray*, 41 N.S.R. 321, 13 Can. Cr. Cas. 113. But where Part XV could apply only by its inclusion by reference in the special Act, such reference will not involve the application of sec. 661 (3) to warrants in execution in default of distress or of payment of a fine under secs. 739-741 of Part XV. *Ex parte Frecker*, 33 C.L.J. 248; *Ex parte Willis*, (*R. v. Lawlor*) 44 N.B.R. 447, 27 Can. Cr. Cas. 383.

For any offence against the Criminal Code, search warrants are authorized to be issued, Part XII, sec. 629, *et seq.*, and the execution of such a warrant is authorized to be made on a Sunday or statutory holiday. (Part XIII, sec. 661, sub-sec. 3.)

*Warrants under the Canada Temperance Act*—

Selling, keeping or exposing for sale intoxicating liquor contrary to the provisions of Part II of the Canada Temperance Act is not an offence against the provisions of the Criminal Code; neither is it an indictable offence; but in so far as no provision is made in Part III of the Canada Temperance Act for any matter or thing which is required to be done with respect to prosecutions under the provisions of that Act, all the provisions of Part XV of the Criminal Code, that is the part relating to Summary Convictions, are made applicable in the same manner as if they were incorporated in the Canada Temperance Act, R.S.C. 1906, ch. 152, sec. 135. The Canada Temperance Act makes special provision for the issuance, upon proper information, of search warrants to search for intoxicating liquor, and prescribes the form of both information for the warrant and the warrant itself: (sec. 136 as amended in 1908, ch. 71, sec. 3, and in 1916, ch. 14); but the Act is silent both as to the manner and the time of service (except that the search shall be made in the daytime), of any search warrant that may be issued under the Act. In *Ex parte Willis*, *supra*, Barry, J., said: "It is important to bear in mind that by the express words of sec. 135 of the

Canada Temperance Act it is only Part XV of the Criminal Code that is made applicable to prosecutions under the former Act, and that according to the accepted canons of construction of statutes, all the other provisions of the Code are, therefore, inferentially or impliedly excluded. And since the provisions of the Criminal Code in regard to the issue and service of search warrants are to be found in Parts XII and XIII of that Act, it follows that we cannot resort to or rely upon these parts for authority to serve on a Sunday a search warrant issued under the provisions of the Canada Temperance Act. We cannot invoke the aid of sec. 661, sub-sec. 3 of the Criminal Code for the purpose of legalizing the service on a Sunday of a search warrant, because that provision is not found in Part XV, but is a provision of Part XIII, which latter part is not applicable to prosecutions under the Canada Temperance Act."

*Informant officer may be given the warrant of arrest*—The same officer who laid the information may be deputed to execute the warrant of arrest. *B. v. Harrison*, (1918) 29 Can. Cr. Cas. 420 (B.C.). But it is undesirable that he should make the arrest if he has any personal feeling against the accused or any financial interest in the prosecution or in the matter of the complaint. *B. v. Harrison*, (1918) 29 Can. Cr. Cas. 420. (B.C.).

**662.** If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name authorizing the execution thereof within his jurisdiction.

2. Such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.

3. Such endorsement may be in form 8.

4. If the person against whom such warrant has been issued is then confined for some other cause in any prison within the

province then, upon application to the judge of any superior, county or district court, and upon production to him of the warrant with an affidavit setting forth the above facts, such judge if he is satisfied that the ends of justice require it, may make an order in writing addressed to the warden or keeper of such prison, or to the sheriff or other person having the custody of the prisoner, to bring up the body of such person before the justice who is holding the preliminary inquiry, from day to day, as may be necessary for the purposes of such inquiry, and such warden, keeper, sheriff or other person, upon being paid his reasonable charges in that behalf, shall obey such order.

*Origin*].—Sec. 565, Code of 1892; R.S.C. 1886, ch. 174, sec. 49.

*Form of endorsement in backing a warrant*].—Code form 8, following sec. 1152.

*Adding direction to bring accused before endorsing justice*].—Code sec. 663.

*Arrest on suspicion by peace officer*].—See secs. 30, 647, 649, 652, 652A.

*Endorsement of warrants in execution under Part XV*].—See sec. 712.

*Prosecution may proceed before endorsing justice in certain cases*].—Sec. 663 shows that in some cases the endorsing magistrate may require that the person when apprehended in his territorial division on his endorsement of the warrant from another division, shall be brought before him or some other justice of the division in which the arrest took place; but this is only to be done if the prosecutor, or some of the witnesses for the prosecution, are in that territorial division. Code sec. 663. The magistrate may then exercise a discretion as to whether the interests of justice will be better served by taking the preliminary hearing in the district of the arrest instead of allowing the arresting officer to take the prisoner to the district in which the warrant issued. This provision would doubtless be applied if all of the witnesses desired to be called on either side, including the informant, had followed the accused to the place where he was arrested, and both parties desired the preliminary inquiry and the subsequent trial, if any, to take place in the district of the arrest rather than in another district where the offence is alleged to have been committed.

*Habeas corpus to review arrest warrant from another province*].—R. v. Galloway, 2 Alta. L.R. 258, 15 Can. Cr. Cas. 317.

#### **Procedure on arrest under endorsed warrant.**

**663.** If the prosecutor or any of the witnesses for the prosecution are in the territorial division where such person has been apprehended upon a warrant endorsed as provided in the last

preceding section, the constable or other person or persons who have apprehended him may, if so directed by the justice endorsing the warrant, take him before such justice, or before some other justice for the same territorial division and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect as if he had himself issued the warrant.

*Origin*—Sec. 566, Code of 1892; R.S.C. 1886, ch. 174, sec. 50.

**Procedure in other cases of person arrested on warrant.**

**664.** When any person is arrested upon a warrant he shall, except in the case provided for in the last preceding section, be brought as soon as is practicable before the justice who issued it or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail or permit him to be at large on his own recognizance according to the provisions hereinafter contained.

*Origin*—Sec. 567, Code of 1892.

*Person arrested to be brought before the justice*—The first duty of a magistrate dealing with a person arrested upon his warrant is to have such person brought before him as soon as practicable, and then make out such order as the case requires. The express enactment of Code sec. 664 must be followed in this respect and ordinarily no remand may be made in the prisoner's absence. *Ex parte Sarrault*, 15 Que. K.B. 3, 9 Can. Cr. Cas. 448; and see sec. 679.

*Preliminary enquiry on charge of indictable offence*—See sec. 668.

**Preliminary inquiry.—Offence committed out of jurisdiction.—  
Offender taken before justice where offence committed.**

**665.** The preliminary inquiry may be held either by one justice or by more justices than one.

2. If the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed.

3. The justice so ordering shall give a warrant for that purpose to a constable, which may be in form 9, or to the like effect, and shall deliver to such constable the information, depositions and recognizances, if any, taken under the provisions of this Act, to be delivered to the justice before whom the accused person is to be taken, and such depositions and recognizances shall be treated to all intents as if they had been taken by the last-mentioned justice.

*Origin*—Code of 1892, sec. 557.

*Transfer of preliminary enquiry to place of offence*—If a person is brought before a justice of the peace charged with an offence committed within the province, but out of the limits of the jurisdiction of such justice the latter, in his discretion, may either order the accused to be taken before some justice having jurisdiction in the place where the offence was committed (sec. 665), or may proceed as if it had been committed within his own jurisdiction. S. was brought before the stipendiary magistrate of the City of Halifax charged with having committed burglary in Sydney, C.B. It was held that the stipendiary magistrate could, with the consent of the accused, try him summarily under sec. 777. *Re Charles Seeley*, 41 Can. S.C.R. 5, 14 Can. Cr. Cas. 270.

The power conferred on a magistrate under this section of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. *R. v. Burke* (1900), 5 Can. Cr. Cas. 29 (Ont.).

*"Recognizances, if any"*—As to bail on remand, see sec. 681.

*Form of warrant to convey before a justice of another county*—Code form 9, following sec. 1152.

*Montreal*—In the district of Montreal the clerk of the peace or deputy clerk of the peace has all the powers of a justice under Parts XIII and XIV.

#### **Transfer to another justice.—Receipt to constable.**

**666.** Upon the constable delivering to the justice the warrant, information, if any, depositions and recognizances, and proving on oath or affirmation, the handwriting of the justice who has subscribed the same, such justice, before whom the accused is produced, shall thereupon furnish such constable with a receipt or certificate in form 10, of his having received from him the body of the accused, together with the warrant, information, if any, depositions and recognizances, and of his having

proved to him, upon oath or affirmation, the handwriting of the justice who issued the warrant.

2. If such justice does not commit the accused for trial, or hold him to bail, the recognizances taken before the first mentioned justice shall be void.

*Origin*].—Code of 1892, sec. 557.

*Form of receipt to be given to the constable by the justice for the county in which the offence was committed*].—Code form 10, following sec. 1152.

*Procedure on preliminary enquiry*].—See sec. 668 *et seq.*

**Coroner's inquisition.—Warrant or recognizance to bring case before magistrate.—Transmitting depositions.—Procedure.**

**667.** Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall, if the person or persons, or either of them, affected by the verdict or finding is not already charged with the said offence before a magistrate or justice, by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without a surety or sureties, to appear before a magistrate or justice.

2. In either case, it shall be the duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter.

3. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons.

*Origin*].—Sec. 568, Code of 1892.

*Coroner's court*].—The coroner's court is a common law tribunal charged with making an investigation into the cause of death; *Robin v. McMahon*, (1917) 50 Que. S.C. 267, 27 Can. Cr. Cas. 407. It is a court of record, and the coroner is a judge of a court of record. *Davidson v. Garrett*, (1899) 30 Ont. R. 653, 5 Can. Cr. Cas. 200.

*"Inquisition whereby any person is charged," etc.*].—The inquiry before the coroner is to ascertain the cause of death, and no one is, strictly speaking, a defendant on such an inquiry, at least until the verdict is rendered. This may be an open verdict, such as that the deceased



came to his death by foul means used by some person or persons to the jury unknown, or it may define the cause of death as due to accident or to the criminal neglect or the wilful and malicious act of a named person. Such person is then "charged" by the inquisition, and it is to the latter class of case where the finding charges manslaughter or murder that reference is made in sec. 667. The verdict of the coroner's jury and the record of the depositions and proceedings at the inquiry are to be transmitted in such cases for use on the preliminary enquiry before a magistrate (sec. 668 *et seq.*). The finding of the coroner's jury is not a substitute for a true bill by a grand jury or for a formal charge in jurisdictions where there is no grand jury. Code sec. 940. In practice the coroner's inquest does little more than marshal the evidence for the prosecuting officer and indicate to some extent the class of charge which the Crown officer is likely to bring to trial. The depositions forwarded to the magistrate under sec. 667 (2), have again to be transmitted by the magistrate to the trial court if he sends the case up for trial. Sec. 695. But no one is to be tried upon a coroner's inquisition alone, as was possible prior to the Code. Sec. 940. Much freedom is usually given in permitting persons who claim to have an interest in the coroner's proceedings to be represented by counsel and examine and cross-examine witnesses, but there being no person "accused" until the termination of the proceedings there is no absolute right to have counsel examine the witnesses. *Agnew v. Stewart*, 21 U.C.Q.B. 296.

*Non-judicial days*—The issue and execution of the warrant on a Sunday or holiday is authorized by sec. 661. Code sec. 961, in view of its context, would probably be held not to apply to a coroner's court, and the holding of the inquest and the taking of evidence would be limited to judicial days. It was held in *Re Cooper*, 5 P.R. 256 (Ont.), that a coroner's inquest held on Sunday was invalid.

*Witness disobeying summons*—A coroner is a local officer who can act only within his own municipal jurisdiction; and a warrant issued by him to apprehend a defaulting witness cannot be validly executed outside of that jurisdiction. The fact that a witness at an inquest has already been questioned at great length is not a ground for prohibiting the coroner from subjecting her to further examination; the court assumes that the coroner will not permit the witness to be unduly harassed. *Re Anderson and Kinrade*, 18 O.L.R. 362; 14 Can. Cr. Cas. 448.

*Coroner's duties both ministerial and judicial*—A coroner's duties are partly judicial and partly ministerial. *Re Anderson and Kinrade*, 18 O.L.R. 362, 14 Can. Cr. Cas. 448; *Ex parte Wilson* (1871) *Stevens N.B.*, Dig. 334. He is appointed by provincial authority and is assigned special duties by provincial legislation, but in holding an inquest in respect of a death charged to have been brought about criminally, the coroner presides over a criminal court and its proceedings in that regard are within federal control. *R. v. Hammond*, 29 Ont. R. 211, 1 Can. Cr. Cas. 373.

As provincial legislation controls the compensation paid to coroners for their services, reference has to be made to provincial statutes and regulations to ascertain the classes of cases in which coroners are expected to hold inquests and the conditions framed for the purpose of limiting the expenditure of public money for inquests to those which are considered absolutely necessary. The coroner should not hold an inquest in a matter in which he himself had been employed as a surgeon or physician and would more properly be a witness than an officer presiding over a judicial enquiry. *Re Haney and Mead*, 34 C.L.J. 330.

A coroner has power to himself summon the coroner's jury by a mere verbal direction to the persons required to be jurors. *Davidson v. Garrett*, (1899) 30 Ont. R. 653, 5 Can. Cr. Cas. 200.

A coroner may summon a witness to re-attend to give further evidence on new matter alleged to have been disclosed to the Crown since the witness' examination in the same inquest. *Re Anderson and Kinrade*, (1909) 14 Can. Cr. Cas. 448.

*Subsequent use of depositions taken at coroner's inquest*—A coroner is not a "justice" within sec. 999, so as to permit the depositions taken before the coroner being certified by him and read at a subsequent trial in a criminal court without further proof; *R. v. Graham*, 2 Can. Cr. Cas. 388; but the coroner may be called as a witness to prove the accuracy of the depositions. Any deposition before the coroner will be admitted in evidence against the person subsequently charged only in case such person was present before the coroner and was afforded full opportunity to cross-examine the witness, and that the particular witness whose deposition it is proposed to use in this way is proved to be dead or unable to travel or is being kept out of the way by the contrivance of the accused. In such cases the evidence might be admitted under common law principles quite apart from sec. 999 of the Code or of sec. 23 of the Canada Evidence Act. *R. v. Riggs*, 4 F. & F. 1085; *Johnson v. The King*, (1911) 13 Can. Exch. R. 379; *Phipson on Evidence*, 4th ed., 449; *Boys on Coroners*, 4th ed., 291.

The English practice is to treat the depositions as inadmissible unless they comply with all the requirements of the Indictable Offences Act, 11-12 Vict., Imp., ch. 42, which corresponds with sec. 999 of the Code. *Bird v. Keep*, (1918) 87 L.J.K.B. 1199, 1204. The inquisition or finding is not conclusive upon any person affected by it. *Bird v. Keep*, *supra*.

Depositions of a witness speaking in French taken down by the translator in English at a preliminary inquiry, but not read over and explained to the witness or signed by him are not admissible to contradict his testimony on a subsequent proceeding, but the witness may be cross-examined as to material statements then made, and witnesses called to show a contradiction with his former testimony. *R. v. Ciarlo*, (1897) 1 Can. Cr. Cas 157 (Que.).

An accused person on a murder trial giving testimony on his own

behalf may be asked whether or not he made a certain statement at the inquest although the original depositions are not available in court; and he has no right to demand before answering that he be informed of what was taken down in the depositions; but if use is to be made of the latter to contradict him the original deposition should be produced. *R. v. Mulvihill*, 22 Can. Cr. Cas. 354, 5 W.W.R. 1229, 19 B.C.R. 197, affirmed in *Mulvihill v. The King*, 23 Can. Cr. Cas. 194, 6 W.W.R. 462, 49 S.C.R. 587.

Once the signature of the witness has been proven to his deposition at the inquest, it may be used to test his memory or to impeach his credit, although it may have been insufficiently certified or irregularly returned; *R. v. Laurin*, 5 Can. Cr. Cas. 545 and 548 (Que.); *Can. Evid. Act*, R.S.C., 1906, ch. 145, sec. 10. Similarly it may be used to impeach the credit of an adverse witness on his denying having made the previous statement, but the previous statement when admitted does not become proof of the fact it purports to verify. *R. v. Duckworth*, 37 O.L.R. 197, 26 Can. Cr. Cas. 314; *Can. Evid. Act*, sec. 9.

*Coroner's warrant*—On a verdict being found by the coroner's jury against a person for culpable homicide, the coroner may issue his warrant for that person's arrest. *Robin v. McMahon* (1915) 50 Que. S.C. 267, 27 Can. Cr. Cas. 407.

*Removal of verdict and proceedings by certiorari*—The verdict declaring a person criminally guilty of the death under investigation can be attacked only for irregularities shown against the verdict itself and not for irregularities prior to the verdict or prior to the holding to the inquest by non-conformity with provincial regulations. *Robin v. McMahon* (1917) 50 Que. S.C. 267, 27 Can. Cr. Cas. 407.

The Quebec statute as to Coroners (4 Geo. V Que. (1914), ch. 38, amending R.S. Que., articles 3477 to 3487 (a) for the most part relate to the preliminary declaration to be made by the coroner, the medical examination, the declaration concerning the report which must be made by the coroner to the Government, also the provisions concerning the place where the inquest should be held, and the selection of the jury and the duties of the coroner; but these dispositions are not imperative and are more directory than mandatory. They have for their object the regulation of the proceedings of the coroner with the administrative authority so as to assure a better control of the expense incurred for the maintaining of this official and the expense of his tribunal, but they cannot constitute illegality of such a nature that the verdict should be set aside on *certiorari*. *Robin v. McMahon* (1917) 50 Que. S.C. 267, 27 Can. Cr. Cas. 407.

## PART XIV.

### PROCEDURE ON APPEARANCE OF ACCUSED BEFORE JUSTICE.

#### *Jurisdiction.*

##### **Preliminary Inquiry by Justice.**

**668.** When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed.

*Origin*—Sec. 577, Code of 1892; Indictable Offences Act, 1848, Imp., sec. 18.

*Jurisdiction generally*—Jurisdiction involves two distinct concepts: authority to deal with a person against his will, and authority to deal with the subject matter. If a person who is not amenable without his consent to the coercive jurisdiction of a court voluntarily appears and submits to it, the court has jurisdiction to deal with the matter as against him as in the well-known instance of an action against a foreign sovereign. But consent cannot give jurisdiction over subject matter which is itself not within the cognizance of the court. *Ridley v. Whipp* (1916) 23 Argus L.R. (Austr.) 129, 22 C.L.R. 381, per Griffith, C.J.

In *R. v. Hughes*, 4 Q.B.D. 614, it was held that upon the proper construction of the Justices Acts, Imp., the mode of bringing a man before the court is a mere matter of procedure, and that if a man being in fact before justices and being charged, submits to the jurisdiction, the justices have authority to proceed. That case did not decide what would happen if the defendant had made a valid objection to the jurisdiction. Griffith, C.J., in *Ridley v. Whipp* (1916), 22 C.L.R. 381, 23 Argus L.R. (Australia) 129, 131.

*When accused is "before a justice"*—Code sec. 668, directing the justice to proceed to inquire into the matters charged when a person is before a justice and is accused of an indictable offence, is to be limited to cases in which the accused is rightly before such justice. *Re Holman and Rae*, (No. 2), 21 Can. Cr. Cas. 11, 27 O.L.R. 432.

A magistrate may hold a preliminary enquiry in respect of an indictable offence committed in the same province outside of his territorial jurisdiction, if the accused is apprehended within the limits over which such magistrate has jurisdiction. Code sec. 577. *Re the Queen v. Burke* (1900), 5 Can. Cr. Cas. 29 (Ont.); *re Seeley*, 41 S.C.R. 5, 14 Can. Cr. Cas. 270.

A written information on a preliminary enquiry is for the protection of the accused so that he may know the charge laid against him, but if the magistrate on being verbally informed of the offence by the accused himself issues a summons and the accused attends on its return a committal for trial may be made on the depositions taken upon the preliminary enquiry, without an information in writing. *R. v. Thompson*, 15 Can. Cr. Cas. 162. The committing justices had jurisdiction over the accused on his attending in answer to the summons although objection was taken to the want of an information, but *semble*, a warrant to arrest the accused could not have been issued without a sworn information, had he failed to attend on the summons. *R. v. Thompson*, 15 Can. Cr. Cas. 162; same case, *Re Thompson*, 14 B.C.R. 314.

*Part XIV not applicable to corporation defendants*—

The procedure of Part XIV is applicable to persons and not to corporations. If a corporation is to be charged with an indictable offence, the prosecution is begun by an indictment preferred by leave of the court or of the Attorney-General, or preferred by the Attorney-General himself or some one authorized to act for him. Secs. 873, 873A. Code secs. 916-921 deal with procedure in the case of a corporation defendant.

*"Apprehended with or without warrant"*—As to arrest without warrant, see secs. 646-652; and as to issuing a summons or warrant, see secs. 653-655. A commitment for trial for an indictable offence may be justified in respect of a person brought before the magistrate under an invalid warrant, if the magistrate had a general jurisdiction over the person and over the subject matter of the inquiry; *R. v. Hughes*, 4 Q.B.D. 614; *McGuinness v. Dafoe*, 23 A.R. (Ont.) 704, 3 Can. Cr. Cas. 139; but different considerations may apply to the special jurisdiction of summary trial conferred by secs. 771-799 (Part XVI).

*Irregularity or defect in warrant or summons*—Code sec. 669.

*Several charges*—Where several informations for various offences are laid against the same person, the magistrate will have jurisdiction under sec. 668, to proceed with preliminary enquiries as to all of such charges, although the accused was arrested and brought before him by virtue of a warrant of arrest issued upon one information only, subject to the right of the accused to a reasonable adjournment. *R. v. Weiss* (No. 2), 22 Can. Cr. Cas. 42, 5 W.W.R. 48 and 460, 6 Alta. L.R. 264.

That the magistrate proceeded with the hearing of the evidence on preliminary enquiries for two offences at the same time, against the

same accused, is not a ground for habeas corpus in respect of his committal for trial. *Dick v. The King*, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

*Other justices*—When a magistrate has become seized of a case by taking the information for an indictable offence no other magistrate having general concurrent jurisdiction with him can acquire jurisdiction to intervene and preside at a preliminary enquiry, even with the consent of the first magistrate, except in so far as such course is authorized by statute in special circumstances such as illness or absence of the first magistrate. *Re Holman and Rae* (No. 2), 21 Can. Cr. Cas. 11, 27 O.L.R. 432; *R. v. McBae*, 2 Can. Cr. Cas. 49, 28 Ont. R. 569.

*Regina v. McBae* (1897) 2 Can. Cr. Cas. 49; 28 O.R. 569, determines that where an information is laid before a magistrate he becomes seized of the case and that no other magistrate has any right to take part in the trial unless at the request of the magistrate before whom proceedings are taken. All the magistrates in the county have jurisdiction; but so soon as proceedings are taken before any one of these officers having concurrent jurisdiction he becomes solely seized of the case. The magistrate has under the statute, and possibly apart from the statute, the right to ask other magistrates to sit with him; and, if he does so, the whole bench becomes seized of the complaint: *Regina v. Milne*, 15 U.C.C.P. 94.

The Ontario statute relating to Police Magistrates, R.S.O. 1914, ch. 88, sec. 18, recognizes this principle. So also do secs. 10 and 34, which provide that the Deputy Police Magistrate, or if there is no Deputy, any other Police Magistrate appointed for the county, may proceed for the Police Magistrate in the case of his illness or absence. Middleton, J., in *Re Holman & Rae* (No. 2), 21 Can. Cr. Cas. 11, said: "Neither of these sections (10 and 34) gives to the magistrate any power, once he has undertaken the case, to discharge himself, save in the case of illness or absence. He has no power to request another magistrate to sit for him. Contrast the provisions of the two sections with sec. 18, which provides that in the case falling within it, the magistrate may so request. By sec. 31, where the case arises out of the limits of the city, the Police Magistrate is not bound to act; but if once he does act it appears that he must continue to the end. This view of the statute is quite consistent with the view taken in *Regina v. Gordon*, 16 O.R. 64."

In Quebec if the magistrate who had begun the hearing dies, is dismissed, resigns his office or withdraws from the hearing, then another competent magistrate may take it up, but he should begin the hearing *de novo* before himself; he cannot merely continue that previously begun. The judge of the sessions of the peace, Hon. Mr. Chaveau, who had begun the preliminary hearing, having obtained leave of absence, and, without concluding it, started for a voyage to Europe, is deemed to be withdrawn from the proceeding; and in such case, with the consent of the Crown, the party prevented from proceeding was entitled to

obtain from the magistrate, Angers, who replaced him, an order for beginning *de novo* the hearing in order to dispose of the matter. A writ of *certiorari* will not, in such case, be granted to prevent Magistrate Angers from taking up the case and beginning it again. *Bertrand v. Angers*, 21 Que. S.C. 213 (Sup. Ct.).

*Power to regulate course of inquiry*—See sec. 679.

*Discretion to transfer inquiry to locality of offence*—See secs. 665 and 666.

*Montreal*—In the district of Montreal the Clerk of the Peace or Deputy Clerk of the Peace has all the powers of a justice under Parts XIII and XIV. Code sec. 605.

*Saskatchewan and Alberta*—In these provinces a preliminary enquiry before a magistrate is not an essential before the preferring of a formal charge under 873A, by the Attorney-General or an agent of the Attorney-General or a person with the written consent of the judge or of the Attorney-General or by order of the court. *Re Criminal Code*, 16 Can. Cr. Cas. 459, 43 Can. S.C.R. 434; *R. v. Duff*, 15 Can. Cr. Cas. 454, 2 S.L.R. 388, overruled on this point.

*R.N.W. Mounted Police*—By the statute, R.S.C. 1906, ch. 91, the Royal North-West Mounted Police Force, as constituted by the Governor-in-Council, shall continue to be a police force duly constituted for the province of Saskatchewan and the Yukon Territory, and shall be known as the "Royal North-West Mounted Police."

The Commissioner of Police and the assistant commissioners shall, respectively, have all the powers of two justices of the peace under the R.N.W. Mounted Police Act, or any Act in force in the provinces of Saskatchewan and Alberta, and in the North-West Territories and the Yukon Territory. R.S.C. 1906, ch. 91.

The superintendents and such other officers as the Governor-in-Council approves, shall be *ex-officio* justices of the peace.

Every constable of the force shall be a constable in and for the said two provinces and the North-West Territories and the Yukon Territory for carrying out any laws or ordinances in force therein. R.S.C. 1906, ch. 91, sec. 12.

The R.N.W. Mounted Police Act further provides that: "It shall be the duty of members of the force, subject to the orders of the Commissioner:—

- (a) to perform all duties which now are or hereafter shall be assigned to constables in relation to the preservation of the peace, the prevention of crime, and of offences against the laws and ordinances in force in the provinces of Saskatchewan and Alberta and in the North-West Territories and the Yukon Territory, and the criminal and other laws of Canada, and the apprehension of criminals and offenders, and others who may be lawfully taken into custody;

- (b) to attend upon any judge, stipendiary magistrate, or justice of the peace, when specially required, and to execute all warrants, and perform all duties and services in relation thereto, which may, under this Part or the laws and ordinances in force in the said two provinces and in the North-West Territories and the Yukon Territory, or the criminal or other laws of Canada, be lawfully executed and performed by constables;
- (c) to perform all duties which may be lawfully performed by constables in relation to the escort and conveyance of convicts and other prisoners and lunatics to or from any courts, places of punishment or confinement, asylums or other places. R.S.C. 1906, ch. 91, sec. 18.

*Juvenile Courts*—Where Juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30, and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age.

**Irregularity or variance not to affect validity.**

**669.** No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing.

*Origin*—Sec. 578, Code of 1892; R.S.C. 1886, ch. 174, sec. 58; Indictable Offences Act, 1848, Imp., sec. 9.

*Defects in substance or form*—Defects cured under this section would include an omission to state in the warrant of arrest that the information was under oath where it was so in fact; *Kingston v. Wallace*, 25 N.B.R. 573; or the lack of a law stamp on the warrant even if a stamp were required under provincial law; *R. v. Rodrigue*, 9 Que. P.R. 122, 13 Can. Cr. Cas. 249; *R. v. Hamelin*, 16 Que. K.B. 501, 13 Can. Cr. Cas. 333. As to defects in summary conviction proceedings, under Part XV, see secs. 723-725, 753, 754, 1121-1125, 1129; and in summary trials under Part XVI, sec. 1130.

**Adjournment in case of variance.—Ball.**

**670.** If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may adjourn the hearing of the case to some future



day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned.

*Origin*—Sec. 579, Code of 1892; R.S.C. 1886, ch. 174, sec. 59; Indictable Offences Act, 1848, Imp., sec. 9.

*Adjournment of hearing*—See sec. 679.

### *Procuring Attendance of Witnesses.*

#### **Summons for witness.—Form.**

**671.** If it appears to the justice that any person being or residing within the province is likely to give material evidence either for the prosecution or for the accused on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, and to bring with him any documents in his possession or under his control relating thereto.

2. Such summons may be in form 11, or to the like effect.

*Origin*—Sec. 580, Code of 1892; R.S.C. 1886, ch. 174, sec. 60; Indictable Offences Act, 1848, Imp., sec. 16.

*Form of summons to a witness*—Code form 11 following sec. 1152.

*Compelling attendance of witnesses*—The magistrate, under sec. 671, is vested with some discretion in issuing subpoenas to witnesses, because of the words of that section "if it appear to the justice that any person is likely to give material evidence," and may refuse to issue a subpoena if the reasons advanced by the applicant do not show that the witness sought to be examined is likely to give material evidence. *R. v. Allerton* (1914) 22 Can. Cr. Cas. 273, 6 W.W.R. 522.

A magistrate is justified in refusing to issue a subpoena for the attendance of the Attorney-General before him as a witness if it appears that the Attorney-General could not give material evidence. *Ibid*; *R. v. Baines*, [1909] 1 K.B. 258, 21 Cox C.C. 756.

In *Bex v. Baines* [1909] 1 K.B. 258, 21 Cox C.C. 756, ministers of the Crown were sought to be examined as witnesses at a criminal trial, and a subpoena was actually issued and served; an application was successfully made to the court to set aside such subpoena, as being an abuse of the process of the court, on the ground that such witnesses could not give any relevant evidence. It was mentioned in that case that a minister of the Crown had no special privilege from being summoned as a witness. They have no privilege or precedence over other subjects of the Crown; but if a subpoena is issued in a way that would be harassing and not to aid in the administration of justice, but for an ulterior purpose, a superior court may interfere. *R. v. Allerton*, 22 Can. Cr. Cas. 273, 6 W.W.R. 522.

The summons to witness here referred to, commonly called a subpoena, is for a preliminary enquiry. If the case is one of summary trial under Part XVI, reference is to be had to secs. 788 and 789. *Titchmarsh v. Crawford*, 1 O.W.N. 587.

The summons to witness is to be issued by the justice holding the inquiry, i.e., the justice before whom the accused has been brought as indicated in sec. 668. *Bryne v. Arnold*, 24 N.B.R. 161.

If the witness is unable to attend through illness, but could give his depositions at his residence, and desires to do so, the proper course would be to adjourn the inquiry to his residence where such a course is practicable. *R. v. Bros.* [1911] 1 K.B. 159.

*Warrant for defaulting witness*—See secs. 673, 674.

*Fining witness for default in not attending*—Code sec. 674.

*Witness in another part of Canada*—See. secs. 676, 677.

*Commission to take evidence out of Canada*—See sec. 997; *R. v. Verrall*, 6 Can. Cr. Cas. 325, 17 P.R. (Ont.) 61.

*Commission to take evidence of witness who is dangerously ill*—See secs. 995, 996.

#### Service of summons for witness.

**672.** Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed either personally, or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

*Origin*—Sec. 581, Code of 1892; Indictable Offences Act, 1848, Imp., sec. 16.

"*Last or most usual place of abode*"—Compare sec. 658 as to summons to accused, and, in summary conviction matters, see sec. 711.

#### Warrant for witness after summons.—Form.—Execution.—Endorsement.

**673.** If any one to whom such last-mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then after proof upon oath that such summons has been served as aforesaid, or that the person to whom the summons is directed is keeping out of the way to avoid service, the justice before whom such person ought to have appeared, if satisfied by proof on oath that such person is likely to give material evidence, may issue a warrant under his hand to bring such person at a time

and place to be therein mentioned before him or any other justice in order to testify as aforesaid.

2. The warrant may be in form 12, or to the like effect.

3. Such warrant may be executed anywhere within the territorial jurisdiction of the justice by whom it is issued, or, if necessary, endorsed as provided in sec. 662 and executed anywhere in the province out of such jurisdiction.

*Origin*—Sec. 582, Code of 1892; R.S.C. 1886, ch. 174, sec. 61, 51 Vict., ch. 45, sec. 1; Indictable Offences Act, 1848, Imp., sec. 16.

*Defaulting witness*—Some reasonable effort should be made to serve the witness personally; and before any warrant to arrest a witness for non-attendance is issued, evidence should be given that the summons has, in all probability, come to the witness' knowledge. *Gordon v. Denison*, 22 A.R. (Ont.) 326.

If the witness be too poor to travel to the place of the hearing that may be a "just excuse" for his non-appearance, if no provision has been made for his expenses. *Stone's Justice*, 39th ed. 8.

A witness subpoenaed in a criminal case where the charge is for an indictable offence must attend without prepayment of expenses or witness fees; *R. v. James*, 1 C. & P. 322; though an allowance is usually made under provincial laws regarding the administration of justice for an allowance to such of the witnesses subpoenaed by the Crown in criminal prosecutions as are unable to bear their own expenses of attending court.

*Form of warrant when a witness has not obeyed the summons*—Code Form 12, following sec. 1152; and see secs. 662 and 673 (3), as to endorsement in another magisterial jurisdiction.

#### **Procedure against defaulting witness.—Conviction for contempt.**

**674.** If a person summoned as a witness under the provisions of this Part is brought before a justice on a warrant issued in consequence of refusal to obey the summons, such person may be detained on such warrant before the justice who issued the summons, or before any other justice in and for the same territorial division who shall then be there, or in the common gaol, or any other place of confinement, or in the custody of the person having him in charge, with a view to secure his presence as a witness on the day fixed for the trial, or, in the discretion of the justice, released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer as for contempt for his default in not attending upon the said summons.

2. The justice may, in a summary manner, examine into and dispose of the charge of contempt against such person, who, if found guilty, shall be liable to a fine not exceeding twenty dollars, or to imprisonment in the common gaol, without hard labour, for a term not exceeding one month, or to both such fine and imprisonment, and may also be ordered to pay the costs incident to the service and execution of the said summons and warrant and of his detention in custody.

3. The conviction under this section may be in form 13.

*Origin*—Sec. 582, Code of 1892; R.S.C. 1886, ch. 174, sec. 61, 51 Vict., ch. 45, sec. 1.

*Form of conviction for contempt*—Code form 13, following sec. 1152.

*Canada Civil Service Act*—The like proceedings may be taken by the chairman of an examining board under the Civil Service Act, R.S.C. ch. 16 against a defaulting witness in an official inquiry into fraudulent practices at examinations. See secs. 10 and 11 of that Act.

**Warrant for witness in first instance.—Endorsement for another place in same province.**

**675.** If the justice is satisfied by evidence on oath that any person within the province, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance.

2. Such warrant may be in form 14, or to the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in sec. 662 and executed anywhere in the province out of such jurisdiction.

*Origin*—Sec. 583, Code of 1892; R.S.C. 1886, ch. 174, sec. 62; Indictable Offences Act, 1848, Imp., sec. 16.

*Form of warrant for a witness in the first instance*—Code form 14, following sec. 1152.

*Requiring recognizance from witness to give evidence at trial*—Code sec. 692.

**Witness beyond jurisdiction.—Subpœna for witness in another province.**

**676.** If there is reason to believe that any person residing anywhere in Canada out of the province who is not within the

province, is likely to give material evidence either for the prosecution or for the accused, any judge of a superior court or a county court, on application therefor by the informant or complainant, or the Attorney General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpoena to be issued under the seal of the court of which he is a judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein to give evidence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

2. Such subpoena shall be served personally upon the person to whom it is directed, and an affidavit of such service by a person effecting the same purporting to be made before a justice, shall be sufficient proof thereof.

*Origin*—Sec. 584, Code of 1892.

*Subpoena to witness in another province*—Such particulars as to the nature of the evidence expected from the witness should be set forth in the affidavit or deposition upon which the application is made as will satisfy the judge applied to that the evidence of the witness is material. A judge may make an order for the issue of a subpoena to witnesses in another province to compel their attendance upon an appeal from justices under Part XV of the Code. *R. v. Gillespie*, 16 P.R. 155 (Ont.).

Sec. 677 provides for enforcement of the subpoena by a warrant endorsed in the other province under secs. 662 and 677 (2).

**Witness in another province.—Warrant for witness defaulting under subpoena.**

**677.** If the person served with a subpoena as provided by the last preceding section, does not appear at the time and place specified therein, and no just excuse is offered for his non-appearance, the justice holding the inquiry, after proof upon oath that the subpoena has been served, may issue a warrant under his hand directed to any constable or peace officer in the district; county or place where such person is, or to all constables or peace officers in such district, county or place, directing him, them or any of them to arrest such person and bring him before the said justice or any other justice at a time and place mentioned in such warrant in order to testify as aforesaid.

2. The warrant may be in form 15, or to the like effect; and if necessary, may be endorsed in the manner provided by sec. 662 and executed in a district, county or place other than the one therein mentioned.

*Origin*—Sec. 584, Code of 1892.

*No just excuse for non-appearance*—See sec. 673.

*Form of warrant when a witness in another province has not obeyed the subpoena*—Code form 15, following sec. 1152. Code form 8 may be applied in preparing the endorsement of the warrant, sec. 677, sub-sec. (2) and sec. 662.

### *Hearing and Connected Procedure.*

**Witness refusing to be examined.—Commitment to gaol.—Further commitment on again refusing.—Disposing of case on the other evidence.**

**678.** Whenever any person appearing, either in obedience to a summons or subpoena, or by virtue of a warrant, or being present and being verbally required by the justice to give evidence, refuses to be sworn, or having been sworn, refuses to answer such questions as are put to him, or refuses or neglects to produce any documents which he is required to produce, or refuses to sign his depositions without in any such case offering any just excuse for such refusal, such justice may adjourn the proceedings for any period not exceeding eight clear days, and may in the meantime by warrant in form 16, or to the like effect, commit the person so refusing to gaol, unless he sooner consents to do what is required of him.

2. If such person, upon being brought up upon such adjourned hearing, again refuses to do what is required of him, the justice, if he sees fit, may again adjourn the proceedings, and commit him for the like period, and so again from time to time until such person consents to do what is required of him.

3. Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him.

*Origin*—Sec. 585, Code of 1892; R.S.C. 1886, ch. 174, sec. 63; Indictable Offences Act, 1848, Imp., sec. 16.

*Form of warrant of commitment of a witness for refusing to be sworn or to give evidence*—Code form 16, following sec. 1152.

*Witness refusing to testify*—It must appear not only that the witness refused without just excuse to answer, but that the question asked was in some way relevant to the charge. *Re Ayotte* (1905), 9 Can. Cr. Cas. 133, 15 Man. R. 156.

*Defendant and wife or husband of defendant as witnesses*—See Canada Evidence Act, secs. 4 and 5.

*Fugitive Offenders Act*—As a magistrate is expressly empowered by sec. 29 of the Fugitive Offenders Act, 44-45 Vict., Imp., ch 69 [B.S.C. 1906, ch. 154, sec. 27], to take depositions for the purpose of that Act in the absence of the person accused, he must be held to have the like power to punish a witness for refusing to testify in proceedings so taken in Manitoba in the absence of accused for the purpose of bringing the latter back from England to Manitoba to answer the charge. *R. v. Simpson, re Whitla* (1916), 26 Can. Cr. Cas. 15, 9 W.W.R. 986 and 1461, 26 Man. L.R. 129; *Ex parte Lillywhite*, 19 N.Z.R. 510.

**Preliminary inquiry.—Powers of justice.—Addresses.—Further evidence.—Adjournment of hearing.—Inquiry may be private.—Regulating course of inquiry.—Verbal remand for three days.—Custody of accused.**

**679.** A justice holding a preliminary inquiry may, in his discretion,—

- (a) permit or refuse permission to the prosecutor, his counsel or attorney, to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused;
- (b) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused;
- (c) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused, if required, by warrant in form 17: Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day;

- (d) order that no person other than the prosecutor and accused, their counsel and solicitors shall have access to or remain in the room or building in which the inquiry is held, if it appears to him that the ends of justice will be best answered by so doing;
- (e) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.

2. If any remand under this section is for a time not exceeding three clear days the justice may verbally order the constable or other person in whose custody the accused then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before him or such other justice as shall then be acting at the time appointed for continuing the examination.

*Origin*—Sec. 586, Code of 1892; R.S.C. 1886, ch. 174, sec. 65; Indictable Offences Act, 1848, Imp., sec. 21.

*"A justice holding a preliminary enquiry"*—When a person accused of an indictable offence is before a justice having jurisdiction to hold a preliminary enquiry, sec. 668 makes it obligatory that the latter should "proceed to inquire into the matters charged." A common practice makes this cover an inquiry immediately after the arrest as to the question of bail and the taking of bail before the magistrate if he can be got to attend at the gaol or police station for that purpose; but in such cases the bail is for the attendance of the accused at the first sittings of the police court, usually on the next juridical day. Some city magistrates require payment of a small fee from the accused asking this special consideration, but the legality of the collection of any fee cannot be considered as settled.

*Person arrested to be brought before a justice*—Sec. 664 provides that a person arrested "upon a warrant" is to be brought "as soon as practicable" before the justice; and the justice is to proceed with the inquiry or postpone it to a future time in which latter case he shall either commit the accused to proper custody or admit him to bail or permit him to be at large on his own recognizance according to the provisions which follow, thus including the provisions of sec. 679.

It is the duty of every one arresting another to give notice, where practicable, of the warrant or cause of the arrest. Code sec. 40. He is to produce the warrant, if required; sec. 40. In the special case of an arrest without warrant by a peace officer of a suspected person loitering by night, the person apprehended is not to be detained after noon of the following day without being brought before a justice. Code sec.



652. And in other cases of arrest without warrant on a criminal charge, there is a common law obligation to bring the arrested person promptly before a justice.

*Irregularity in summons or warrant*—See secs. 669, 670.

*Hearing by substitute justice*—When a magistrate has become seized of a case by taking the information for an indictable offence no other magistrate having general concurrent jurisdiction with him can acquire jurisdiction to intervene and preside at a preliminary enquiry, even with the consent of the first magistrate, except in so far as such course is authorized by statute in special circumstances such as illness or absence of the first magistrate, or his death or resignation: *Re Holman, and Rae* (No. 2), 21 Can. Cr. Cas. 11, 4 O.W.N. 434, 23 Q.W.R. 428, 27 O.L.R. 432; *Re Guerin*, 16 Cox C.C. 596, 60 L.T. 538, 53 J.P. 468; *Bertrand v. Angers*, 21 Que. S.C. 213.

But the justice of the peace who issues a warrant of arrest to bring the accused in custody for a preliminary enquiry has the right to order him by the warrant to appear before himself or any other justice or magistrate having jurisdiction in the district, and the enquiry may be taken in such case before another magistrate who replaces the first. *R. v. Daigle*, 23 Can. Cr. Cas. 92 (Que.).

*Associate justices*—The preliminary enquiry may be held either by one justice or by more justices than one. Code sec. 665 (1). If an associate justice is brought into the case after the evidence of a material witness has been taken, the case should be begun *de novo* and the evidence given again as the commitment by the two magistrates will be invalid if one of them had not heard all the material evidence. *Re Nunn*, 6 B.C.R. 464, 2 Can. Cr. Cas. 429.

*Preserving order in court*—See sec. 607.

*Sub-sec (a)*—"Permit or refuse permission to the prosecutor to address him in support," etc.]—The prosecutor is the informant and so also is the person on whose behalf the informant stated in the information that he was laying the charge. See sec. 688, as to binding over the person preferring the charge. Quite evidently it does not apply to restrict counsel representing the Crown or any public department of the government from addressing the magistrate in support of a charge laid on behalf of the Crown.

A private informant is no party to a criminal prosecution, and cannot insist that he or his counsel shall aid in the conduct thereof. *R. v. Gilmore*, 7 Can. Cr. Cas. 219, 6 O.L.R. 286. Permission may, however, be granted in the discretion of the justice under sub-sec. (a).

*Sub-sec. (c)*—*Adjournment of hearing*—Where on a preliminary enquiry a remand is to be made for a time exceeding three clear days, the justice may remand only by warrant, declaring that it appears to be necessary to remand the accused, Code form 17, and an informal remand endorsed upon the warrant is insufficient. *R. v. Holley* (1893), 4 Can. Cr. Cas. 510.

The accused must be personally present before the magistrate to be remanded. *Re Sarault* (1905), 9 Can. Cr. Cas. 448, 15 Que. K.B. 3. A verbal remand for eight days for the purpose of a medical examination of the accused as to sanity cannot be made on the mere suggestion of the police officer without bringing the accused personally before the magistrate. *Re Sarault*, *supra*.

If, however, a remanded prisoner is too ill to be brought from the gaol on the day to which he was remanded, the magistrate, on being satisfied of the fact by medical evidence, may issue a warrant of remand for another eight days, 59 J.P. 682; *Stone's Justice*, 39th ed. 7.

In *Dick v. The King*, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57, *Laurendeau, J.*, said: "We must consider par. (c) of article 679 as making an exception. The article states that the postponement cannot be for more than eight clear days if the accused is remanded back to prison—'and may remand the accused by warrant, provided that no such remand shall be for more than eight clear days.' When the accused is admitted to bail, no warrant of remand according to form 17, is required. The French version of the same articles is perhaps even more obvious. It states: '*pourvu qu'aucun renvoi du prévenu en prison ne soit pour plus de huit jours francs.*' If the accused is held on bail the delay of postponement may be longer." *Dick v. The King*, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

In a Yukon case it was held that the sureties to a recognizance of bail expressly given for an adjournment of a preliminary enquiry by consent, for longer than the eight days provided by Code sec. 679, are not released for non-conformity with the statutory direction that adjournments shall not be for more than eight days, that being a matter of procedure only which it was competent for the parties to waive, if indeed the statutory direction applies at all where bail is given. *R. v. Sullivan*, 23 Can. Cr. Cas. 174; *re Burns' bail*, 17 Can. Cr. Cas. 292, and *R. v. Hazen*, 20 A.R. (Ont.) 663, applied.

A prisoner in custody under two warrants of commitment for trial for different offences cannot set up the irregularity of a remand under sec. 679, because of an adjournment exceeding eight days made during the preliminary inquiry on one of the charges, as a ground for his release on habeas corpus. *Rex v. Beaudoin*, 22 Can. Cr. Cas. 319.

If the magistrate has exercised his discretion on legal grounds, the court will not interfere with him merely because they would have exercised the discretion in another way; but if the magistrate exercised his discretion on something extraneous or something illegal, it is the same as declining jurisdiction, and if a magistrate declines to exercise his jurisdiction he may be compelled by mandamus to go on. *Regina v. Adamson*, 1 Q.B.D. 201; *Regina v. Fawcett*, 11 Cox C.C. 305; *Regina v. Evans* (1890), 54 J.P. 471.

If there is a variance from the charge stated in the information or in the summons or warrant, and the accused is thereby prejudiced in

his defence, such will be a ground for asking an adjournment. Secs. 669, 670.

As to adjournment of summary conviction proceedings under Part XV, see sec. 722.

The language of sec. 679 differs from that of sec. 722, which deals with summary conviction procedure, in that sec. 679 says "eight *clear* days," while sec. 722 says "eight days." Eight clear days would leave eight intervening days between the day of remand and of hearing.

*Sub-sec. (e)*—"Regulate the course of the inquiry"]—In *R. v. Phillips*, 11 Can. Cr. Cas. 89, 11 O.L.R. 478, defendant was charged that he did in specified years "conspire with others whose names are unknown, by deceit, falsehood and other fraudulent means to defraud the public." The magistrate having power under sec. 679 (e) to "regulate the course of the inquiry" might have ordered particulars on the defendant's application, but he declined to do so on the ground that the preliminary inquiry was merely an investigation and defendant would not be prejudiced. It was held that his refusal did not go to the jurisdiction and prohibition was refused. The absence or insufficiency of particulars does not vitiate the information for the purposes of a preliminary enquiry, but the magistrate has a discretion to order particulars to be furnished by the prosecution. *R. v. France*, 1 Can. Cr. Cas. 321.

It is essential that whatever words may be used in the information they should be sufficient to give the accused notice of the offence with which he is charged, and to identify the transaction referred to. The absence or the insufficiency of particulars does not vitiate an indictment nor an information; but if it should be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate. *R. v. France* (1898), 1 Can. Cr. Cas. 321, 329 (Que.).

In a criminal case the preliminary hearing before the magistrate of an offence punishable on indictment, is not, properly speaking, the inquiry of the informant, but that of the magistrate. *Belanger v. Mulvena*, 22 Que. S.C. 37. Even after argument on questions of law arising from the evidence given, the magistrate may, in his discretion, allow the informant to give further evidence. *Belanger v. Mulvena*, 22 Que. S.C. 37.

Magistrates conducting a preliminary enquiry in respect of an indictable offence, may not on its conclusion convict of a lesser criminal offence, over which they have summary jurisdiction, although proved by the evidence adduced if no complaint was laid before them, nor the accused called upon to defend in respect of such lesser offence. *R. v. Mines* (1894), 1 Can. Cr. Cas. 217, 25 Ont. R. 577; *ex parte Duffy*, 8 Can. Cr. Cas. 277. And where the information is laid for an offence

under the Code which the magistrate has no jurisdiction to try summarily, he cannot convert it into a charge under a municipal by-law and convict of the latter upon the original information. *R. v. Dungey*, 2 O.L.R. 223, 5 Can. Cr. Cas. 38. But he may commit for trial on any one or more charges of indictable offences which the evidence may disclose. *R. v. Mooney*, 15 Que. K.B. 57, 11 Can. Cr. Cas. 333.

*Bail on remand*—Code sec. 681; Code form 18.

*Form of warrant remanding a prisoner*—Code form 17, following sec. 1152.

*Transfer of inquiry to a justice in locality of offence*—See secs. 665, 666.

*Requiring recognisance from witnesses to give evidence at trial*—Code sec. 692, 840, 1094.

*Juvenile Courts*—Where juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30, and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age.

*Montreal*—In the district of Montreal the Clerk of the Peace or Deputy Clerk of the Peace has all the powers of a justice under Parts XIII and XIV.

**Hearing may be resumed during time of remand.**

**680.** The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order.

*Origin*—Sec. 588, Code of 1892; B.S.C. 1886, ch. 174, sec. 66.

*"Before any other justice"*—See note to sec. 679.

**Bail on remand.**

**681.** If the accused is remanded as aforesaid, the justice may discharge him, upon his entering into a recognisance in form 18, with or without sureties in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination.

*Origin*—Sec. 587, Code of 1892; B.S.C. 1886, ch. 174, sec. 67.

*Form of recognisance of bail instead of remand in custody on an adjournment of examination*—Code form 18, following sec. 1152.

*Giving bail on remand*—Every individual may in criminal cases become bail who is a housekeeper and possessed of property equal to the responsibility incurred. *Petersdorff on Bail*, 505.

Any indemnity given to the bondsmen, whether by the prisoner or by a third person, is illegal. Consolidated Exploration & Finance Co. v. Musgrave, [1900] 1 Ch. 37; R. v. Porter [1910] 1 K.B. 369, 102 L.T. 255.

If the accused consents to an adjournment for more than the eight clear days specified in sec. 679, the recognizance of bail is not invalid because taken for the longer period even if the limitation applies to remands on bail. *Re Burns* bail, 17 Can. Cr. Cas. 292; 2 E.L.R. 167; R. v. Sullivan, 23 Can. Cr. Cas. 174; *Dick v. The King*, 13 Que. P.R. 157, 19 Can. Cr. Cas. 44.

The omission of the words "to owe" in the form corresponding to the present form 18 was held fatal to the recognizance. *R. v. Hoodless*, 45 U.C.Q.B. 556.

A superior court has jurisdiction to admit the accused to bail while the preliminary enquiry is pending before the magistrate. In making an order for bail pending the preliminary enquiry a judge of a superior court may impose the condition that the proposed bail shall not only make affidavits of justification but attend before a magistrate for examination as to their qualification. *R. v. Hall*, 12 Can. Cr. Cas. 492; *R. v. Mason*, 5 P.R. 125 (Ont.).

*Cash bail*—A justice may as a substitute for bail take money in deposit, commonly called cash bail. *Petersdorf on Bail*, 506; *Moyser v. Gray*, Cro. Car. 446.

*Breach of recognizance on remand*—See sec. 1097 and Code form 73.

*Bailing accused to appear for trial without committal*—See sec. 696 and Code form 28.

*Bail by superior court after committal*—See secs. 696-702.

*Ontario*—The Police Magistrates' Act, R.S.O. 1914, ch. 88, sec. 18, provides that no justice of the peace shall admit to bail or discharge a prisoner or adjudicate upon or otherwise act until after judgment, in a case arising in a city or town for which there is a police magistrate, except at the court of general sessions of the peace or in the case of the illness or absence or at the request of the police magistrate; R.S.O. 1914, ch. 88, sec. 18; nor shall he do so except in those circumstances in any case in which the initiatory proceedings had been taken before a police magistrate. *Ibid.* But a justice of the peace "acting within his territorial jurisdiction" may take an information or issue a summons or warrant returnable before the proper police magistrate; R.S.O. 1914, ch. 88, sec. 18 (3); that is, if the case is one in which he has concurrent jurisdiction with the county police magistrate if proceedings have not already been begun before the latter, he may on issuing process make it returnable before himself and take charge of the future proceedings or he may make the process returnable before the police magistrate, and so effectively transfer the case to the latter official.

**Evidence for prosecution to be taken.—Upon oath.—Cross-examination.—Deposition in writing.—To be read over and signed.**

**682.** When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.

2. The evidence of the said witnesses shall be given upon oath and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

3. The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in form 19, or to the like effect.

4. Such deposition shall in the presence of the accused, and of the justice, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice.

5. The signature of the justice may either be at the end of the deposition of each witness, or at the end of several or of all the depositions in such a form as to show that the signature is meant to authenticate each separate deposition.

*Origin*—Sec. 590, Code of 1892; R.S.C. 1886, ch. 174, sec. 69; Indictable Offences Act, 1848, Imp., sec. 17.

*Magistrate must be present during entire hearing*—The magistrate is not required to take down the evidence himself, but the law requires in effect that the witnesses must be before him, and that he must see them and hear them when testifying, and then their testimony may be taken down either at length by a clerk or in shorthand by a stenographer. *R. v. Traynor*, 10 Que. Q.B. 63, 4 Can. Cr. Cas. 410.

Where on a preliminary inquiry before a magistrate the witnesses were sworn by him and were then taken into another room and their evidence in chief taken by a stenographer and not in the presence of the magistrate, such depositions are illegally taken, although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate. *R. v. Traynor*, *supra*; *R. v. Watts*, 33 L.J.M.C. 63.

The objection to the irregularity is not waived by the cross-examination of the witnesses on the prisoner's behalf on their return to the magistrate's presence, if the objection is taken by the prisoner's counsel before he proceeds to cross-examine. *R. v. Traynor*, *supra*.

Both the commitment for trial and the indictment founded on such illegal depositions are invalid and should be set aside. *Ibid*.

*"Entitled to cross-examine"*—The expressions "entitled to cross-examine" and "full opportunity to cross-examine" as used in secs. 682

(2) and 999, imply for the accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of the witness, and to mark his expression and demeanour while testifying. *R. v. Lepine* (1900), 4 Can. Cr. Cas. 145 (Que.).

When depositions in a preliminary enquiry, to which the accused was not a party, and, consequently, taken in his absence, are read to the same witness in a case against the accused, and the witness, after being sworn in the presence of the accused, either affirms that his former deposition contains the truth, or makes corrections, as the case may be, and then affirms its truth as corrected, the prosecutor, being then given permission to ask further questions, and the accused to cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by law. *Ibid.*

On a preliminary hearing, counsel for the accused on cross-examination questioned a witness as to a conversation with another party relating to the charge. On objection being taken the justice refused to allow the question and the accused thereupon applied for a mandamus requiring the justice to allow the question. It was held that, while the court has power to issue mandamus to compel a justice to hear and determine a case it has no authority to control a justice in the conduct of the case or to prescribe to him the evidence he shall receive or reject, particularly so in the case of a preliminary hearing where the justice is not trying the case. *R. v. Martin*, 3 Sask. L.R. 495, 18 Can. Cr. Cas. 107.

*Form of depositions*—A form for the taking of depositions on a preliminary enquiry is provided; Code form 19; and is applicable to summary conviction matters also except as to matters in which Part XV, dealing with summary convictions procedure makes some variance. Code sec. 721 (3). In a hearing under Part XV the witnesses need not sign their depositions, Code sec. 721 (5); but they are to do so on a preliminary enquiry. Sec. 682.

The statutory form for depositions contemplates a caption in which are to be stated (1) the name of the justice. (This may be by a reference to the "undersigned" justice); (2) his jurisdictional territory; (3) the date on which the depositions were taken; (4) the presence of the accused in the case of a preliminary enquiry; and, in case of his absence at a summary hearing, the due service of a summons and his default thereon; (5) the charge; (6) the fact that the witness was sworn or affirmed; (7) a concluding certificate to the effect that the depositions if on a preliminary enquiry were taken in the presence and hearing of the accused and were signed by the witnesses and the justices. *R. v. Dickey* (1915) 9 W.W.R. 142, 32 W.L.R. 404 (Alta.).

*Application to summary conviction procedure*—

On a summary conviction matter, the appearance of the accused is not a pre-requisite to the taking of depositions and adjudication, and the justice has a discretion to proceed *ex parte* if the accused has been

duly summoned; Cr. Code sec. 718; or the justice on default of appearance either by counsel or in person, may issue his warrant (Code secs. 659, 660) and adjourn the hearing until the defendant is apprehended. A strict construction of sec. 718, if taken alone, would seem to authorize the justice, if he saw fit, to issue a warrant for the personal appearance of the accused even where he was represented by counsel (Code sec. 715); but secs. 715 and 720 taken together make it clear that where defendant appears by counsel in a matter subject to Part XV the magistrate has no jurisdiction to enforce the personal appearance of the accused for the purposes of the trial, but must hear and determine the complaint if both parties appear "either personally or by their respective counsel, solicitors or agents" (Code sec. 720). *R. v. McDonald* (1913), 21 Can. Cr. Cas. 348 (P.E.I.), citing *R. v. Thompson*, 100 L.T.R. 970, and *R. v. Montgomery*, 102 L.T.R. 325. The depositions must show that the witnesses were sworn or affirmed, as the case may be. *R. v. Dickey* (1915), 9 W.W.R. 142, 144, 32 W.L.R. 404 (Alta.).

*Signing the depositions*—

The provision that the justice is to sign the depositions taken on a preliminary enquiry, (sec. 682, sub-secs. (4) and (5)), or in a summary matter (sec. 721, sub-sec. (3)), has been held to be directory only and not mandatory. [Alta.] *R. v. Dickey* (1915) 9 W.W.R. 142, following *ex parte Doherty*, 32 N.B.R. 479, 3 Can. Cr. Cas. 310 (N.B.); and that it does not go to the jurisdiction. *Rex v. Kay*; *Ex parte Gallagher*, 38 N.B.R. 498; *Ex parte Budd*, 39 N.B.R. 602, 17 Can. Cr. Cas. 235. *Contra*: *R. v. Robert*, 12 Que. P.R. 7, 17 Can. Cr. Cas. 194. The provision that the witnesses should sign their depositions, unless taken in shorthand, is directory only and not imperative. *R. v. Scott*, 26 Ont. R. 646. A statutory provision that depositions be read over to the accused may be waived. *R. v. Leach*, 17 O.L.R. 643, 14 Can. Cr. Cas. 375.

*Irregularity in taking the depositions*—

By the Interpretation Act, R.S.C. ch. 1, sec. 34 (24), unless the contrary intention appears, the word "shall" is to be construed as imperative, and "may" as permissive. But while the direction of the statute may be imperative so far as the magistrate is concerned, it seems necessary to inquire further into the purpose of the enactment before it can be affirmed that non-compliance therewith will be a cause of nullity. Certain matters of procedure may be waived by the accused or his counsel; some of them, although not waived may be of such a character that non-compliance could not prejudice the accused. But as the depositions on the preliminary enquiry may in certain events be read in evidence at the trial of an indictment (sec. 999), the better opinion seems to be in favour of quashing a commitment or an indictment founded on the irregular depositions if they have not been read over in the presence of the accused so that errors which the deponents might correct on such reading might be amended. See *R. v. Beaulieu*, 26 Que. K.B. 151; *McDonald v. The King*, 25 Que. K.B. 322, 26 Can. Cr. Cas.



175, and compare Code sec. 684. It is irregular for the magistrate to obtain in the absence of the accused, the signature of a witness to his incomplete deposition. *R. v. Trevane*, 4 O.L.R. 475, 6 Can. Cr. Cas. 125. If the cross-examination has not been completed, the deposition of that witness cannot be used under sec. 999, at the trial in the event of the witness' illness. *R. v. Trevane*, *supra*.

In *R. v. Eliasoph*, 19 Que. K.B. 232, 16 Can. Cr. Cas. 131, it was held that the hearing of the testimony of one witness in the absence of the accused would not afford ground for quashing an indictment which followed the preliminary enquiry and the commitment there made. See sec. 872. Probably any effect which an irregularity in the depositions may have upon the indictment itself, may be obviated by obtaining the consent or order of the court or of the Attorney-General, to prefer the indictment. Code sec. 873.

It is too late to object to an irregularity in the signature of the depositions, after electing a speedy trial. *R. v. Morin* (1917) 26 Que. K.B. 428, 28 Can. Cr. Cas. 269.

A charge brought for trial under the Speedy Trials clauses, Part XVIII of the Code (see sec. 827) will not be quashed because the justice issuing the committal did not strictly comply with sub-sec. (5) by signing at the "end" of the deposition, if it was otherwise signed by him in form sufficient for identification. *R. v. Jodrey*, 38 N.S.R. 142, 9 Can. Cr. Cas. 477; As it is the statutory duty of the magistrate to take down all the relevant testimony on a preliminary inquiry, the production of written depositions regular in form raises a presumption that all material testimony is included therein, but this presumption may be rebutted on a charge of perjury brought in respect of one of such depositions by producing the writing and proving by parol testimony that it is incomplete. *R. v. Prasiloski* (No. 2), 16 Can. Cr. Cas. 139, 15 B.C.R. 29, 13 W.L.R. 298.

*Noting objections raised*—The depositions taken in writing by the magistrate should contain all the material statements sworn to by the witnesses, and the objections of counsel and rulings made by the magistrate thereon should also be noted therein. *R. v. Grady*, 7 C. & P. 650; *R. v. Thomas*, 7 C. & P. 817; and see sec. 691, under which the accused is entitled on payment of the prescribed fee to a copy of the depositions.

*Defence evidence*—Depositions of witnesses for the defence are, if offered, to be taken in the same manner as the depositions of the witnesses for the prosecution. Code sec. 686.

*Waiver of depositions on preliminary inquiry*—In some cases the accused by his counsel may desire to waive the taking of depositions and consent to a committal for trial (sec. 690), or, being held to bail under sec. 696, thus reserving until the trial itself the cross-examination of the witnesses for the prosecution. If there is a probability that crown witnesses available on the preliminary enquiry might be absent from Canada at the later trial, the taking of their depositions so that their testimony

might be available under sec. 999, might be advisable for the prosecution, and objection might be raised on this ground to such a course being adopted. The evidence must be taken in conformity with sec. 682 unless the waiver is assented to by the prosecution. Waiver of depositions is not expressly dealt with by the Code, but is recognized in numerous cases. See *R. v. Gibson*, 29 N.S.R. 4, 3 Can. Cr. Cas. 45, *R. v. Wener*, 12 Que. K.B. 320, 6 Can. Cr. Cas. 406; *R. v. Breckenridge*, 7 Can. Cr. Cas. 116, 12 Que. K.B. 474; *R. v. McDougall*, 8 O.L.R. 30, 8 Can. Cr. Cas. 238; *R. v. Hebert*, 10 Can. Cr. Cas. 284. Those cases, however, which held that the right of speedy trial under former secs. 825 and 827 was dependent upon the actual taking of depositions at the preliminary enquiry, are no longer applicable because of the amended form of those sections following the Code Amendment Acts of 1907 and 1909. *Giroux v. The King* (1917) 56 S.C.R. 63, 29 Can. Cr. Cas. 258, affirming *R. v. Giroux* (1916), 26 Que. K.B. 323; *R. v. Walsh*, 48 N.S.R. 1, 23 Can. Cr. Cas. 7.

*Form of deposition of a witness*—Code form 19, following sec. 1152.

*Where depositions taken in shorthand*—See sec. 683.

*Statutory presumptions*—As the purpose of the preliminary inquiry is to ascertain whether "the evidence is sufficient to put the accused on his trial" (Code sec. 690), reference may be had to statutory provisions constituting certain facts *prima facie* evidence in certain cases or otherwise providing special methods of proof. See Code secs. 979-994.

*Competency of witnesses, notwithstanding interest*—See Canada Evidence Act, sec. 3.

*Evidence of young child when taken without oath*—See Canada Evidence Act, sec. 16 and Code sec. 1003.

*Incriminating questions*—See Canada Evidence Act, sec. 5.

*Where affirmation is a substitute for witness' oath*—See Canada Evidence Act, secs. 14 and 15.

*Taking evidence under commission where witness not otherwise available*—See secs. 995, 997; *R. v. Verral*, 6 Can. Cr. Cas. 325, 17 P.R. (Ont.), 61; *R. v. Hogue*, 39 O.L.R. 427, 28 Can. Cr. Cas. 419; *R. v. Roblin*, 26 Man. R. 97, 26 Can. Cr. Cas. 222.

*Similar procedure in summary conviction matters*—See sec. 721.

*Identification by Bertillon system*—By the Identification of Criminals Act, R.S.C. 1906, ch. 149, any person in lawful custody, charged with, or under conviction of, an indictable offence, may be subjected, by or under the direction of those in whose custody he is, to the measurements, processes and operations practised under the system for the identification of criminals commonly known as the Bertillon Signaletic System, or to any measurements, processes or operations sanctioned by the Governor-in-Council having the like object in view. Such force may be used as it is necessary to the effectual carrying out and application of such measurements, processes and operations. R.S.C. 1906, ch. 149,

sec. 2. The signalitic cards and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law. R.S.C. 1906, ch. 149, sec. 2 (3).

No one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication, shall incur any liability, civil or criminal, for anything lawfully done under the provisions of the Act. R.S.C. 1906, ch. 149, sec. 3.

*Canadian Criminal Identification Bureau*—A system of finger-print records is maintained by the Canadian Criminal Identification Bureau under the supervision of the Chief Commissioner of Dominion Police, Ottawa. These include finger prints of convicts in Dominion penitentiaries and in many provincial and county prisons, and also prints obtained by municipal and provincial police.

**Depositions in writing or by stenographer.**—Stenographer to be sworn.—Affidavit proving transcript.

**683.** Every justice holding a preliminary inquiry shall cause the depositions to be written in a legible hand and on one side only of each sheet of paper on which they are written: Provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer who may be appointed by the justice and who before acting shall, unless he is a duly sworn official court stenographer, make oath that he shall truly and faithfully report the evidence.

2. Where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness, but it shall be sufficient if the transcripts be signed by the justice and be accompanied by an affidavit of the stenographer, or if the stenographer is a duly sworn court stenographer by the stenographer's certificate that it is a true report of the evidence.

*Origin*—Sec. 590, Code of 1892; B.S.C. 1886, ch. 174, sec. 69.

*Evidence on preliminary inquiry may be taken in shorthand*—Where a statute provides for taking "the evidence" in shorthand, it is not to be assumed that the stenographer's notes are a complete record of all that took place; it will, therefore, not be assumed that there was not first an adjudication of guilt on the second offence charged without reference to the prior conviction, and that such adjudication preceded the interrogation of the defendant by the justice on the close of the evidence, as to whether he denied the prior conviction or not. *R. v. Hanley*, 41 O.L.R. 177; and see as to when a statute is to be held to be

directory only, in requiring the accused to be interrogated after conviction for the later offence. *R. v. McDevitt*, 39 O.L.R. 138; *R. v. Coote*, 22 O.L.R. 269; *R. v. Hanley*, 41 O.L.R. 177, 179.

*Depositions taken in shorthand*—When, as provided by the 2nd sub-sec. of sec. 683, the depositions were taken in shorthand by a stenographer, previously sworn to take them, it is not necessary that they should be read in presence of the accused and of the magistrate to the witnesses, and signed by them, as in the case where the depositions are taken down in longhand according to the provisions of sec. 682; it is sufficient that the depositions in shorthand should, before being transmitted to the clerk of the peace be authenticated by the signature of the presiding magistrate, and that they should at the same time be accompanied by an affidavit of the stenographer establishing that his transcript is a true report of the evidence. *R. v. Rouleau*, 17 Can. Cr. Cas. 281.

The proviso contained in sec. 683 which permits the proceedings to be taken down in shorthand, was introduced into Canadian criminal law in 1892, when the law was codified.

*Stenographer must be sworn*—

The omission to swear the stenographer, not already sworn as an official stenographer, is a matter of substance and not a mere matter of form. *R. v. L'Heureux* (1908) 14 Can. Cr. Cas. 100; *R. v. Johnson* (1912) 1 W.W.R. 1045, 19 Can. Cr. Cas. 203 (Man.); *R. v. Limerick, ex parte Dewar* (1916) 44 N.B.R. 233, 27 Can. Cr. Cas. 309.

But the petitioner's affidavit in support of an application for habeas corpus that the stenographer who transcribed the evidence at the preliminary enquiry had not been sworn will not be credited as against the certificate of oath signed by the magistrate and filed in the record. *Dick v. The King*, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57; compare *R. v. Book* (1915) 25 Man. R. 480, 25 Can. Cr. Cas. 89, under a Manitoba statute.

The fact that the stenographer was duly sworn may be proved by the justice's certificate, although the stenographer did not sign a formal affidavit or oath in writing. *McDonald v. The King*, 25 Que. K.B. 322, 26 Can. Cr. Cas. 175.

Under sec. 13 of the Extradition Act, R.S.C. 1906, c. 155, which provides that the judge before whom the fugitive is brought should hear the case in the same manner as nearly as may be as if the fugitive was brought before a justice charged with an indictable offence, the proceedings are regulated by sub-sec. 682-686 of the Criminal Code and under sec. 683, if the evidence is taken in shorthand, it is imperative that the transcript be signed by the judge and be accompanied by an affidavit of the stenographer that it is a true report of the evidence before there can be a committal of the accused for extradition, and, if these be lacking, the prisoner is entitled to his discharge on habeas corpus, although there would be nothing to prevent fresh proceedings

being taken against him. *Re Royston*, 18 Man. R. 539, 15 Can. Cr. Cas. 96.

The stenographer must be first sworn as provided by the section, that is, as the section states, "before acting" the stenographer shall make oath that he shall truly and faithfully report the evidence. Failure in this respect is not merely a matter of procedure or relating to procedure, but it is a matter of substance which goes to the jurisdiction. *R. v. Limerick*, 44 N.B.R. 233, 27 Can. Cr. Cas. 44.

The effect of failure to comply with the strict requirements of sec. 683 is that the justice acting in a summary conviction matter (Code sec. 721), lacks the necessary jurisdiction to make his acts legal. *R. v. Limerick*, supra; *R. v. Johnson* (1912), 1 W.W.R. 1045, 19 Can. Cr. Cas. 203 (Man.). Contra: *R. v. Bosak* (1916), 26 Can. Cr. Cas. 374, 10 O.W.N. 301, in which Sutherland, J., in dealing with a corresponding section of a provincial licensing law said that failure to swear the stenographer under R.S.O. 1914, ch. 215, sec. 87 (2), did not affect the jurisdiction of the magistrate to make a summary conviction under that Act. And see *R. v. Jackson* (1918) 40 O.L.R. 173, 29 Can. Cr. Cas. 352, 362.

*Effect of irregularity on the indictment following the committal*—

It has been held that an indictment will not be quashed on the ground that it is founded on depositions certified by the magistrate's stenographer, but not signed by the magistrate nor accompanied by the stenographer's affidavit under sec. 683. *R. v. Prasiloski* (No. 2), 16 Can. Cr. Cas. 139, 15 B.C.R. 29, 13 W.L.R. 298. Contra: *R. v. Robert* (No. 1), (1910) 17 Can. Cr. Cas. 194, 12 Que. P.R. 7, where both the commitment for trial and the indictment based thereon were quashed for non-compliance with sec. 683, but this did not bar a fresh indictment preferred under sec. 873 by the Attorney-General, independently of any commitment or preliminary inquiry. *R. v. Robert* (No. 2), 17 Can. Cr. Cas. 196 (Que.).

*Accused may obtain copy of depositions*—See sec. 691.

*Procedure applicable to summary conviction proceedings*—See sec. 721.

**Depositions in general to be read to accused.—Accused to be addressed in statutory form.—Statement of accused.**

**684.** After the examination of the witnesses produced on the part of the prosecution has been completed, and after the depositions have been signed as aforesaid, the justice unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and unless the accused dispenses therewith shall read or cause them to be read again.

2. When the depositions have been again read, or the reading dispensed with, the accused shall be addressed by the justice in these words, or to the like effect:

“Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial notwithstanding such promise or threat.”

3. Whatever the accused then says in answer thereto shall be taken down in writing in form 20, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses and dealt with as hereinafter provided.

*Origin*—Sec. 591, Code of 1892; R.S.C. 1886, ch. 174, secs. 70 and 71; 32-33 Vict., Can., ch. 30, sec. 32; Indictable Offences Act, 1848, Imp., sec. 18.

*Second reading of the depositions*—When the evidence has been taken in shorthand, the accused party can lawfully be asked if he wishes the depositions to be read again before the stenographer's transcript has been made. *McDonald v. The King* (1916) 25 Que. K.B. 322, 26 Can. Cr. Cas. 175; *R. v. Beaulieu*, 26 Que. K.B. 151, 28 Can. Cr. Cas. 336. In such a case, sec. 684 is sufficiently complied with, if when the justice asks the accused whether he wishes the depositions to be read again, he has the stenographer in attendance with his note-book ready to do the reading, even if the depositions have not yet been transcribed, though possibly the accused may be entitled to ask to have the transcript made before he is called upon for the statement. *McDonald v. The King*, supra, which seems to overrule the decision of *Mercier, J.*, in *R. v. Rouleau*, 17 Can. Cr. Cas. 281 (Que.), holding that no re-reading was necessary where the depositions were taken in shorthand.

*Form of statement of the accused*—Code form 20, following sec. 1152.

*Taking statement of accused on Form 20*—An opportunity is given the accused on the preliminary enquiry to have his own statement (not under oath) taken down and kept with the depositions. This statement is in statutory form after due caution to the accused. *McDonald v. The King* (1916), 25 Que. K.B. 322, 26 Can. Cr. Cas. 175. The accused is to be asked to sign it if he will; Code form 20.

*Caution to the accused in statutory form*—

Although the magistrate's record of proceedings does not show on its face that a statement made by the accused to him in answer to the charge was made after due caution in accordance with sec. 684, the fact that it was so made may be proved at the trial and the statement may then be put in evidence by the prosecution. *R. v. Kalabeen* (1867), 1 B.C.R., pt. 1, per Begbie, C.J. It has been held also that the statutory form of inquiry contained in sub-sec. (2) is directory only as regards telling the accused that he has nothing to hope for, and nothing to fear from promises or threats; and if the accused was cautioned without strict compliance with its formalities his answer may be given in evidence against him if it be shown that he was not induced to make it by any promise or threat. *R. v. Soucie*, 17 N.B.R. 611; *R. v. Sansome* (1850), 1 Den. 645, 19 L.J.M.C. 143, 4 Cox 203; and see Code sec. 685, which recognizes the right to give in evidence any admission notwithstanding sec. 684, if it would by law be admissible as evidence against the accused. In the English statute of 1848, the enactment now contained in present sec. 685 is in the form of a proviso to the section corresponding with the present sec. 684. There are, in effect, two cautions in sec. 684; first, that what the accused says, although not bound to say anything, will be put in the record and may be used against him, and, second, that if any promises or threats have been made to him to induce him to make a statement when he should come before the magistrate, he is to understand that such promises, or threats, were not authorized, and he is not to make any admissions because of them. It was held under the English Act that these cautions were separable and that where the first had been duly given and was shown in the record, but the second was omitted, the prisoner's statement in answer could be used against him if no previous inducement or threat had been held out; the second caution being designed only to take away the effect of previous inducements or threats. *R. v. Sansome*, 1 Den. 545, 19 L.J.M.C. 143. It is, of course, advisable that both portions of the caution be given and duly certified along with the statement made by the accused in answer so that there may be no question of its admissibility in case inducements had been previously held out or threats made. *R. v. Bate*, 11 Cox 686. It is further to be noted that these cautions were in separate sections in the Canadian statute 32-33 Vict., ch. 30 (secs. 31 and 32).

Where the prisoner, having once been examined before the justice, and cautioned by him in the manner prescribed, made a statement, which was taken down in writing, but not signed by him or by the justice, he was then remanded, and on a subsequent day was brought again before the justice; no new witnesses were then examined, but the prisoner's counsel put some questions to a witness who had been examined before; but the prisoner was again cautioned, but declined to make any further statement; the statement made by him on the first

occasion was held admissible against him on his trial. *R. v. Bond*, 1 Den. 517, 19 L.J.M.C. 138.

Statements made by a prisoner while cross-examining a witness before the magistrate may be given in evidence against him on his trial, but if they have been reduced to writing as part of the depositions they must be proved by the depositions and not by the witness so cross-examined. *R. v. Taylor*, 13 Cox 68, 77 L.R. 2 C.C.R. 147, 38 J.P. 484.

A prisoner was sworn and gave evidence on own behalf under the Criminal Law Amendment Act, 1885, Imp., before any caution was given to him. The usual caution was afterwards given, when he said, "What I have already said is true." At the trial, under the advice of counsel he declined to give evidence. It was held that the deposition was rightly admitted in evidence for the prosecution. *R. v. Bird*, 62 J.P. 760.

Code sec. 684 (2), prescribing the warning to be given to the accused by a justice holding a preliminary enquiry applies only to statements which the accused may make on the preliminary enquiry and the full statutory warning need not be given by police officers or other persons in authority with whom the prisoner holds conversations after his arrest. *The King v. Steffoff*, 15 Can. Cr. Cas. 366, 20 O.L.R. 103.

The omission of the justice of the peace on a preliminary examination to put the usual question inviting a statement by the accused under sec. 684 of the Code, after the depositions have been read over, does not invalidate a commitment for trial. *R. v. Lantz*, 47 N.S.R. 495, 22 Can. Cr. Cas. 212; compare *R. v. Prasiloski* (No. 2), 16 Can. Cr. Cas. 139; *R. v. McClain*, 7 W.W.R. 1134, 8 Alta. L.R. 73, 23 Can. Cr. Cas. 488. Contra: *R. v. Beaulieu*, (1917) 26 Que. K.B. 151, 28 Can. Cr. Cas. 336, where the indictment was quashed by Lemieux, C.J.

*Accused to be asked to sign the statement*—The statement made by the accused is to be signed "by the justice," but it is not irregular for him to ask the accused himself to sign it (Code form 20), even where the statement consists merely of the words, "I have nothing to say"; and if he signs such statement in a preliminary inquiry upon a forgery charge it may be used against him for purposes of comparison of handwriting on the trial. *R. v. Golden*, 11 B.C.R. 349, 10 Can. Cr. Cas. 278. While the statement of the accused is required to be signed only by the justice, it is an instruction upon the statutory form that the accused should be got to sign it, "if he will." See *R. v. Walebek*, 4 W.W.R. 501, 507, 21 Can. Cr. Cas. 130; Code form 20. A further instruction upon the form is to state "whatever the prisoner says and in his very words, as nearly as possible." The statement may be put in evidence by the Crown. Code sec. 1001. It is sufficiently authenticated by the justice's signature. Code sec. 1001; *R. v. Walebek*, 4 Can. Cr. Cas. 501, 507; 21 Can. Cr. Cas. 130.

It has been held that a prisoner called as a witness on his own behalf cannot be compelled to furnish a specimen of his handwriting; *Rex v.*



- Grinder, 11 B.C.R. 370, 10 Can. Cr. Cas. 333; and the prisoner's statement taken under Form 20, must be certified and forwarded with the depositions, although the prisoner declines to sign it. *R. v. Walebek*, supra. If, however, the prisoner tenders his own evidence in defence under sec. 686, both he and the justice are to sign his deposition. Secs. 682, 686.

*Statement of accused made through interpreter*—If the accused is a foreigner, not understanding the English language, the statement may be taken through the sworn interpreter, and it is a proper precaution to have the completed statement when transcribed in English re-translated into the language of the accused and to have its correctness assented to after any necessary alterations. See *R. v. Walebek* (1913), 4 W.W.R. 501, 21 Can. Cr. Cas. 130 (Alta.). The statement becomes admissible in evidence against the accused at the trial. Code sec. 1001. If the accused then claims that he did not understand what he signed or the warning given, he may establish that fact on the trial and so weaken the effect of the statement. [Alta.] *R. v. Walebek* (1913) 4 W.W.R. 501, 507, 21 Can. Cr. Cas. 130 (Alta.).

A statement by an accused, made on his preliminary hearing in the form prescribed by the Code, and signed by him and by the magistrate before whom it was taken is not rendered inadmissible under sec. 1001 on the trial by the fact that the justice testifies that the accused was a foreigner, that it was necessary to use an interpreter during the preliminary proceedings and that the statement was taken down in condensed form by the magistrate, then read over to the accused by the interpreter and duly signed. *R. v. Walebek* (1913) 4 W.W.R. 501, 21 Can. Cr. Cas. 130 (Sask.). His objection is not tenable that the statement is not admissible in the absence of evidence that the interpreter correctly interpreted the warning and the statement of the accused. If the accused did not understand what he signed or the warning given it is open to him to establish that fact. *R. v. Walebek*, supra.

*Accused may obtain copy of his statement*—See sec. 691.

*Statement of accused to be transmitted with the depositions*—See sec. 695.

*Statement of accused may be used against him at the trial*—See Code sec. 1001.

#### **Confession or admission of accused.**

**685.** Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him.

*Origin*—Sec. 592, Code of 1892; R.S.C. 1886, ch. 174, sec. 72.

*Onus of proof on prosecutor to show that confession voluntary*—The prosecution must show that the statement of the accused was a

voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. *R. v. Rodney* (1918) 42 O.L.R. 645, 648; *Ibrahim v. The King* [1914] A.C. 599; *R. v. Voisin*, (1918) 34 Times L.R. 263; *R. v. Thompson*, [1893] 2 Q.B. 12; *R. v. Benjamin*, (1917) 53 Que. S.C. 161; *R. v. Viau*, 7 Que. Q.B. 362; *R. v. Ockerman*, 6 B.C.R. 143; *R. v. Ryan*, 9 O.L.R. 137; *R. v. Todd*, (1901) 13 Man. R. 364; *R. v. Lai Ping*, 11 B.C.R. 102; *R. v. Royds*, 10 B.C.R. 407; *re Lewis*, 9 Can. Cr. Cas. 233; *R. v. Young*, 10 Can. Cr. Cas. 466 (N.S.); *R. v. Tutty*, 9 Can. Cr. Cas. 544; *R. v. Charcoal*, 4 Can. Cr. Cas. 93, 3 Terr. L.R. 7; *R. v. Sanavitch*, [1917] 3 W.W.R. 568 (Alta.); *R. v. Benjamin*, (1917) 53 Que. S.C. 161, 41 D.L.R. 388.

Where evidence is given on the question of the admissibility of an alleged confession as a voluntary one, this raises a trial within a trial, and such evidence should, if possible, all be given at one time. *R. v. De Mesquito*, 9 W.W.R. 113, 114, per Martin, J.A. (B.C.)

No formula is necessary to be used to prove the want of inducement or threat. *R. v. Hoo Sam* (1912) 1 W.W.R. 1049, 1053 (Sask.), per Wetmore, C.J.

Where the trial is with a jury, the confession should not be let in subject to its being later displaced if not shown to have been voluntary. *R. v. De Mesquito*, 9 W.W.R. 113, 114, per Martin, J.A. (B.C.). Such would be a ground for a new trial if done before a jury in the event of the evidence being finally excluded. *Ibid.*, citing *R. v. Sonyer*, (1898) 2 Can. Cr. Cas. 501. Such a practice is inconvenient and undesirable even where the trial is before a judge alone. *R. v. De Mesquito*, 9 W.W.R. 113, 114 (B.C.).

If after taking objection at the time that the evidence of an admission was tendered that a sufficient foundation had not been made and cross-examining on the questions which were then put to the witness to lay the foundation by proving that the admissions, to which he is to depose, were made voluntarily, counsel for the accused should again take objection if he desires to raise the point that a sufficient foundation had not been made for the admissibility of the confession. *R. v. Hoo Sam* (1912), 1 W.W.R. 1049, 1053. *Seem*, if he does not do so it is not open to him to set up after verdict that the evidence was improperly received. *Ibid.* at 1053, per Wetmore, C.J.

*Confessions generally*—The general rule is, that a confession is not admissible as evidence against any person except the person who makes it; Stephen, Dig. Ev., art. 21. But if one prisoner makes a confession in the presence of another, who thereupon makes statements which are properly construable as admissions by him, the confession of the first will be admissible against the second, not as evidence of the facts which it states, but introductory to and explanatory of the admissions of the second. Before a confession can be received in evidence, it must be proved affirmatively that the confession was free and voluntary; and

therefore the prosecutor must always prove the circumstances under which it was made. *R. v. Sanavitch*, [1917] 3 W.W.R. 568 (Alta.); *R. v. Spain*, [1917] 2 W.W.R. 465, 27 Man. R. 473; *R. v. Bogh Lingh*, (1913) 18 B.C.R. 323, 24 W.L.R. 941, 21 Can. Cr. Cas. 323; *R. v. Bruce*, 13 B.C.R. 1, 12 Can. Cr. Cas. 275; *Ibrahim v. The King*, [1914] A.C. 599, 83 L.J.P.C. 185, 24 Cox C.C. 174; *R. v. Rodney* (1918) 42 O.L.R. 645.

A confession is not deemed to be voluntary, if it appears to the court to have been caused by any inducement, threat, or promise proceeding from a magistrate or other person in authority or concerned in the charge (*e.g.*, the prosecutor or the person having the custody of the accused), and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly, and if, in the opinion of the court, the inducement, threat, or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him. Thus, on a trial of A. for murdering B., a handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, was brought to the knowledge of A. who, under the influence of a hope of pardon, made a confession. It was held that the confession was not voluntary: *R. v. Boswell, Car. & Marsh*, 584, cited as an illustration by Stephen, Dig. Ev., art. 22. *R. v. Thompson*, [1893] 2 Q.B. 12.

In *Ibrahim v. The King*, [1914] A. C. 599, Lord Sumner, in delivering the judgment of the Privy Council, says (p. 609): "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained by him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

A confession is not involuntary merely because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceedings, or by inducements held out by a person having nothing to do with the apprehension, prosecution, or examination of the accused. Thus, A. being charged with the murder of B., the chaplain of the gaol read the Communion Service to A. and exhorted him on religious grounds to confess his sins. A., in consequence, makes a confession, and it was held that this confession was voluntary: *R. v. Gilham*, 1 Moo. C.C., 186, cited by Stephen, Dig. Ev., art. 22. So, again, a confession made by a prisoner to the gaoler in consequence of a promise by the gaoler that if the prisoner confessed he should be allowed to see his wife, would be admissible in evidence. To make a confession involuntary, the inducement must have reference to the escape of the accused from the criminal charge against him, and must be made by some person having power to relieve him, wholly or

partially, from the consequences of that charge, or by a person pretending to have such power.

A confession is deemed to be voluntary if, in the opinion of the court, it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary. Thus, A. is accused of the murder of B.; and C., a magistrate, tries to induce A. to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C. that no pardon can be granted, and this is communicated to A. After this, A. makes a statement. This is a voluntary confession. *Stephen, Dig. Ev., art. 22, R. v. Clewes, 4 C. & P., 221.*

It is a question of fact whether or not the statement was voluntarily and freely made: It is not to be excluded merely because made to a person in authority. Statements made by soldiers at a military court of inquiry at which they were given a chance of making statements on their own behalf were held admissible in a prosecution at the assizes for conspiracy to defraud. *R. v. Colpus, (1917) 86 L.J.K.B. 459, [1917] 1 K.B. 574.*

A confession made without suggestion from any outside source is admissible although the statement itself showed that it was induced by the hope of pardon operating on his mind. *R. v. Godinho, (1911) 7 Cr. App. R. 12.*

*Voluntary confession obtained by fraud or deceit*—

Facts discovered in consequence of a confession improperly obtained, and so much of the confession as distinctly relates to those facts may be proved. Thus, A., accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A. had thrown a lantern into a pond; the fact that he said so, and that the lantern was found in the pond in consequence, may be proved: *Stephen, Dig. Evid., art. 22, R. v. Gould, 9 C. & P., 364.*

It is improper to endeavour to extort a confession by fraud or under the promise of secrecy; but if a confession is otherwise admissible as evidence, and was made voluntarily, it does not become inadmissible merely because it was made under a promise of secrecy or in consequence of a deception practised on the accused person for the purpose of obtaining it; *R. v. White, (1908) 18 O.L.R. 640, 15 Can. Cr. Cas. 30; R. v. Best, (1909) 78 L.J.K.B. 692; or when he was drunk, or because it was made in answer to questions whether put by a magistrate, officer, or a private person, or because he was not warned that he was not bound to make a confession and that evidence of it might be given against him.*

If a confession is given in evidence, the whole of it must be given, and not merely the parts disadvantageous to the accused person.

*Confessions made under oath*—

Evidence amounting to a confession may be used as such against the person who gives it, though it was given on oath and though the

proceeding in which it was given had reference to the same subject matter as the proceeding in which it is to be used, and though the witness might have refused to answer the questions put to him; but if he was improperly compelled to answer, his answers are not a voluntary confession: Stephen, Dig. Ev., art. 23.

Thus, A. was charged with maliciously wounding B. Before the magistrates, A. had appeared as a witness for C., who was charged with the same offence. A.'s deposition was allowed to be used against him on his own trial: *R. v. Chidley and Cummins*, 8 Cox C.C. 365.

*Non-incriminating statements*—

A conviction where corroboration is required should not be based on proof of a statement made by the accused, and used as corroboration, if the statement may with equal reason be construed as non-incriminating. *R. v. Blyth*, 11 O.W.N. 406; 28 Can. Cr. Cas. 20.

An acknowledgment of a subordinate fact not directly involving guilt, or in other words, not essential to the crime charged, is not a confession, *Crossfield's Trial*, 26 How. St. Tr. 215; *R. v. Hurd* (1913) 4 W.W.R. 185, 189, 23 W.L.R. 812, 21 Can. Cr. Cas. 98 (Alta.).

*Proving that accused denied guilt*—The rule as to the exclusion of the confession or admission of the accused without proof that it was voluntarily made does not apply to a statement made by him which rather suggests a denial of his guilt. *R. v. Hurd*, 4 W.W.R. 185, 23 W.L.R. 812, 21 Can. Cr. Cas. 98 (Alta.); and see *R. v. Thompson* [1910] 1 K.B. 640.

In *R. v. Christie* [1914] A.C. 545, 554, Lord Atkinson says: "It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them."

In *Rex v. Christie*, supra, the statement objected to went to the question of guilt. It was substantially as if the accused had been asked if he were guilty of the crime charged and had denied the charge. The statement in question in *R. v. Letain*, [1918] 1 W.W.R. 505, 518, merely referred to the subject of the deceased's raincoat, which might possibly have been lawfully in the accused's possession, thus dealing merely with a collateral circumstance and not with the question of guilt. On this point, *R. v. Letain*, is distinguishable from both *Rex v. Christie*, supra, and *R. v. Norton* [1910] 2 K.B. 496, 79 L.J.K.B. 756.

*Written confessions*—If the admissions have been reduced to writing and read over and explained to and signed by the accused, the writing will be admissible on proof of the confession being a voluntary one. *De Paoli v. The King*, (1915) 24 Que. K.B. 525, 25 Can. Cr. Cas. 256.

If a written confession or admission by the accused was not a voluntary one and its admission in evidence was therefore improper, this

raises a question of law, and the conviction may be quashed or a new trial ordered as the Court of Appeal may see fit. *R. v. De Mesquito*, (1915) 9 W.W.R. 113 (B.C.)

If there was no other evidence upon which the conviction could be supported after ruling out the inadmissible confession, the Court of Appeal should order the conviction to be quashed rather than direct a new trial. *R. v. De Mesquito*, (1915) 9 W.W.R. 113.

*Fact of person being in custody as affecting statement made by him*—The arrest itself is said to be an inducing cause sufficient to bar the reception in evidence of a confession or statement elicited by questions put by an officer to a prisoner while under arrest, where there had been no caution or warning that what he might say might be used against him. *R. v. Kay*, 9 Can. Cr. Cas. 403, 11 B.C.R. 157; *R. v. Cook*, 22 Can. Cr. Cas. 241.

The rule requiring a warning to persons under arrest before receiving their confessions is not an arbitrary one, but rests on the presumption of inducement which arises from the arrest or other custody. *Ibrahim v. The King*, [1914] A.C. 599, 609; *R. v. Colpus*, 12 Cr. App. R. 193, 200; *R. v. Rodney*, (1918), 42 O.L.R. 645, 653, in which *R. v. Kay*, 9 Can. Cr. Cas. 403, 11 B.C.R. 157, was referred to as not laying down an absolute rule of exclusion. As stated by Latchford, J., in *R. v. Rodney*, supra: "It is not the fact that an accused person was under arrest that determines whether a statement made by him to a constable or other person in authority is admissible, though that fact is of undoubted importance, and should receive careful consideration when evidence of a statement so made is proffered. Nor is the absence of warning the determining factor in such a case. The utmost circumspection should, no doubt, be exercised in the reception of evidence of statements made in such circumstances. Before admitting evidence of statements so made, the magistrate or judge should be satisfied that no inducement whatever has been held out to the accused by any person having authority over him or concerned in the subject-matter of the charge. But, if satisfied that the statement has not been obtained by fear of prejudice or hope of advantage held out by a person in authority, he should declare the evidence admissible. The matter is largely, if not entirely, one of discretion, to be exercised in accordance with the rule laid down by Lord Sumner in *Ibrahim v. The King* [1904] A.C. 599, 609.

If there is no ground for a suggestion that the statement was made in reply to a threat or upon any inducement, the evidence will be admitted. *Rogers v. Hawken*, 67 L.J.Q.B. 526, 19 Cox C.C. 122 (discussing *R. v. Male*, 17 Cox C.C. 689); *R. v. Day*, 20 Ont. R. 209 (discussing *R. v. Gavin* (1885) 15 Cox C.C. 656; *R. v. Miller*, (1895) 18 Cox C.C. 54; *Attorney-General of N.S.W. v. Martin*, (1909) 9 Com. L.R. 713 (Austr.); *R. v. Elliott* (1899) 31 Ont. R. 14; *R. v. Hoo Sam* (1912) 1 W.W.R. 1049 (Sask.), distinguishing *R. v. Kay*, 11 B.C.R. 157.

The same rebuttable presumption against a confession being voluntary may arise although the accused has not been formally arrested; *R. v. Jones* (1910), 5 Cr. App. R. 177, 180; as where the accused was subjected to search at police headquarters whither he had gone on invitation. *R. v. Rodney*, (1918) 42 O.L.R. 645, 650, per Latchford, J.

*Cautioning the accused*—It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible. It may tend to show that the person was not on his guard as to the importance of what he was saying or as to its bearing on some charge of which he has not been informed. *R. v. Voisin*, 34 Times L.R. 263; *R. v. Colpus*, (1917) 12 Cr. App. R. 193, [1917] 1 K.B. 574; *R. v. Ryan*, 9 O.L.R. 137; *R. v. Steffoff*, 20 O.L.R. 103; *R. v. Spain*, 28 Can. Cr. Cas. 113 (Man.) [1917] 2 W.W.R. 465; *R. v. Hoo Sam*, (1912) 1 W.W.R. 1049, 1051.

Statements made by an accused person to a constable in reply to an inquiry are not inadmissible on the ground that the constable did not previously caution him, provided that the constable did not, before making the inquiry, make up his mind to take the person into custody or to take proceedings against him. *Lewis v. Harris*, 24 Cox C.C. 66, 30 T.L.R. 109, 58 S.J. 156.

It would not be correct to say that a caution given to the prisoner validates as evidence any answer he makes. It would be otherwise if anything were done by the officers to intimidate the prisoner or to withdraw or nullify the caution. See *R. v. Wallace*, 24 Can. Cr. Cas. 158, 20 B.C.B. 97.

Statements voluntarily made after caution and while under arrest for one charge are equally admissible on another and quite different charge. *R. v. Van Horst* (1914) 20 B.C.R. 81.

There is no absolute rule that the caution given by one officer to the prisoner must be repeated on his being brought before another officer; the admission made to the latter has been admitted where the court was satisfied that the effect of the caution to the first officer still remained. *R. v. Wallace*, 20 B.C.R. 97. But where a prisoner has been warned, the warning will not necessarily make admissible a statement made on a later occasion to a constable who interrogated him without renewing the warning. *R. v. Bela Singh*, 7 W.W.R. 603 (B.C.).

On the other hand, it would seem that if a statement has been elicited by an officer without cautioning a person in custody under circumstances which would exclude the statement so made, he should be specifically warned that what he then said cannot be used against him, when the same officer on another occasion renews the interrogation of the prisoner in respect of the same admissions after warning him that he is not obliged to answer. *R. v. Kong*, (1914) 20 B.C.B. 71, 24 Can. Cr. Cas. 142.

Every case as to the admissibility of a statement made by an accused person while under arrest must be decided according to its own

circumstances. *Ibrahim v. The King* [1914] A.C. 599, 614, 83 L.J.P.C. 185; *R. v. Spain* [1917] 2 W.W.R. 465, 469.

*Interrogation by police*—There is no statutory form prescribed for police officers in warning an accused that anything he says may be used against him, and that he is not bound to say anything. *R. v. Spain*, [1917] 2 W.W.R. 465, 27 Man. R. 473, 28 Can. Cr. Cas. 113.

It was said in *R. v. Gavin*, (1885) 15 Cox C.C. 656, that a policeman should not interrogate a prisoner as to the charge; but that case was expressly overruled in *R. v. Best*, [1909] 1 K.B. 692, 78 L.J.K.B. 692; and see *R. v. Firth* (1913) 8 Cr. App. R. 162, from which it would appear that, as a matter of law, if the police make an untrue statement to a prisoner which calls forth an admission, the latter is admissible notwithstanding the prior untruth which elicited it. But see, contra, *R. v. McDonald* (1896) 2 Can. Cr. Cas. 221 (Terr.).

Where the prosecution offers evidence of an alleged confession made by the accused to a police officer it is the duty of the presiding judge to enquire into all the circumstances in order to ascertain whether the confession was made freely, and if he finds that it was not, he must reject the evidence. *R. v. Sanavitch*, [1917] 3 W.W.R. 568, per Hyndman, J., applying *R. v. McCraw*, 12 Can. Cr. Cas. 253 (Que.). Even if an admission made to a police officer were admitted without proper proof that it was a voluntary statement, this would not justify the ordering of a new trial if the accused himself went into the witness box and told there in substance the story related by him to the police. The jury having before them practically the same thing from the accused in his testimony as they had in the alleged confession, there was no substantial wrong and the Code forbade a new trial. *R. v. Moke*, [1917] 3 W.W.R. 575, 586, 28 Can. Cr. Cas. 296 (Alta.).

*Interrogation by employer*—A confession is not voluntary where it followed a statement made by the employer complaining of a theft and accusing his employee in the presence of a constable by saying: "You will be arrested if you do not say where the goods are." *R. v. De Mesquito* (1915) 9 W.W.R. 113 (B.C.).

*Exact words of confession not essential to admissibility*—The doctrine in *R. v. Sexton* (1822) referred to in Joy, on Confessions (1842) 19, and in Russell on Crimes, 7th ed., 2205, that confessions must be excluded unless the *ipsissima verba* are given, is now doubted, *R. v. Godinho* (1911) 7 Cr. App. R. 12; and see Russell on Crimes, 7th ed., 2180. As to confessions or admissions made through an interpreter, the same rule would probably apply as would in taking admissions under sec. 684, through an interpreter; see *R. v. Walebek* (1913) 4 W.W.R. 501, 21 Can. Cr. Cas. 130 (Sask.); *R. v. Charcoal*, 3 Terr. L.R. 7.

*Assent of accused to statements of others; silence not always assent*—Statements not coincident, in point of time, with the occurrence of the shooting, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have



been expected to have made some explanatory reply to remarks in reference to them, are admissible as evidence. *Gilbert v. The King*, 38 Can. S.C.R. 284, 12 Can. Cr. Cas. 127.

It is a rule of law that an incriminating statement made in the presence and hearing of the defendant, even on occasion which would reasonably be expected to call for some explanation from him, is not evidence against him on his trial of the facts therein stated, save in so far as he has accepted the statement. But a mere denial by him of the truth of such a statement does not in law render that statement inadmissible against him. To this extent, *R. v. Norton* [1910] 2 K.B. 496, 5 Cr. App. R. 65 is overruled by *R. v. Christie* [1914] A.C. 545. In practice, however, there is a rule of prudence and discretion that such a statement should not be tendered until, in the opinion of the judge, there is a foundation for a reasonable inference by the jury that the defendant accepted it or part of it. If, notwithstanding this rule, such a statement has been given in evidence, the judge, if he thinks that it should have been withheld, should caution the jury concerning its true effect. In this respect the judgment in *R. v. Norton* [1910] 2 K.B. 496, represents the correct practice. *R. v. Christie*, [1914] A.C. 545, 10 Cr. App. R. 141 (H.L.) affirming *R. v. Christie*, 9 Cr. App. R. 169.

The former rule of evidence that one's silence shall be construed as a virtual assent to all that is said in his presence, is susceptible of great abuse, and calls for a course of conduct which prudent and quiet men do not generally adopt. If that rule be sound to the full extent, as laid down in some of the early cases, it would be in the power of any evil-disposed person to always ruin his adversary's case by drawing him into a compulsory altercation in the presence of chosen listeners, who would be sure to misrepresent what he said. Nothing could be more unjust or unreasonable. Hence, in more recent cases, the rule has undergone very important qualifications. The mere silence of one, when facts are asserted in his presence, is no ground of presuming his acquiescence, unless the conversation were addressed to him under such circumstances as to call for a reply. The person must be in a position to require the information, and he must ask it in good faith, and in a manner fairly entitling him to expect it, in order to justify any inference from the mere silence of the party addressed. If the occasion, or the nature of this demand, or the manner of making it, will reasonably justify silence in a discreet and prudent man no unfavourable inference therefrom should on that account be made against the party. *R. v. McCraw*, (1906) 12 Can. Cr. Cas. 253, 16 Que. K.B. 193. *Greenleaf on Evid.* 273.

The contents of a statement alleged to have been made in the presence of a prisoner cannot be given in evidence unless and until the judge has satisfied himself from the evidence contained in the depositions or given at the trial, that there is evidence, fit to be submitted to

a jury, that the prisoner by his answer to the statement, whether given in words or by conduct, acknowledged the truth of the statement. *R. v. Christie* [1914] A.C. 545, 10 Cr. App. R. 141, affirming 9 Cr. App. B. 169, and overruling in part *R. v. Norton* [1910] 2 K.B. 496, 79 L.J.K.B. 756. The fact of the silence of a person accused of receiving stolen property upon hearing statements made as to his alleged guilt by the person who stole the property may be admissible in evidence as leading to the inference of his guilty knowledge. *Re Cohen*, 8 O.L.R. 143, 8 Can. Cr. Cas. 251 (Anglin, J.).

*Confession is evidence only against person making it*—In every case where there is an incriminating statement by a co-prisoner, the jury should be carefully directed on the relevant law. *Rex v. Althshuler*, 11 Cr. App. B. 243; *R. v. Martin*, 9 O.L.R. 218, 5 O.W.R. 317, 9 Can. Cr. Cas. 371.

Generally, a confession is only evidence against the person making it and cannot be used against others. *R. v. Davis*, 22 Can. Cr. Cas. 431; *R. v. Hearne* (1830), 4 C. & P. 215; *R. v. Clewes*, 4 C. & P. 221; and *R. v. Fletcher*, 4 C. & P. 250. In the latter case, Mr. Justice Littledale said, after deciding that the whole of a certain letter written by one of the prisoners implicating and naming other prisoners should be read to the jury:—"But I shall take care to make such observations to the jury as will prevent its having any injurious effect against the other prisoners; and I shall tell the jury that they ought not to pay the slightest attention to this letter except so far as it goes to affect the person who wrote it." And see *R. v. Davis*, 9 Cr. App. R. 66. Where two persons are charged with being concerned in the same offence and are put in adjoining cells, and the police overhear a conversation between them, evidence of the conversation is admissible at the trial. *R. v. Gardner*, 32 Times L.R. 97. Where two persons have been separately arrested and separately charged with an offence and have subsequently been put in the dock together and charged jointly, a statement made previously by one of them behind the back of the other and implicating him ought not to be read in the presence of that other. Nevertheless, any material statement or confession by the other in answer to such statement is admissible in evidence, but the judge ought to reject it, if he is satisfied that it was read over to the prisoner for the mere purpose of getting an admission from him. *Rex v. Gardner*, *supra*.

The confession of another person arrested with the accused in a gaming house case, but not jointly charged, is not admissible on the trial of the accused; such person should be called as a witness for the prosecution if it is desired to prove the facts which he professes to confess. *R. v. See Woo*, 16 Can. Cr. Cas. 213.

*Effect of confession*—A confession alone is sufficient to justify a conviction. *Rex v. Graf*, 19 O.L.R. 238, 15 Can. Cr. Cas. 193.

A confession properly proved in law needs no corroboration to found

a conviction for murder although in practice there is invariably some corroboration. *R. v. Sykes*, (1913) 8 Cr. App. R. 233.

The admission by the defendant in a bigamy case of his marriage may be sufficient not only as to the fact of the ceremony but as to the validity of the ceremony according to the foreign law. *Zdrahal v. Shatney* (1912) 3 W.W.R. 239, 259, (Man.), citing *R. v. Newton*, alias *Simmonsto*, 1 Cox C.C. 30, 1 C. & K. 174, 2 M. & Rob. 503.

But it seems that it is a question for the jury whether they will or will not infer from an admission of the first marriage not only an admission of the fact of the first marriage but the foreign law under which it was celebrated. *Zdrahal v. Shatney* (1912) 3 W.W.R. 239, 259, (Man.), citing *R. v. Newton*, supra; *R. v. Creamer*, 10 Lower Canada R. 454; *R. v. Nadum* (1911) 24 O.L.R. 306; and *Miles v. United States*, 103 U.S. 304.

Any statement of the accused which tends to prove his guilt would be a confession, and, if the words used are ambiguous, it would be for the jury to say what was the effect of them. *R. v. Hoo Sam*, (1912) 1 W.W.R. 1049, 1057 (Sask.), per *Newlands, J.*; but see *R. v. Blyth*, 11 O.W.N. 406.

*Error on admitting statement or confession which was not admissible*—If it should happen that an involuntary confession has been put in evidence before the jury, the safer course is for the judge to offer to discharge the jury. *R. v. Hurd*, 4 W.W.R. 185, 192, 23 W.L.R. 812, 21 Can. Cr. Cas. 98 (Alta.).

The prisoner's counsel may, however, waive the right to a new jury and be satisfied with a proper direction to the same jury to disregard the evidence improperly admitted. *R. v. Hurd*, (1913) 4 W.W.R. 185, 192 (Alta.). As to reversal of verdicts for error, see Code sec. 1019

**Witnesses for the defence.**—All relevant evidence to be taken down.

**686.** After the proceedings required by sec. 684 are completed the accused shall be asked if he wishes to call any witnesses.

2. Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the depositions of the witnesses for the prosecution.

*Origin*—Sec. 593, Code of 1892.

*Evidence for defence on preliminary enquiry*—Sections 686 and 687 are not applicable to summary conviction proceedings (but see sec. 715); they are part of the preliminary procedure in prosecutions for indictable offences; and are necessary in that connection, because, without them.

It might be deemed that such evidence as grand juries usually act upon would be enough. In regard to an actual trial, no such provisions should be needed, because first principles in the administration of justice require that the court shall plainly call for, and patiently hear, the defence, at the conclusion of the case for the prosecution. *R. v. Keenan* (1913) 21 Can. Cr. Cas. 467, 469, 28 O.L.R. 441, 4 O.W.N. 1034. Sec. 721 does not expressly make secs. 686 and 687 applicable to summary prosecutions; there was no need that it should. Sec. 721 deals with the manner of taking the evidence of the witnesses—procedure separately provided for in secs. 682, 683, 684, and (in part) 687. *R. v. Keenan*, *supra*. Sec. 686 introduced by the Code of 1892 made a change in the law, as prior to that time the justice was obliged to receive only evidence “in proof of” the charge. The application of the procedure in preliminary enquiries to extradition matters made it impossible under the former law for the person whose extradition was sought, to prove an alibi before the extradition judge; *Re Garbutt*, 21 Ont. R. 465; except possibly where the judge granted leave to adduce evidence for the defence. *Re Burley*, 1 C.L.J. 20. The person charged has now the absolute right to adduce his evidence, and regard is to be had to the whole of the evidence by the magistrate or extradition judge, as the case may be, in ascertaining whether a sufficient case is made out. Code sec. 687; Extradition Act, R.S.C. 1906, ch. 155, sec. 18; *R. v. Payne*, (1919) 30 Can. Cr. Cas. — (Que.), overruling *ex parte Burke*, 2 Rev. de Jur. 151.

Section 686 of the Code is substantially complied with in extradition proceedings where the Commissioner at the close of the case for the prosecution calls upon counsel for the accused for his defence, whereupon the argument was proceeded with, without specifically asking the accused if he wished to call any witnesses. *Re Moore*, 16 Can. Cr. Cas. 264, 20 Man. R. 41.

*Evidence in reply*—The justice may in his discretion receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused. Code sec. 679 (b).

*Depositions to be taken “in the same manner,” etc.*—Code secs. 682, 683.

*Addresses of counsel*—See sec. 679, sub-secs. (a), (d) and (e).

*Regulating the course of the inquiry*—See sec. 679.

### *Adjudication and subsequent steps and Bail.*

**Accused discharged if no case.**—Discharge makes defendant's recognizance void unless prosecutor bound over.

**687.** When all the witnesses on the part of the prosecution and the accused have been heard the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon his trial, discharge him.

2. In such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions of the next following section.

*Origin*—Sec. 594, Code of 1892; R.S.C. 1886, ch. 174, sec. 73.

*Procedure on change of magistrates pending the hearing*—A preliminary hearing in a criminal case commenced before one magistrate cannot be continued before another. But if the magistrate who had begun the hearing dies, is dismissed, resigns his office or withdraws from the hearing, then another competent magistrate may take it up, but he should begin the hearing *de novo* before himself; he cannot merely continue that previously begun. *Bertrand v. Angers*, 21 Que. S.C. 213. If the preliminary enquiry was begun before one justice and another justice is called in to sit with him, the hearing of the evidence must be begun *de novo*, as it would then be essential that both justices should hear all the evidence on which their joint deliberation was to depend. *Re Nunn*, 2 Can. Cr. Cas. 429 (B.C.). But if the associate justice sitting with a stipendiary magistrate withdraws on the disagreement arising and takes no part in the decision which the stipendiary gives as his own and the stipendiary might have sat alone, it would seem by analogy to summary conviction procedure that his decision would be valid. *R. v. Thomas, ex parte O'Hare*, [1914] 1 K.B. 22, 23 Cox C.C. 687. Where the two justices disagree as to committing for trial and neither is willing to withdraw, they should adjourn the case to be re-heard before other justices; if this is not done, the accused may be entitled to demand his discharge. *Ex parte Hanning*, 5 Que. Q.B. 549, 4 Can. Cr. Cas. 203; *Durrand v. Forrester*, 18 Man. L.R. 444. The prosecutor may have himself bound over to prefer an indictment if the accused is discharged; Code secs. 688, 871; or he may apply to the Attorney-General to prefer an indictment; *Scottstown v. Beauchesne*, 5 Que. Q.B. 554; or he may apply to the court for leave to prefer an indictment. Code sec. 873.

*Application of sec. 687 to preliminary enquiry only*—See note to sec. 686; *R. v. Keenan*, 21 Can. Cr. Cas. 467, 28 O.L.R. 441.

*Discharge of the accused*—If the magistrate is positive that no grand jury would bring in a true bill against the accused before him on a preliminary enquiry, and that no petit jury would find him guilty, it is his duty to dismiss the charge. *R. v. Howard* (1913) 5 W.W.R. 838, 841 (Man.). Applied to a charge of manslaughter on its being shown that death did not result from the blow given in the altercation but indirectly from the excitement following the altercation. *R. v. Howard, supra*; Cr. Code, sec. 255.

*Termination of proceedings in favour of accused*—One of the essentials in an action of malicious prosecution is that the criminal proceedings shall have terminated in favour of the accused who has become

the plaintiff in a damage action against the complainant or other prosecutor in the preliminary inquiry or other criminal proceedings. If the prosecutor gives his recognizance to prosecute notwithstanding the discharge of the accused, the proceedings are not at an end, although the accused is no longer under any recognizance. If a true bill is found he must appear and answer the charge or be brought up on a bench warrant. If the accused is discharged and the prosecutor is not bound over at his own request, the discharge is provisionally a termination of the proceedings, but it may appear that a new charge was laid or leave granted to indict independently of any preliminary inquiry. Sec. 873 (2).

The termination of the proceedings may appear from the production of the original information on which the informant had signed a memorandum drawn by the magistrate to the effect that he withdrew the information. *Tamblen v. Westcott*, 7 W.W.R. 1037 (Alta.); *Fancourt v. Heaven*, 18 O.L.R. 492.

And even where there was a committal for trial, the direction of the Attorney-General in Saskatchewan to his agent not to prefer a charge will be *prima facie* proof of termination of the proceedings. *Mortimer v. Fisher*, 4 W.W.R. 454 (Sask.).

On the preliminary hearing of a charge of arson against the plaintiff, one justice decided that he should be committed for trial and the other that the information should be dismissed, and nothing more was ever done in the matter. It was held that it could not be said that plaintiff had been discharged on this investigation so as to entitle him to bring an action for malicious prosecution against the informant. As other justices had not been called in to rehear the case on the disagreement, possibly the justices might have been compelled by mandamus to make an order of dismissal and, if they had made such an order, the plaintiff could have proceeded with his action. *Durrand v. Forrester*, 18 Man. L.R. 444, 15 Can. Cr. Cas. 125.

*No effective certificate of discharge on preliminary inquiry*—There is no provision under the Criminal Code to give any legal effect to a justice's certificate of discharge on a preliminary enquiry so as to bar a second prosecution. *United States v. Ford*, 10 W.W.R. 1042, 1044 (Man.). Similarly a certificate of discharge by an extradition judge on the hearing of an application for an extradition commitment will not bar a subsequent application. *Ibid.*

If the justice discharge the accused on a preliminary enquiry either the same justice or another may cause him to be brought up again for another preliminary enquiry upon the same charge. *R. v. Ford*, 10 W.W.R. 1042, at 1044, citing *R. v. Hannay*, 11 Can. Cr. Cas. 23. But if the justice or magistrate is "trying" the charge, instead of holding a mere preliminary enquiry, the certificate of discharge becomes important. If the hearing is one in summary conviction proceedings he may give

a certificate of dismissal. Code sec. 730. Such certificate is a bar to any further or subsequent prosecution for the same offence; sec. 730.

If the case be one of summary trial under Part XVI of the Code, for an indictable offence, the certificate of discharge is likewise a bar to a subsequent prosecution. Secs. 791, 792; and see *United States v. Ford*, 10 W.W.R. 1042, 1044 (Man.), an application for extradition and subject to similar rule as that applicable to preliminary enquiries.

*Sub-sec. (2)*—"Any recognizances taken in respect of the charge"—The justice may have admitted the accused to bail; Code secs. 664, 681: in which case a recognizance with sureties may have been given or a cash deposit made with the Crown officer by way of "cash bail"; or the justice may have ordered that the accused shall go at large on his own recognizance, until an adjourned date for proceeding with the enquiry; secs. 664, 681. On a prejudicial variance appearing between the charge in the information or warrant and that contained in the information, the justice may have admitted the accused to bail pending the hearing; Code sec. 670. There are also the recognizances which may have been required from defaulting witnesses in the course of the inquiry; sec. 674.

*Montreal*—In the district of Montreal the Clerk of the Peace or Deputy Clerk of the Peace has all the powers of a justice under Parts XIII and XIV.

*Application to extradition proceedings*—In the case of a fugitive, accused of an extradition crime, and not convicted therefor in the foreign state, the extradition judge or commissioner is to commit the fugitive for surrender if such evidence is produced as would, according to the law of Canada, subject to Part I of the Extradition Act, "justify his committal for trial if the crime had been committed in Canada": Extradition Act, R.S.C. 1906, ch. 155, sec. 18; and if such evidence is not produced, the judge shall order him to be discharged. *Ibid*.

In extradition proceedings the judge is to find (1) whether there is *prima facie* evidence of the commission by the accused of an offence, which if committed in Canada would be an indictable offence by the law of Canada; and, if it be so found, then (2) whether there is *prima facie* evidence that the offence is one of the crimes described in the extradition arrangement with the foreign country seeking extradition. *Re F. H. Martin* (No. 1), 2 Terr. L.R. 301, 8 Can. Cr. Cas. 326; *Re Latimer*, 10 Can. Cr. Cas. 244.

It is no objection to an extradition warrant that two offences of a cognate character are stated therein. *R. v. Butland*; *Ex parte Kalke*, 14 Can. Cr. Cas. 22.

Whether that part of the depositions taken in the foreign state which contain evidence which would have been excluded under the rules of evidence in Canadian courts is to be considered or not, is an unsettled question. *Re Rosenberg* [1918] 1 W.W.R. 845 (Man.); *Re Harsha*, 11 O.L.R. 494, 7 O.W.R. 97, 10 Can. Cr. Cas. 433, 440.

The weight of authority seems to favour the view that where evidence is received from the foreign state, demanding the extradition, its admissibility depends on the foreign law of evidence. *Piggott on Extradition*, 153, 154. But the magistrate is entitled to scrutinize the foreign depositions with a view to ascertaining the substance of them and disregarding mere hearsay when he comes to weigh the evidence. *Re Rosenberg* [1918] 1 W.W.R. 845 (Man.). Depositions which otherwise would establish the facts sworn to are not to be excluded because of failure to comply with certain formalities which Canadian law may impose in domestic litigation upon the admission of the like evidence. *Re Zossenheim*, 20 Times L.R. 121; *re Rosenberg*, *supra*.

In international extradition applications it has been doubted whether opposing evidence could be received to prove that the application was not made in good faith. *Re Rosenberg*, *supra*. When defence evidence was not admissible on preliminary enquiries (prior to the enactment of Code sec. 687), such evidence was rejected; *re Debaun*, 32 Lower Canada Jurist, 281, 296; but the change in the practice in that respect appears to make it admissible at least where it would affect the credit to be given to the testimony in support of the extradition application.

If the application is one for extradition from one British territory to another under the Fugitive Offenders Act (Imp. and Canadian), the evidence of bad faith would be admissible. *Re McTier*, 17 Can. Cr. Cas. 80 (Que.); *R. v. Delisle*, 5 Can. Cr. Cas. 210.

It is only necessary that the evidence should be such as to give rise to probable cause to believe the accused guilty. *Re Goodman*, 26 Man. R. 537, at p. 556, 10 W.W.R. 1178; 34 W.L.R. 1091, following *Ex parte Feinberg*, 4 Can. Cr. Cas. 270; The Court should always lean in favour of sending the fugitive for trial in his own country, unless it should be plain that under no view of the evidence the offence could be made out. *Moore on Extradition*, p. 648, citing *Hagarty, C.J.*, in *Re Phipps*, 1 O.R. 586; and see *United States v. Webber*, 20 Can. Cr. Cas. 6 (N.S.) and *re Siletti*, 71 L.J.K.B. 935; 87 L.T. 332; *Re Castioni* [1891] 1 Q.B. 149; 60 L.J.M.C. 22; *re Rosenberg*, [1918] 1 W.W.R. 845 (Man.).

*Review of extradition committal by habeas corpus*—On a habeas corpus application for discharge of the person committed by an extradition warrant in international extradition, the only question is whether the accused was at the time of the issue of the writ in lawful custody. *United States v. Gaynor*, [1905] A.C. 128, at p. 134; 74 L.J.P.C. 44. The lawfulness of the custody must depend upon the question whether there was a sufficient compliance with the provisions of The Extradition Act. If the extradition judge had no evidence before him upon which he could act, he would have no jurisdiction to order a committal. In *re Galwey* [1896] 1 Q.B. 230; 65 L.J.M.C. 38; In *re Arton* (No. 2), [1896] 1 Q.B. 509, 65 L.J.M.C.; *Ex parte Huguet*, 29 L.T. 40, at p. 41; 12 Cox C.C. 551, and In *Re Siletti*, 71 L.J.K.B. 935; 87 L.T. 332. In



the last-mentioned case the view was expressed that on a habeas corpus the only question that the court can entertain is the question of jurisdiction, that is, that the crime charged is not one within the meaning of The Extradition Act; that the accused might contend that there was no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not; but that the court ought not to enter into the consideration as to whether the magistrate had exercised his discretion properly where there was some evidence of the extradition offence.

**Prosecutor may be bound over to prosecute.—Form of recognizance.**

**688.** If the justice discharges the accused, and the person preferring the charge desires to prefer an indictment respecting the said charge, he may require the justice to bind him over to prefer and prosecute such an indictment, and thereupon the justice shall take his recognizance to prefer and prosecute an indictment against the accused before the court by which such accused would be tried if such justice had committed him, and the justice shall deal with the recognizance, information and depositions in the same way as if he had committed the accused for trial.

2. Such recognizance may be in form 21, or to the like effect.

*Origin*—Sec. 595, Code of 1892; R.S.C. 1886, ch. 174, sec. 80.

*"Indictment"*—This word includes a formal charge under sec. 873A and a "record" under sec. 827 on a speedy trial. Code sec. 2 (16), as amended 6-7 Edw. VII, ch. 8.

*Form of Recognizance where the prosecutor requires the justice to bind him over to prosecute after the charge is dismissed*—Code form 21, following sec. 1152.

*Prosecutor applying to be bound over to prefer indictment notwithstanding discharge*—The justice is not bound to take the recognizance of the prosecutor when neither the information nor the evidence discloses a criminal offence. *Ex parte Wason*, L.R. 4 Q.B. 573, 38 L.J.Q.B. 302. Compare sec. 2 of the Vexatious Indictment Act, Imp. 1859, and see *R. v. Lord Mayor of London*, *Ex parte Gostling* (1886) 16 Cox C.C. 77, 54 L.T. 646, *R. v. Crabbe*, 59 J.P. 247.

The discharge referred to in sec. 688 is a discharge on the preliminary enquiry, and the section does not apply to the refusal of process under sec. 655. *Ex parte Reid* (1885) 49 J.P. 600.

The person preferring the charge has a legal right to require that his recognizance be taken to prosecute where the magistrate discharges the accused, and the fact that the prosecutor exercises such legal right, particularly where a true bill was afterwards returned, will not alone

displace his defence of reasonable and probable cause in an action for malicious prosecution brought by the accused, who was acquitted on the trial. *Klein v. Katz* (1914) 24 Can. Cr. Cas. 153, 21 Rev. Leg. 275.

A person accused of perjury may, with his own consent, be summarily tried before a police magistrate; and where the defendant sought and consented to be tried summarily pleading "not guilty," and the magistrate, upon hearing the evidence, adjudicated summarily and dismissed the charge; it was held that the magistrate was right in refusing thereafter to bind the prosecutor over to prefer and prosecute an indictment against the defendant, for the magistrate has, under sec. 784 to determine before the defence has been made, whether he will try the case summarily or not. *Re Rex v. Burns* (No. 2), 1 O.L.R. 341, 4 Can. Cr. Cas. 330.

*Status of private prosecutor*—See secs. 689, 840, 871, 962.

Although bound over to prosecute an indictment, a private prosecutor may not be entitled to have his counsel attend before the grand jury to submit a draft bill of indictment. It has been held that in the district of Montreal, he must apply to the trial court for leave to do so. *R. v. Hoo Yoke*, 10 Can. Cr. Cas. 211, 14 Que. K.B. 540.

The Crown Attorney for the county has the statutory right in Ontario under the Crown Attorney's Act, R.S.O. 1914, ch. 91, sec. 8, to "assume wholly the conduct of the case where justice towards the accused seems to demand his interposition," and upon his taking charge of the prosecution after a true bill has been found, the private prosecutor has no right to take part in the proceedings at the trial, at least where the case does not present more of the features of a private injury than of a public offence. Crown Attorney's Act, R.S.O. 1914, ch. 91, sec. 8 (c). *R. v. Fraser*, (1914) 30 O.L.R. 598, 23 Can. Cr. Cas. 140.

*Order for security for costs against private prosecutor bound over*—Security for costs may be ordered against the informant at a later stage when the case comes before the jury court. The defendant may there move for an order that the prosecutor be not permitted to prefer any indictment until he has given security for the costs of the defence, including the costs of appearance on the preliminary inquiry, in case the grand jury should not find a true bill, or, if found, there was no conviction upon the indictment. Code sec. 689.

*Informant's recognizance to prosecute*—This recognizance given by the informant to ensure the case going to the grand jury notwithstanding the adverse opinion of the magistrate (sec. 687) is to be dealt with in the same way as if there had been a committal; sec. 688; that is, it is to be transmitted along with the information, depositions, etc., to the clerk or other proper officer of the court by which the accused is to be tried. Code sec. 695.

*Witnesses not under recognizance*—While the magistrate is compelled to take the informant's recognizance under sec. 688, if the informant requires him to do so, there is no similar obligation to bind over

the witnesses to appear. It may be doubted whether there is any authority to receive the recognizance of a witness to appear and give evidence in the contingency here provided for, after the discharge of the accused on the preliminary inquiry. The witnesses for the prosecution can be summoned to attend before the grand jury.

*Prosecutor bound over may prefer an indictment*—The person bound over to prosecute, whether there has been a committal for trial or not, may prefer an indictment; Code sec. 871; subject to any order made for security for costs under sec. 689 (2). The bill of indictment may be for the charge in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice; Code sec. 871. The indictment may contain more than one count, for sec. 871 contemplates a possible motion on behalf of the accused to quash "any count in the indictment" on the ground that it is not founded on the facts or evidence disclosed on the depositions taken before the justice; sec. 871, sub-secs. (2) and (3). The private prosecutor who has given a recognizance to prosecute, may apply for leave to prefer an indictment; Code sec. 873 (2); and as such leave may be granted to any person whether bound over or not, and whether or not there has been a preliminary enquiry, the granting of such leave, endorsed upon the bill of indictment itself, obviates many questions which otherwise might be raised as to the regularity of the recognizance to prosecute, or as to the conformity of the indictment with the offences disclosed on the depositions or set forth in the prosecutor's recognizance.

**Prosecutor bound over may be ordered to pay costs on failure of prosecution.—Security for costs may be ordered as condition for leave to prefer indictment.**

**689.** If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury does not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

2. The court before which the indictment is to be tried or a judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such court or judge.

*Origin*—Sec. 595, Code of 1892; R.S.C. 1886, ch. 174, sec. 80.

*Preferring the indictment*—See secs. 871-878.

*Ordering costs and security for costs*—The person filling the office

of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of the Crown, and in laying an information in which he designated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such commissioner "on behalf of Her Majesty the Queen." *R. v. St. Louis* (1897), 1 Can. Cr. Cas. 141 (Que.).

The accused having been discharged, and the commissioner having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the grand jury having thrown out the bill of indictment, the commissioner was held to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the trial court. *Ibid.*

An order made by the presiding judge of a criminal superior court awarding costs against the private prosecutor in respect of an indictment for assault on which the grand jury found no bill, is not subject to review by or appeal to the court *en banc*. *R. v. Mosher* (1899), 3 Can. Cr. Cas. 312; 32 N.S.R. 139.

Where the application for such an order has been made on the last day of the term of the criminal court and judgment reserved thereon the order may be legally made out of term *nunc pro tunc* as of the date of application, the delay in such case being the act of the court and not being due to the neglect or fault of the applicant. *Ibid.*

The application for security may be made at the time when the prosecutor moves for leave to go before the grand jury, where the local practice requires an order for leave; or in case the prosecutor has irregularly gone before the grand jury without an order for leave, the court may afterwards order the security to be given in like manner as if the prosecutor had proceeded regularly, and on security being given may refuse to quash the indictment already found by the grand jury. *R. v. Hoo Yoke*, 10 Can. Cr. Cas. 211, 14 Que. K.B. 540.

*Taxation of costs*—See secs. 1045, 1047; and Crown Rules, under sec. 576.

#### **Committal of accused for trial.—Form of warrant.**

**690.** If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in form 22, or to the like effect.

*Origin*—Sec. 596, Code of 1892; R.S.C. 1886, ch. 174, sec. 73; 32-33 Vict., Can., ch. 30, sec. 56; Indictable Offences Act, 1848, Imp., sec. 23.

*Sufficiency of evidence to put accused on his trial*—Saunders' "Practice of Magistrate Courts," 5th ed., 231, says: "Justices in the performance of this portion of their duties will not balance the evidence and

decide according as it preponderates, for this would, in fact, be taking upon themselves the functions of jury and be trying the case; but they will ask themselves whether or not the evidence as it stands makes out a strong or probable, or even conflicting case of guilt, in any of which cases they will do right in committing the party to trial. If, however, from the weakness of the evidence, the unworthiness of the witnesses or the conclusive proof of innocence produced on the part of the prisoner they feel that the case is not sustained, and that if they committed for trial a verdict of acquittal must be the necessary consequence, they will at once discharge the accused and so put an end to the enquiry so far as they are themselves concerned."

See also sec. 687; *R. v. Howard* (1913) 5 W.W.R. 838 (Man.).

The magistrate has only to find evidence of a probable case of guilt to justify a committal for trial, and has not to deal with the preponderance of testimony. *R. v. Odell*, 22 Can. Cr. Cas. 39 (Que.).

Sec. 690 should be read along with sec. 696, both having originated from the same sec. (56) of the Indictable Offences Act, 32-33 Vict., Can., ch. 56. Under that Act, if, in the opinion of the justice and justices the evidence was sufficient to put the accused party upon his trial for an indictable offence, although it did not raise such a strong presumption of guilt as would induce them to "commit the accused for trial *without bail*," or if the offence with which the party is accused was misdemeanour, then the justices were to admit the party to bail, but if the offence were a felony, and the evidence given was such as to raise a strong presumption of guilt, then the justice or justices were by his or their warrant to commit him to the common gaol, to be there safely kept until delivered by due course of law.

*Depositions taken before another magistrate at one stage of preliminary inquiry*—Depositions taken before one magistrate should not be considered by another magistrate sufficient evidence to commit a prisoner upon, without having seen the demeanour of the witnesses when they were giving their evidence, and so being in a position to judge for himself of the truth of their statements. *Re Guerin*, 16 Cox C.C. 596.

*Form of warrant of commitment*—Code form 22, following sec. 1152.

*Magistrate not bound to accept defendant's consent to committal on partial hearing*—A Superior Court will not interfere with the magistrate's discretion as to adjourning the inquiry when the discretion is exercised in good faith and he must be allowed a reasonable length of time after the close of the evidence to reach a decision. *Re Ying Foy*, 15 Can. Cr. Cas. 14, 14 B.C.R. 254.

It is the duty of the magistrate to take the evidence of all concerned, and a Superior Court will not on the application of the accused order the magistrate by mandamus to forthwith commit for trial, instead of adjourning for further evidence, although a *prima facie* case is admitted by the accused and commitments had been made by the same magistrate

of others charged with the same offence on similar evidence. *Re Ying Foy*, 15 Can. Cr. Cas. 14, 14 B.C.R. 254.

In *Re Schofield and Toronto*, (1913) 22 Can. Cr. Cas. 93, a motion for leave to prefer an indictment against a municipality for maintaining a nuisance, Meredith, C.J.C.P., said: "It is plain that the policy of the criminal law is to require a somewhat thorough preliminary investigation of every indictable offence. That is very apparent from many of the provisions of the Criminal Code. And the purposes of it are obvious. For one thing, it lays the facts in a proper manner before this court so that they can be in a proper manner laid before the grand jury. It has been the practice in some cases not to make such an investigation, but to do what has been called 'waive examination.' I find no warrant for any practice of that character; it seems to me to be quite improper. What the law requires is a preliminary investigation; and it is only upon the facts thus brought out that ordinarily an indictment can be laid. The Code provides that there may be an indictment for the offence for which the accused has been committed for trial; and that there may be an indictment for any other offence founded on the facts disclosed in the preliminary inquiry. The policy of the law plainly is, that cases should pass through an inquiry of that sort before being presented to the grand jury. It is true that power is given to the Attorney-General, and to the judges, to permit an indictment in cases which have not come up in that manner; but I cannot think that that power was intended to be exercised in any but unusual cases. It is necessary sometimes where magistrates have not done their full duty, not made that inquiry into the case which the law required; and there are other cases in which it is plain that, if there were no provision of that character, there might be delay in the administration of criminal justice, if not eventually a miscarriage."

*Inspection and obtaining copy of depositions*—See secs. 894, 896.

*Review of commitment on habeas corpus*—The court has jurisdiction upon habeas corpus to examine into the legality of a commitment for trial made by a justice upon a criminal charge, and in a proper case to order the discharge of the accused. *R. v. Mosier*, 4 P.R. 64 (Ont.); *R. v. Hicks*, (1912) 2 W.W.R. 1100; 20 Can. Cr. Cas. 192; *R. v. Gillespie*, 1 Can. Cr. Cas. 551; *R. v. Cox*, 16 Ont. R. 228; *R. v. Weiss and Williams*, (No. 1) 6 Alta. L.R. 264, 4 W.W.R. 1358, 21 Can. Cr. Cas. 438, 25 W.L.R. 286; *R. v. Weiss and Williams* (No. 2), 22 Can. Cr. Cas. 42, 6 Alta. L.R. 264, 25 W.L.R. 351, 5 W.W.R. 48 and 460; *ex parte Garland*, 35 N.B.R. 509.

Defects in the commitment may be cured by the depositions returned with it on a habeas corpus motion. *R. v. Phillips*, 11 Can. Cr. Cas. 89; *R. v. Beaudoin*, 22 Can. Cr. Cas. 319; *R. v. Brown*, [1895] 1 Q.B. 119.

The fact that the magistrate proceeded with the hearing of the evidence on preliminary enquiries for two offences at the same time,

against the same accused, is not a ground for habeas corpus in respect of his committal for trial. *Dick v. The King*, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

The omission of the justice of the peace on a preliminary examination to put the usual question inviting a statement by the accused under sec. 684, after the depositions of the Crown witnesses have been read over, does not invalidate a commitment for trial. *R. v. Lantz*, 47 N.S.R. 495, 22 Can. Cr. Cas. 212.

*Power to remand on habeas corpus where proceedings in excess of justice's jurisdiction are set aside*—See Code sec. 1120; *R. v. Frejd*, 18 Can. Cr. Cas. 110, 22 O.L.R. 566; *R. v. Manzi* (1915) 24 Can. Cr. Cas. 359, 8 O.W.N. 533; *R. v. Goldsberry*, 11 Can. Cr. Cas. 159; *Morgan v. Malepart*, 20 Rev. Leg. 277, 25 Can. Cr. Cas. 192.

*Territorial jurisdiction over offence or over the person*—If the accused was not resident in the district in which the preliminary enquiry was held but was brought there to answer a charge for an offence laid as having been committed there, and was committed on that charge, the committal does not aid the jurisdiction of a local court to try him without his consent, if it turns out that the alleged offence was in all other respects outside of the territorial jurisdiction, and consequently the committal should not have been made on the facts as they later developed. *R. v. O'Gorman*, 18 O.L.R. 427, 15 Can. Cr. Cas. 173; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113; Code secs. 577, 580, 582.

If there is a total absence of jurisdiction upon the face of the proceedings, the right to prohibition is not lost by acquiescence down to the time of application for the writ. *Farquharson v. Morgan* [1894] 1 Q.B. 592, 63 L.J.Q.B. 474; *Clarke v. Knowles* (1918) 87 L.J.K.B. 189. There may also be cases in which a person has by virtue of certain formalities of law chosen his forum and acquired the privilege of a particular mode of trial; but this privilege may be waived and another forum selected with the consent of the Crown or prosecutor as the case may be. *Giroux v. The King*, (1917) 56 S.C.R. 63, 29 Can. Cr. Cas. 258, affirming *Giroux v. The King* (1916) 26 Que. K.B. 323.

And the election of speedy trial upon a charge framed as within the jurisdiction is not a selection of the forum for trial of a charge of the like offence which otherwise would not be within the territorial jurisdiction of the court. *R. v. O'Gorman*, *supra*.

It would seem that the fact that the charge does not contain the particulars of the offence does not withhold from the magistrate jurisdiction to go on with the preliminary investigation and commit for trial. *R. v. Beaudoin*, 22 Can. Cr. Cas. 319.

There is a distinction in this respect between those proceedings before magistrates which are essentially summary proceedings upon which the magistrates will themselves adjudicate and cases where the magistrates are merely exercising their jurisdiction with a view to sending

the case for trial before a different tribunal. In the one, the magistrates straightway exercise their jurisdiction over the offence; in the other the accused is sent for trial before a different tribunal and has full and ample notice before his trial of the character of the offence with which he is charged. "When a case is sent for trial the real question to be considered is whether the evidence on the hearing of the summons covers and justifies the counts of the indictment." Lord Russell, in *Reg. v. Brown*, [1895] L.R. 1 Q.B. 119, at 126.

And see *R. v. Phillips*, 11 Can. Cr. Cas. 89; *Reg. v. France*, 1 Can. Cr. Cas. 321; *R. v. Beaudoin*, 22 Can. Cr. Cas. 319.

*Attorney-General may indict regardless of commitment*—It is the privilege of the Attorney-General to be able to present directly before the grand jury an indictment against a person suspected of committing a criminal offence, without having recourse to the ordinary mode of a preliminary enquiry generally followed. *R. v. Weir*, 3 Can. Cr. Cas. 155 (Que.). The fact that the accused was sent to the assizes pursuant to a preliminary inquiry to stand his trial according to law, does not deprive the Attorney-General of the right himself, by the agency of his representative duly authorized for the purpose, to present an indictment before the grand jury and to entirely ignore the proceedings already taken before the magistrate. *R. v. Houle*, 17 Can. Cr. Cas. 407 (Que.).

*Saskatchewan practice on committal*—In Saskatchewan the practice with regard to criminal charges is as follows: When any person is committed for trial, the justice of the peace before whom the preliminary inquiry is held transmits the original depositions to the clerk of the district court of the district in which the offence is alleged to have been committed. The local agent of the Attorney-General for the district then transmits a copy thereof to the department of the Attorney-General. Upon receipt of a copy of the depositions the Attorney-General either authorizes the local agent to prefer a charge, under the provisions of sub-sec. 2 of sec. 873A of the Criminal Code, or instructs him not to prefer a charge in the matter. In exercising this discretion the Attorney-General is practically performing the functions of the grand jury: see *In re Criminal Code*, 16 Can. Cr. Cas. 549, 43 S.O.R. 434; *R. v. Weiss*, 23 Can. Cr. Cas. 460, 7 W.W.R. 1160, 8 S.L.B. 74.

*North-West Territories*—Whenever any person charged with a criminal offence is committed to gaol for trial, the person in charge of such gaol, shall, within twenty-four hours, notify the nearest stipendiary, in writing, that such prisoner is so confined, stating his name and the nature of the charge preferred against him; whereupon with as little delay as possible, the stipendiary shall cause the prisoner to be brought before him for trial, either with or without a jury, as the case requires. R.S.C., ch. 62, sec. 53.

*Montreal*—In the district of Montreal the Clerk of the Peace or Deputy Clerk of the Peace has all the powers of a justice under Parts XIII and XIV.



*Committal for different offence disclosed on the evidence*—The magistrate may commit the accused on any other charge or charges disclosed by the evidence. *R. v. Mooney*, 11 Can. Cr. Cas. 333, 15 Que. K.B. 57.

*Electing trial without jury after committal for trial*—Code sec. 825, *et seq.*

*Extradition between British possessions*—See the Fugitive Offenders Act, R.S.C. 1906, ch. 154; the Fugitive Offenders Act, 1881, Imp.; the Foreign Jurisdiction Act, 1890, Imp.; *R. v. Delisle*, 5 Can. Cr. Cas. 225; *R. v. Wishart*, 18 Can. Cr. Cas. 146; *Re McTier*, 17 Can. Cr. Cas. 82.

#### **Accused entitled to copy of depositions.**

**691.** Every one who has been committed for trial, whether he is bailed out or not, shall be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has custody thereof, on payment of a reasonable sum not exceeding five cents for each folio of one hundred words.

*Origin*—Sec. 597, Code of 1892; R.S.C. 1886, ch. 174, sec. 74; 32-33 Vict., Can., ch. 29, sec. 48; 6-7 William IV, Imp., ch. 114, sec. 3.

*Accused may obtain copy of depositions*—The object of a statutory provision giving prisoners the right to a copy of the depositions is to enable them to know what they have to answer on their trial, and the magistrate should therefore take down all that took place before him with respect to the charge. *R. v. Grady* (1836), 7 C. & P. 650; *R. v. Thomas*, 7 C. & P. 718.

*Officer having custody of depositions*—See sec. 695.

*Right to inspect depositions at trial*—See sec. 894.

#### **Recognizances to prosecute or give evidence.—Contents.—Forms.—Recognizance or deposit.**

**692.** When any one is committed for trial the justice holding the preliminary inquiry may bind over to prosecute some person willing to be so bound, and bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted.

2. Every recognizance so entered into shall specify the name and surname of the person entering into it, his occupation or profession, if any, the place of his residence and the name and number, if any, of any street in which it may be, and whether he is owner or tenant thereof or a lodger therein.

3. Such recognizance may be either at the foot of the deposition or separate therefrom, and may be in form 23, 24 or 25, or to the like effect, and shall be acknowledged by the person entering into the same, and be subscribed by the justice or one of the justices before whom it is acknowledged.

4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the court by which the accused shall be tried.

5. If it is made to appear to the justice that any person to be so bound over as a witness is without means or without sufficient means, or if other reasons therefor satisfactory to him are shown, the justice may require that a surety or sureties be procured and produced and join in the recognizance, or that a sum of money be deposited with the justice, sufficient in his opinion to ensure the appearance of such person at the trial and the giving of his evidence.

*Origin*—Sec. 598, Code of 1892; 48-49 Vict., Can., ch. 7, sec. 9; 32-33 Vict., Can., ch. 30, sec. 36.

*Recognizance to prosecute*—Sec. 688; Code form 23, following sec. 1152.

*Form of recognizance to prosecute and give evidence*—Code form 24, following sec. 1152.

*Application of recognizance if accused elects for speedy trial under secs. 826 and 827*—Code sec. 840.

*Estreat of recognizance*—See sec. 1094 *et seq.*

**Warrant for arrest of absconding witness.**—Committal to give evidence.—Copy of information.

**693.** Whenever any person is bound by recognizance to give evidence before a justice, or any criminal court, in respect of any offence under this Act, any justice, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person.

2. If such person is arrested, any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties.

3. Any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued.

*Origin*—Sec. 598, Code of 1892; 48-49 Vict., Can., ch. 7, sec. 9.

**Witness refusing to be bound over.—Discharge of witness.**

**694.** Any witness who refuses to enter into or acknowledge any such recognizance as aforesaid may be committed by the justice holding the inquiry by a warrant in form 26, or to the like effect, to the prison for the place where the trial is to be had, there to be kept until after the trial, or until the witness enters into such recognizance as aforesaid before a justice having jurisdiction in the place where the prison is situated.

2. If the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in form 27, or to the like effect.

*Origin*—Sec. 599, Code of 1892; R.S.C. 1886, ch. 174, secs. 78, 79.

*Form of commitment of a witness for refusing to enter into the recognizance*—Code form 26, following sec. 1152.

*Form of order discharging witness, when accused discharged*—Code form 27, following sec. 1152.

**Transmission of record to clerk of court.—To other officer when place of trial changed.**

**695.** The information, if any, the depositions of the witnesses, the exhibits thereto, the statement of the accused, and all recognizances entered into, and also any depositions taken before a coroner if any such have been sent to the justice, shall as soon as may be after the committal of the accused, be transmitted to the clerk or other proper officer of the court by which the accused is to be tried.

2. When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment, if found, to the officer of the court before which the trial is to take place.

*Origin*—Sec. 600, Code of 1892; R.S.C. 1886, ch. 174, sec. 77.

*After the committal of the accused*—Sec. 691 uses the words "committed for trial whether he is bailed out or not"; and reading secs. 691

and 695 together as dealing with the one subject, it seems that sec. 695 should be interpreted as including the limited form of committal under bail fixed by the justice for which sec. 696 provides. See as to speedy trials, sec. 825 as amended, 6-7 Edw. VII, ch. 45, and 8-9 Edw. VII, ch. 9.

It was, however, held, prior to these amendments, that where the accused is admitted to bail under Crim. Code 696 without being committed for trial under sec. 690, the depositions need not be transmitted by the justice, under sec. 695, to the officer of the court in which an indictment is to be preferred. *R. v. James Gibson* (1896), 3 Can. Cr. Cas. 451, 29 N.S.R. 4.

*Second preliminary enquiry*—A person discharged by a justice on a preliminary enquiry for an indictable offence may be summoned again before the same or another justice on a fresh information for the same offence; and it is said that if the accused is committed for trial on the second preliminary enquiry, the depositions on the first, when he was discharged, need not be transmitted to the trial court under Code sec. 695. *R. v. Hannay*, 11 Can Cr. Cas. 23, 2 W.L.R. 543.

Nothing is admissible as a deposition against the prisoner, unless the prisoner had an opportunity of cross-examining the person making the deposition. Per Lord Denman, C.J., *R. v. Arnold*, 8 C. & P. 621. But where a witness has undergone several examinations, it seems proper to return them all, although those only would be admissible in evidence against the prisoner which were taken in his presence. Thus where a witness for the prosecution had made three statements at three different examinations, all of which were taken down by the magistrate, but the only deposition returned was the last taken after the prisoner was apprehended, and on the day he was committed; Alderson, B., said, that every one of the depositions ought to have been returned, as it is of the last importance that the judge should have every deposition, that has been made, that he may see whether or not the witnesses have at different times varied their statements, and if they have, to what extent they have done so. Magistrates ought to return to the judge all the depositions that have been made at *all the examinations* that have taken place respecting the offence which is to be the subject of a trial; *R. v. Simon*, 6 C. & P. 540, and whether for the prosecution or on the part of the prisoner. Per Vaughan, J., *R. v. Fuller*, 7 C. & P. 269. Roscoe's Crim. Evid., 11th ed., 69.

*Statement of accused at preliminary enquiry*—See 684.

*Right to inspect depositions*—See sec. 894.

*Depositions before coroner in homicide case*—See secs. 667, 940.

*North-West Territories*—By sec. 53 of the N.W.T. Act, R.S.C., ch. 62, every justice of the peace or other magistrate holding a preliminary investigation in the Territories into any criminal offence which may not be tried under Part XV of the Criminal Code shall, immediately after the conclusion of such investigation, transmit to the nearest stipendiary,

all informations, examinations, depositions, recognizances, inquisitions and papers connected with such charge.

*Saskatchewan practice*—In Saskatchewan the practice with respect to criminal charges is as follows: When any person is committed for trial, the justice of the peace before whom the preliminary enquiry was held transmits the original depositions to the clerk of the district court of the district in which the offence is alleged to have been committed. The district local agent of the Attorney-General then transmits a copy to the Attorney-General's Department. Upon receipt of the copy, the Attorney-General decides whether a charge should be preferred or not, and instructs his local agent accordingly. *R. v. Weiss* (1915) 7 W.W.R. 1160 (Sask.); Code sec. 873A.

**Rule as to bail.—When two justices may admit to bail.—When one justice may admit.—Committal on default.—Form of recognizance of bail.**

**696.** When any person appears before any justice charged with an indictable offence punishable by imprisonment for more than five years, other than treason or an offence punishable with death or an offence under any of the secs., 76 to 86 inclusive, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave.

2. In any case in which the offence committed or suspected to have been committed is an offence punishable by imprisonment for a term less than five years any one justice before whom the accused appears may admit to bail in manner aforesaid, and such justice or justices may, in his or their discretion, require such bail to justify upon oath before him or them as to their sufficiency.

3. In default of such person procuring sufficient bail, such

justice or justices may commit him to prison, there to be kept until delivered according to law.

4. The recognizance mentioned in this section shall be in form 28.

*Origin*—Code of 1892, sec. 601; R.S.C. 1886, ch. 174, sec. 81; 32-33 Vict., Can., ch. 30, sec. 52.

*Justices' jurisdiction to take bail on sending case for trial*—Sec. 696 of the Code is the only section conferring upon a justice of the peace any power to bail at the end of a preliminary hearing. The authority conferred by this section only applies, however, to the case of an offence other than a treasonable one or an offence punishable with death. Rape is an offence punishable with death, and justices of the peace on sending a case up for trial for that offence cannot grant bail to the accused. *Re Hopfe's bail*, 4 W.W.R. 1. 22 Can. Cr. Cas. 116 (Alta.).

While the preliminary enquiry remained incomplete and up to the point of decision thereon, the justice who for the time being was seized of the inquiry might admit to bail. Before the final order the justice must be one who would have jurisdiction to proceed with the preliminary inquiry if he chose so to do, although on the particular occasion he may be in attendance as a substitute magistrate acting by arrangement with the magistrate who usually hears the evidence. While the Code is not explicit on the point, it would seem that a substitute magistrate acting at the request of and in the absence of a magistrate having an otherwise exclusive jurisdiction, may attend at the gaol or police station and take bail, although nothing more is done than to fix the time for appearance. The police magistrate or justice who issued the warrant, or before whom the accused is to be brought on his arrest, may, if he chooses, hear a bail application and take bail for the appearance of the accused immediately after the arrest and before any witnesses are in attendance. The Crown prosecutor will usually be consulted before granting bail, but the justice is to exercise his own judgment, he being the public functionary responsible for the granting or refusing of bail pending the inquiry. The taking of bail is generally considered to be a part of the "inquiry" under sec. 668, and wide powers of control of the "inquiry" are conferred by sec. 679.

On a remand of the accused for further hearing in the preliminary inquiry for an indictable offence, bail is expressly authorized under sec. 681 and Code form 18, or the defendant's own recognizance may be taken without sureties. Code sec. 681. But even then, the prohibition of sec. 699 applies so that bail cannot be granted by a justice on a remand for any of the more serious treasonable offences or for an offence punishable with death. No person "accused" of those offences is to be bailed except by order of a superior court.

In exceptional cases a superior court will interfere on habeas corpus to grant bail pending the inquiry if the magistrate declines to grant bail; *R. v. Vincent* (1913) 22 Can. Cr. Cas. 98, 5 O.W.N. 141; *R. v. Hall*, 12 Can. Cr. Cas. 492; but will not usually do so before some depositions have been taken if the charge is a serious one. *R. v. Cox* (1888) 16 Ont. R. 228.

Sec. 696 applies only to the justice's powers in the particular events of which it treats. The order for bail must be made concurrently with the order sending the case up for trial and not after a committal to gaol for trial by a warrant of commitment in form 22. Code secs. 690, 698, 700-702. Furthermore, the case must be one for a non-capital indictable offence, and such offence must be one for which there is a maximum penalty provided by law either of five years' imprisonment or less than five years' imprisonment. Sub-sec. (2) uses the phrase "punishable by imprisonment for a term less than five years" as the antithesis of the phrase contained in the first paragraph, "an indictable offence punishable by imprisonment for more than five years." The context seems to compel the interpretation of the phrase "punishable by imprisonment for a term less than five years" as referring to the maximum and not to the minimum which the law provides. There is another class of cases not within either of these descriptions, and that comprises certain common law offences for which the Code has provided no penalty, and in respect to which the common law punishment of imprisonment applies without any express limit to the term of imprisonment. *R. v. Cole*, 3 O.L.R. 389, 5 Can. Cr. Cas. 330, 1 O.W.R. 117. So it was held that one justice had a common law power to admit to bail on sending the case up for trial where the offence was one at common law not provided for by the Code. *R. v. Cole*, supra; and see *R. v. Walkem*, 14 B.C.R. 7, 14 Can. Cr. Cas. 122, 128.

Imprisonment without hard labour is a common law punishment for misdemeanours, and the common law provides no limit to the term of imprisonment. *Castro v. The Queen*, 5 Q.B.D. 490, 509; 1 Stephen, Hist. Crim. Law, 490.

While the Criminal Code covers nearly all offences which are commonly prosecuted, there are undoubtedly cases of a class the prosecution and punishment of which is left to the common law, the Code not having abrogated the common law. *Union Colliery Co. v. The Queen*, 31 S.C.R. 81, 87; *Brousseau v. The King*, 56 S.C.R. 22; *R. v. Cole*, 3 O.L.R. 389, 5 Can. Cr. Cas. 330. Amongst these are certain classes of conspiracy indictable at common law, but not being a conspiracy to defraud or to commit an indictable offence or other conspiracy specially dealt with by the Code. Bail in such common law conspiracies would follow the rule laid down in *R. v. Cole*, supra, conspiracy being a common law misdemeanour.

The incitement to commit a felony, although no felony is actually committed, is in itself a common law misdemeanour, now held to be included as a substantive offence under Code sec. 69, sub-sec. (d).

*Brousseau v. The King* (1917) 56 S.C.R. 22, 29 Can. Cr. Cas. 207. And there is a suggestion in the *Brousseau* case that a charge against a person in an official position for corruptly using the power of his position by asking for a bribe might be supported as an indictable misdemeanour at common law. *Brousseau v. The King*, 56 S.C.R. 22, 29 Can. Cr. Cas. 207, 208.

If the case is one coming under Part XVI (summary trials) and a tribunal is constituted for such trial, and the defendant has consented to such trial in cases where such consent is essential, different considerations will apply on the question of bail.

*Bail by magistrate holding summary trial for indictable offence*—On the accused being arraigned for summary trial under sec. 778 and a plea of not guilty entered, the magistrate has the jurisdiction to admit to bail which attaches at common law to a trial tribunal. If the offence would before the Code have been classed as a common law misdemeanour, the accused would be entitled to bail at common law. *R. v. Spilsbury* [1898] 2 Q.B. 615; *R. v. Badger*, 12 L.J.M.C. 66, 4 Q.B. 468; *re Frost*, 4 Times L.R. 757; *R. v. Bennett*, 34 J.P. 701; *R. v. Atkins*, 49 L.T.N. 421; *Linford v. Fitzroy*, 18 L.J.M.C. 108, 13 Q.B. 240.

The magistrate's duty in taking bail is a judicial one, and malice must be proved in a civil action against him for neglect of that duty. *Linford v. Fitzroy*, *supra*; *Conroy v. McKenney*, 11 U.C.Q.B. 439 (Ont.); *McKinley v. Munsie*, 15 U.C.C.P. 236.

*Form of recognizance of bail*—Code form 28, following sec. 1152.

*Estreat of bail*—See secs. 1088 *et seq.*

*Bail to sessions court*—Code sec. 697.

*Place of residence of sureties to be stated in the recognizance*—Code sec. 825, sub-sec. (8).

*Notice to sureties on election of speedy trial*—Code sec. 825, sub-sec. (8).

*Render by sureties*—Code sec. 825, sub-sec. (4); 1088, 1090-1093.

*Requiring additional sureties at the trial*—Code sec. 1092.

*Sub-sec. (3)—Committal in default of finding sureties*—The sureties may be found later, and the accused will then be entitled to take advantage of the order for bail. *R. v. Gibson*, 29 N.S.R. 4; *ex parte Blossom*, 10 L.C. Jur. 29, 68.

*Bail after committal for trial*—Where the accused has been "finally committed" (Code sec. 698) by a warrant of commitment under form 22 (see Code sec. 690), he may move for an order for bail to the judge of a superior court or county court (Code secs. 698, 700), but a county court judge is not to be applied to in capital offences or in case of the treasonable offences specified in sec. 699. An alternative procedure is to apply for a writ of habeas corpus to the superior court having habeas corpus jurisdiction, with a view to being bailed on the return of the writ. *R. v. Barthelemy*, 1 E. & B. 8, 1 Dears. 60. The more convenient process is that of a summary application under Code sec. 700,



upon which the like order may be made as could be made on *habeas corpus*. Code sec. 701.

*Procedure as to bail after committal*—See secs. 698-702.

*Speedy trial without a jury*—Whether the order sending the case for trial is made under sec. 696 or under 690, the accused may elect a "speedy trial" without a jury under sec. 825, subject to the limitations of that section; but he must notify the sheriff to that effect. Code sec. 825 (6); *R. v. Daigle* (1914) 23 Can. Cr. Cas. 92 (Que.).

The recognizance of bail and the depositions and information go before the county court judge's criminal court on an election of speedy trial in such case, without any formal certificate from the magistrate being required. *R. v. Daigle, supra*.

#### Appearance at court of sessions of the peace.

**697.** Where the offence is one triable by the court of general or quarter sessions of the peace and the justice is of opinion that it may better or more conveniently be so tried, the condition of the recognizance may be for the appearance of the accused at the next sittings of that court notwithstanding that a sitting of a superior court of criminal jurisdiction capable of trying the offence intervenes.

*Origin*—Sec. 601, Code of 1892; 63-64 Vict., Can., ch. 46, sec. 3; R.S.C., ch. 174, sec. 81.

*Recognizance to sessions instead of superior court*—Sec. 697 leaves a wide discretion to the justice, enabling him to make the recognizance to a court of sessions. It should not be applied to deprive the accused of the privilege of trial at the first available court without a good reason, such as the impossibility of the parties being ready for trial at the first court.

"*Superior court of criminal jurisdiction*"—See definition in sec. 2, sub-sec. (35).

**Bail after committal.—Order for by superior or county court.—**  
Justices taking recognizance to attach court order for bail to their warrant of deliverance.—Warrant of deliverance.—Form.

**698.** In case of any offence other than treason or an offence punishable with death, or an offence under any of the secs. 76 to 86 inclusive, where the accused has been finally committed as herein provided, any judge of any superior or county court, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to

be admitted to bail on entering into a recognizance with sufficient sureties before two justices, in such amount as the judge directs, and thereupon the justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the judge directing the admitting the accused to bail.

2. Such warrant of deliverance shall be in form 29.

*Origin*—Sec. 602, Code of 1892; R.S.C. 1886, ch. 174, sec. 82.

*Notice to committing justice of bail application to judge*—See secs. 700-702.

*Notice to Attorney-General's Department*—The safer course is to notify also the Attorney-General or his representative. The rules of court of the particular province, made under the authority of sec. 576, may make this obligatory.

*Transmission of papers on motion for bail*—Code sec. 700.

*County court judge*—A county court judge may not, however, grant bail for a capital offence such as murder or rape, nor for treason or the treasonable offences specified in secs. 76 to 86 inclusive. See sec. 699.

*Form of warrant of deliverance on bail being given for a prisoner already committed*—Code form 29, following sec. 1152.

**Bail only by a superior court for treason, etc., or capital offence.**

**699.** No judge of a county court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under any of the secs., 76 to 86 inclusive, nor shall any such person be admitted to bail, except by order of a superior court of criminal jurisdiction for the province in which the accused stands committed, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of King's Bench or Superior Court.

*Origin*—Sec. 603, Code of 1892; R.S.C. 1886, ch. 174, sec. 83.

*Province in which the accused stands committed*—See note to sec. 700.

*Certain treasonable offences bailable only by superior court*—Secs. 76-86 inclusive, to which reference is made in sec. 699, refer to offences specially relating to the Government, including treasonable offences, conspiracy to intimidate a legislature, mutiny, desertion from His Majesty's service, spying and disclosure of official secrets.

**Bail after committal.—Notice to justice.—Record to be transmitted.—Penalty for neglect.**

**700.** When any person has been committed for trial by any justice, the prisoner, his counsel, solicitor or agent may notify

If the offence be not very serious and the depositions disclose no more than slender grounds of suspicion, bail may be allowed. *R. v. Jones*, 4 U.C.R. (O.S.) 18 (Ont.).

The court should not, on an application for bail, weigh and decide the question of credibility of witnesses. *R. v. Keeler* (1877), 7 P.R. 117, 123 (Ont.).

*Bail not usual in murder cases*—In cases of murder, and the more so after a preliminary investigation by a judicial officer, an investigation which ought to be thorough, and at which the accused person has the right to give any such relevant evidence as he chooses, and after a commitment for trial as the result of that investigation—and still more so in cases in which a true bill has been found also—the rule is that the accused person should not be admitted to bail, the temptation to escape from a trial in such a case being too great to leave much, if any, great hope that bail to any amount would overcome it. But there well may be some exceptions to that rule, including the statutory one contained in the Habeas Corpus Act. See *Regina v. Bowen* (1840), 9 C. & P. 509; *R. v. Rae* (1914), 32 O.L.R. 89, 23 Can. Cr. Cas. 266; 31 Car. II, ch. 2, sec. 6; *R. v. Gentile* (1915) 24 Can. Cr. Cas. 342 (B.C.); *re Bartlemey*, 1 E. & B. 8; *R. v. Guttredge*, 9 C. & P. 228; *R. v. Greenacre*, 8 C. & P. 594; *R. v. Chapman*, 8 C. & P. 558; *ex parte Corriveau*, 6 L.C.R. 249 (Que.); *R. v. Keeler*, 7 P.R. 117 (Ont.); *R. v. Murphy*, 2 N.S.R. 158; *R. v. Mullady*, 4 P.R. 314 (Ont.); *R. v. Coady*, *Morris' Newfoundland Decisions* 58; *McCraw v. The King* (1907) 16 Que. K.B. 505, 13 Can. Cr. Cas. 337; *R. v. Fitzgerald*, 3 U.C.R. (O.S.) 300 (Ont.); *R. v. Higgins*, 4 U.C.R. (O.S.) 83 (Ont.); *R. v. Blythe* (1909) 19 O.L.R. 386; *R. v. Monvoison*, 20 Man. R. 568; *ex parte Huot*, 8 Que. L.R. 28; *ex parte Maguire*, 7 L.C.R. 59 (Que.).

Under the Habeas Corpus Act, 31 Car. II, ch. 2, sec. 7, the Crown is not obliged to proceed with the trial at the first assize after the commitment. If the prisoner held for a felony petitions in open court at the first sittings to have his trial proceeded with, the Crown must indict him at that sittings or he will be admitted to bail. But the duty of the Crown is said to be fulfilled if the case is traversed to the next sittings of oyer and terminer, and the Crown must then be ready to proceed with the trial at that the second sittings of a competent court following the commitment. *R. v. Keeler*, 7 P.R. 117 (Ont.); *R. v. Bowen*, 9 C. & P. 509; *R. v. Mullady*, 4 P.R. 314 (Ont.); *R. v. Rae* (1914), 32 O.L.R. 89, 23 Can. Cr. Cas. 266.

*Practice on bail orders*—The order for bail should not leave the question of the sufficiency of the sureties solely to the Crown officer without reserving the determination of their sufficiency to the judge himself, or to a justice of the peace, in case of disagreement on that question. *R. v. Greig* (1914) 23 Can. Cr. Cas. 352, 30 W.L.R. 286 (Sask.).

If an order has been made by a county judge for bail, but because

of some irregularity in the warrant of deliverance the accused was re-arrested, the judge may make another order *de novo*, even if he could not amend the first order. *R. v. Greig* (1914) 23 Can. Cr. Cas. 352, 30 W.L.R. 286 (Sask.).

The form of order may be that, upon the defendant entering into a recognizance before the committing justice of the peace, the defendant himself in an amount fixed, and two sufficient sureties in amounts also fixed, to the satisfaction of the justice, the defendant be admitted to bail to appear for trial at the next court of competent jurisdiction to answer the charge stated in the warrant of commitment or any other charge which may then be preferred against him in respect of the depositions on the preliminary enquiry.

An order for bail on an appeal by reserved case may fix the amount of bail and delegate to a justice of the peace the ascertainment of the sufficiency of the sureties and the taking of the recognizance itself. *R. v. Johnston*, 16 Can. Cr. Cas. 296.

Even after conviction affirmed by the Court of Appeal, bail may be granted pending a further appeal to the Supreme Court of Canada if such further appeal lies. *R. v. Brunet* (1917) 27 Que. K.B. 224.

It has been held that a superior court has jurisdiction to rescind an order made for bail on proof being made that fictitious bail had been put in. *R. v. Mason*, 5 P.R. 125 (Ont.).

#### **Order upon application for bail.**

**701.** Upon application for bail as aforesaid to any such court or judge the same order concerning the prisoner being bailed or continued in custody, shall be made as if the prisoner was brought up upon a habeas corpus.

*Origin*—Sec. 604, Code of 1892; R.S.C. 1886, ch. 174, secs. 93, 94, 95.

*Bail on habeas corpus where warrant of arrest is from another province*—On habeas corpus the Supreme Court of Alberta has jurisdiction to admit to bail one arrested on a criminal charge laid in another province, though the arrest be legal, and to make the condition of the recognizance that the prisoner shall surrender himself to the proper officer in the province in which the charge is pending against him, the superior courts of the several provinces being, in criminal matters, auxiliary to each other. *R. v. Hughes* (1914) 6 W.W.R. 1120, per Beek, J.

#### **Warrant of deliverance.**

**702.** Whenever any justice or justices admit to bail any person who is then in any prison charged with the offence for which he is so admitted to bail, such justice or justices shall send to or caused to be lodged with the keeper of such prison.

a warrant of deliverance under his or their hands and seals, requiring the said keeper to discharge the person so admitted to bail if he is detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same.

*Origin*—Sec. 605, Code of 1892; R.S.C. 1886, ch. 174, sec. 84.

**Warrant for the arrest of person bailed about to abscond.**

**703.** Whenever a person charged with any offence has been bailed in manner aforesaid, it shall be lawful for any justice, if he sees fit, upon the application of the surety or of either of the sureties of such person and upon information being made in writing and on oath by such surety, or by some person on his behalf, that there is reason to believe that the person so bailed is about to abscond for the purpose of evading justice, to issue his warrant for the arrest of the person so bailed, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, to commit such person when so arrested to gaol until his trial or until he produces another sufficient surety or other sufficient sureties, as the case may be, in like manner as before.

*Origin*—Sec. 606, Code of 1892.

*Application by sureties to render accused to gaol*—See also secs. 1086-1093.

**Delivery of accused to keeper under warrant of commitment.**

**704.** The constable or any of the constables, or other person to whom any warrant of commitment authorized by this or any other Act or law is directed, shall convey the accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with the warrant, to the keeper of such gaol or prison, who shall thereupon give the constable or other person delivering the prisoner into his custody, a receipt for the prisoner, setting forth the state and condition of the prisoner when delivered into his custody.

2. Such receipt shall be in form 30.

*Origin*—Sec. 607, Code of 1892; R.S.C. 1886, ch. 174, sec. 85.

*Warrant of commitment*—Code sec. 690; Code form 22.

*Form of gaoler's receipt to the constable for the prisoner*—Code form 30, following sec. 1152.

## PART XV.

### SUMMARY CONVICTIONS.

#### *Interpretation.*

##### **Definitions.**

**705.** In this Part, unless the context otherwise requires,—

- (a) 'territorial division' means district, county, union of counties, township, city, town, parish or other judicial division or place;
- (b) 'the court' in the sections of this Part relating to justices stating or signing cases means and includes any superior court of criminal jurisdiction for the province in which the proceedings in respect of which the case is sought to be stated are carried on;
- (c) 'district' or 'county' includes any territorial or judicial division or place in and for which there is such judge, justice, justice's court, officer or prison as is mentioned in the context;
- (d) 'common gaol' or 'prison' for the purpose of this Part means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody;
- (e) 'clerk of the peace' includes the proper officer of the court having jurisdiction in appeal under this Part and, in the province of Saskatchewan or Alberta and in the Northwest Territories, means the clerk of the Supreme Court of the judicial district within which conviction under this Part takes place or an order is made.

*Origin*—Secs. 839 and 900, Code of 1892; R.S.C. 1886, ch. 178, sec. 2; R.S.C. 1886, ch. 50, sec. 102.

*Sub-sec. (b)*—"The court"; "superior court of criminal jurisdiction"—Code sec. 2, sub-sec. (35).

"*Summary Convictions Act*"—A reference in any statute of Canada to the "Summary Convictions Act" is to be construed as a reference to Part XV of the Code. See R.S.C. 1906, ch. 1, sec. 29.

"*Magistrate*"—In every Act of the Parliament of Canada in which the word "magistrate" is used, it means a justice of the peace, unless the context otherwise requires. R.S.C. 1906, ch. 1, sec. 34, sub-sec. (15). But it has a special meaning under the Summary Trials clauses (Part XVI); Code sec. 771.

*Paragraph (c)*—"District" or "county"—In conjunction with sub-sec. (c) *supra*, may be read the definition in sec. 2 (10).

*Yukon Territory*—As to gaols and lockups in the Yukon, see the Yukon Act, R.S.C., ch. 63, secs. 84 and 88.

*Prohibition against summary conviction proceedings—Question of jurisdiction*—Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or court dealing with the proceedings sought to be prohibited. *R. v. Phillips*, 11 Can. Cr. Cas. 89, 11 O.L.R. 478.

It is undoubted law that the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged: *Peacock v. Bell* (1667) 1 Wms. Saund. 73, approved of in *Gosset v. Howard* (1846) 10 Q.B. 411, at pp. 453-4; *Camosun Co. v. Garetson* (1914) 7 W.W.R. 219 (B.C.); *R. v. Taylor* (1913) 5 W.W.R. 1105, 26 W.L.R. 652, 22 Can. Cr. Cas. 234; *Falkingham v. Victorian Ry. Comrs.*, [1900] A.C. 452.

Where the defect of jurisdiction is clear on the face of the proceedings, there is a right to prohibition. *R. v. Jack*, (1915) 49 N.S.R. 238, 24 Can. Cr. Cas. 385; *Farquharson v. Morgan* [1894] 1 Q.B. 552, 63 L.J.Q.B. 474; *Clarke v. Knowles*, 87 L.J.K.B. 189.

It is quite proper to prohibit an appeal or other proceeding of an inferior court where the applicant establishes a defect of jurisdiction. The course open to a defendant where the court is without jurisdiction is two-fold. He may, on that ground apply to this court for a prohibition before the case comes on in the inferior court, or he may go before the inferior court either actively or by awaiting its decisions. The rule is clearly laid down in *Mayor of London v. Cox*, L.R. 2 H.L. 239, that where want of jurisdiction is apparent upon the face of the proceedings, prohibition goes at any time after service of the process, i.e., as soon as the jurisdiction of the inferior court is asserted. It does not matter what the originating proceeding is; as soon as it is filed the proceedings are begun, and if the want of jurisdiction appears on the face of them, any person may apply to restrain the court from further proceeding. *Re Buchanan* (1913) 22 Can. Cr. Cas. 199, at 204, 26 W.L.R. 447; *Brazill v. Johns*, 24 Ont. R. 209; *re Holman and Rea*, 4 O.W.N. 434, 21 Can. Cr. Cas. 11, 23 O.W.R. 428; *R. v. Sparks* (1913) 23 W.L.R. 613, 18 B.C.R.

116, 21 Can. Cr. Cas. 184; *R. v. Speed*, 20 Man. R. 33; 17 Can. Cr. Cas. 24.

Forcing on a trial almost immediately after the service of the summons in a summary matter before a justice despite an application by defendant for an adjournment may be a ground for prohibition where the proceeding was contrary to natural justice. *R. v. Eli*, 10 Ont. R. 727; and see *Trimble v. Miller*, 22 Ont. R. 500; *Goold v. Hope*, 20 A.R. 347; *R. v. Smith*, L.R. 10, Q.B. 604; *Martin v. Mackonachie*, 3 Q.B.D. 739. And so may be the adjournment of the hearing for longer than the statutory period. *Donohue v. Recorder's Court of Quebec City*, 18 Can. Cr. Cas. 182.

If there were a gross abuse of the authority of a magistrate by compelling the attendance of the accused at a place extraordinarily far from his home and the place where the offence was alleged to have been committed and where all the witnesses resided, while a competent and impartial justice was available near the place of the alleged offence, a superior court would have power to intervene and prevent the abuse of the process of the inferior court on the ground that the defendant was prejudiced in his right to make his "full answer and defence." *R. v. Tally*, 7 W.W.R. 1178, at 1180 (Alta.); Code sec. 715. That ground goes to the jurisdiction of the magistrate. *R. v. Tally*, supra; *R. v. Farrell*, 15 O.L.R. 100.

When an irregular adjournment of the hearing of a complaint under the Summary Convictions clauses of the Code is made, the jurisdiction of the magistrate is ousted, he becomes *functus officio*, and prohibition will lie to restrain him from dealing further with the case. *Pare v. The Recorder of Montreal*, 27 Que. S.C. 424, 10 Can. Cr. Cas. 295.

Prohibition lies against the exercise of judicial acts without jurisdiction. *R. v. Coursey*, 27 Ont. R. 181; *Re Cummings and Carleton*, 26 Ont. R. 1; *Re Chapman and London*, 19 Ont. R. 33; *R. v. Davison* [1913] 2 Irish R. 342; *ex parte Demmings*, 37 N.B.R. 586; *Kearney v. Desnoyers*, 10 Que. K.B. 436.

Where the jurisdiction of magistrates is purely statutory, it is open to collateral attack by evidence *dehors* the proceedings, whether or not such proceedings purport to show jurisdiction. *Rex v. Taylor*, (1913) 5 W.W.R. 1105, 22 Can. Cr. Cas. 234, 26 W.L.R. 652. Per Beck, J.

Prohibition may be granted to a court of sessions in respect of its assumption of jurisdiction to set aside a summary conviction in an appeal to it which had not been perfected by proof of statutory requisites. *Re Meyers and Wonnacott*, 23 U.C.Q.B. 611.

Prohibition will be granted against a magistrate who proceeds to try a charge in respect of which he has no jurisdiction; *R. v. Eaton*, 2 Can. Cr. Cas. 252, 31 Ont. R. 276; or from enforcing a summary conviction where the justice was disqualified by interest through membership in an association which would benefit by the fines. *Daigneault v. Emeron*, 5 Can. Cr. Cas. 534, 20 Que. S.C. 310.



Although the authority of county justices of the peace is confined to the limits of the county for which they are named, it does not necessarily extend to all places within the county, if there be any district therein which possesses a separate and exclusive jurisdiction; and if concurrent jurisdiction is to be exercised by the county justices in such separate jurisdiction the commission should so state in express words such as the phrase "as well within liberties as without." *R. v. Cody*, (1914) 48 N.S.B. 255, 23 Can. Cr. Cas. 211, 18 D.L.R. 773. *Paley on Convictions*, 7th ed., 34.

A justice of the peace is sufficiently designated as such in the record of proceedings if he is designated therein as stipendiary magistrate for the county and, as such, is an *ex-officio* justice of the peace by virtue of a provincial statute; *Ex parte Seriesky*, 41 N.B.R. 475, 21 Can. Cr. Cas. 140, 12 E.L.R. 387; but *aliter* if a justice described himself as a justice of the peace in a non-existent district. *Zimmerman v. Burwash*, 29 Que. S.C. 250.

A justice for a judicial district is sufficiently described as the justice for the county, the limits of which are the same as the judicial district. *Sorgius v. Bouchard*, 26 Que. K.B. 242; appeal quashed. *Sorgius v. Bouchard*, 55 S.C.R. 324.

Prohibition has been granted to restrain a county court from an illegal assumption of *certiorari* jurisdiction over a summary conviction. *R. v. O'Neil*, 20 N.S.B. 530.

Prohibition will not lie to correct an illegal or wrong judgment, nor if the defect can be remedied in due course of law. *Elliott v. Biette*, 21 O.R. 596; *Regina v. Murdock*, 27 A.B. 443.

It is not a means of appeal but applies only to keep the inferior court within its jurisdictional limits. *Hudson's Bay Co. v. Joannette*, 23 Can. S.C.R. 415; *Bar of Montreal v. Honan*, 8 Que. Q.B. 26; *Beaupré v. Desnoyers*, 11 Que. S.C. 541; *R. v. Cunerty*, 26 Ont. R. 51.

Where the want of jurisdiction does not appear on the face of the proceedings, but is dependent upon some circumstances which was not brought to the justice's notice, the applicant's failure in the latter respect may be a ground for refusing him a writ of prohibition. *Sherwood v. Cline*, 17 Ont. R. 30; *Broad v. Perkins*, 21 Q.B.D. 533. Reasons which merely show that the petitioner for a writ of prohibition may have a good ground of defence to the charge made against him in the proceedings before the magistrate, are insufficient to justify the issue of a writ of prohibition. *Beaudry v. Lafontaine*, 17 Que. S.C. 396. The magistrate cannot give himself jurisdiction by misconstruing a statute, but otherwise an erroneous interpretation he places upon it is not reviewable by prohibition. *Long Point Co. v. Anderson*, 18 A.B. (Ont.), 401; *Re Dyer and Evans*, 30 Ont. R. 637; *re McLeod and Amiro*; 27 O.L.R. 232, 25 Can. Cr. Cas. 230; *re Sigurdson*, (1915) 25 Man. R. 832, 9 W.W.R. 940.

*Effect of other adequate remedy*—Where the objection to the juris-

diction appears upon the face of the proceedings, prohibition lies even after judgment although there is an alternative remedy by motion to set aside the judgment. *Çamosun v. Garetson* (1914) 7 W.W.R. 219, (B.C.); *Farquaharson v. Morgan* [1894] 1 Q.B. 552; *Thompson v. Hay*, 20 A.E. 379 (Ont.).

In a proper case and for a proper excess of jurisdiction the Superior Court of Quebec may, in virtue of articles 50 and 1003 of the Code of Civil Procedure, issue a writ of prohibition. But, as article 50, C.P. (Que.), says, this control must be exercised in the manner and form provided by law. It does not mean that the Superior Court of Quebec which is a civil tribunal without criminal jurisdiction, has a right by its writ of prohibition to displace, or interfere in a criminal case with the procedure or remedies provided for the case by the Federal Legislature, which has exclusive jurisdiction in criminal law and procedure. *R. v. Amyot*, 11 Can. Cr. Cas. 232 (Que.).

In *Audet & Doyon*, 10 Que. L.R. 21, McCord, J., delivering the judgment of the majority of the court, said:—"Prohibition is an extraordinary remedy and should not be employed where the party has a complete remedy in some other and more ordinary form." And see *Laliberté & Fortin*, 2 Que Q.B. 573; *Breton v. Landry*, 13 Que. S.C. 31.

Prohibition will not be granted while an appeal from the decision attacked is pending. *Re Rochon*, 31 Ont. R. 122.

Prohibition will not lie to determine the status of a *de facto* judicial officer, but proceedings may be taken in *quo warranto*. *Ex parte Gaynor & Greene*, 9 Can. Cr. Cas. 240.

Prohibition is not to issue to an officer of the court applied to, for his official acts may be controlled by court order. *Re Crouse*, (1913) 47 N.S.R. 64, 12 E.L.R. 416, 21 Can. Cr. Cas. 231.

It is not the proper procedure by which to raise the question of the validity of the service of a warrant on a Sunday. *Re McGillivray*, 13 Can. Cr. Cas. 113.

An information for assault was laid before S., justice of the peace for A. county. After summons issued an order *nisi* of prohibition was served on him at the instance of the defendant and no further proceedings were taken before him. B., another justice for the county, having been requested by S. to hear the charge, took another information and issued a summons. On the return of the summons the defendant's attorney, who was clerk of the peace, advised B. that he had no jurisdiction, and B. thereupon refused to proceed. An information was then laid before R., another justice of the peace for A. county who was requested by S. to act after B. had declined to proceed. An order *nisi* of prohibition having been granted against R. and it appearing that the three justices had concurrent jurisdiction, it was held that as S. and B. were not *bona fide* proceeding in the matter, there was no ground for interfering with R. *Ex parte Peck* (No. 2), 39 N.B.R. 274, 16 Can. Cr. Cas. 49.

*Grounds for prohibition to be stated*—The grounds for the prohibition should be set forth in the rule *nisi* or notice of motion as the case may be. *R. v. Kensington*, [1914] 3 K.B. 429, 83 L.J.K.B. 1439.

*No interim order in prohibition*—The court has no power, pending an application for prohibition, to make an interim order staying the proceedings in the inferior court as to which the prohibition is sought. *Myron v. McCabe*, 4 P.R. 171 (Ont.); *re Holman and Rea* (No. 2), 21 Can. Cr. Cas. 11, 4 O.W.N. 434, 23 O.W.R. 428.

*Where prohibition will be adjourned to correct error*—Where an inferior court has made an order which is wrong, but which it may easily set right, a prohibition motion may be enlarged to give it an opportunity to correct the mistake, and, on its being corrected, the motion will be dismissed. *R. v. Hamlink*, 19 Can. Cr. Cas. 493.

The court hearing a prohibition motion has a discretion to refuse an adjournment for the purpose of cross-examination upon an affidavit, where the adjournment would be against justice. *Re Buchanan*, 22 Can. Cr. Cas. 200, 26 W.L.R. 447.

*Rules of court governing prohibition practice*—Rules of Court passed under sec. 576 will apply to all proceedings relating to any criminal prosecution.

But it has been held in Manitoba that prohibition against a magistrate from hearing a criminal charge on the ground of his disqualification through bias, is itself a civil and not a criminal proceeding, and is subject to the practice laid down by provincial law. *R. v. Suck Sin*, 20 Man. R. 720, 18 Can. Cr. Cas. 266.

*Taking objection at hearing on ground of disqualification*—When a case is heard before a court of summary jurisdiction the defendant or his solicitor must take objection to the presence on the bench of any justice who is alleged to have an interest in the subject-matter of the case, if he is aware of the existence of such interest, before the merits of the same are gone into. *R. v. Byles*, 23 Cox C.C. 314, 108 L.T. 270; *R. v. Biggar, ex parte McEwan*, (1906) 37 N.B.R. 372; *Wakefield v. West Biding Ry.* 35 L.J.M.C. 69, L.R. 1 Q.B. 84; *R. v. Brown*, 16 Ont. R. 41. If the defendant or his solicitor, fails to take such objection and is afterwards convicted, he cannot then come to the Superior Court and obtain a writ of *certiorari* to quash the conviction on the ground that one of the justices had an interest in the matter which was before the court of summary jurisdiction. *Rex v. Byles, Ex parte Hollidge*, 23 Cox C.C. 314; 108 L.T. 270.

*Disqualification of magistrate from interest bias or relationship*—Disqualification is made out if the circumstances show a reasonable apprehension that the justice may be biased. *R. v. Woodroof*, 20 Can. Cr. Cas. 17; *R. v. Huggins* [1895] 1 Q.B. 563; *ex parte Peck* (No. 1), 15 Can. Cr. Cas. 133 (N.B.); *ex parte Peck* (No. 2), 16 Can. Cr. Cas. 51 (N.B.).

A magistrate is disqualified on the ground of bias from trying a case if he has himself prosecuted the same defendant before another magistrate for an offence of the same character, if the *certiorari* proceedings upon the conviction which he then obtained are still pending and undisposed of in a Superior Court. *Ex parte Daigle, R. v. Charest*, 18 Can. Cr. Cas. 211, 37 N.B.R. 492.

Uncontradicted affidavits filed on a motion to quash a summary conviction under a liquor law that the magistrate had stated he would convict any parties charged with selling liquor whether the evidence proved it or not, if he believed them to be guilty, shows a disqualifying bias on the part of the magistrate, and the conviction on a liquor-selling charge will be quashed. *R. v. Rand* (1913) 22 Can. Cr. Cas. 147, 15 D.L.R. 69, 13 E.L.R. 450 (N.S.).

Signing a petition against the granting of a liquor license to the accused, does not disqualify the magistrate from subsequently trying the accused for an offence under the liquor license law. *Ex parte Van Buskirk, R. v. Davis*, 13 Can. Cr. Cas. 234, 38 N.B.R. 335.

*Pending action as ground of bias, where magistrate an opposite party*—

The court refused to quash a conviction on the ground of bias of the presiding justice by reason of an action pending against him where it appeared that the action was commenced and declaration and plea filed more than eight years before the conviction; that the action was by the husband (since deceased) of the accused against the justice, and arose out of a trespass committed under a search warrant issued by the justice for the examination of the husband's premises for liquor alleged to have been unlawfully stored; that no further proceedings had been taken, but it was stated in an affidavit of the accused read on the argument that it was not her husband's intention as she believed, and it was and is not her intention to allow the suit to abate. *R. v. Kay; Ex parte McCleave*, 38 N.B.R. 504, 14 Can. Cr. Cas. 18.

*Incompatible office or position held by magistrate*—

The fact that the police magistrate of the city of Moncton was a member of the Board of Police Commissioners for that city as established by 7 Edw. VII (N.B.), c. 97, was held not to disqualify him from hearing an information laid by a police officer who was appointed by such board. *R. v. Kay; ex parte Wilson*, 39 N.B.R. 124, 15 Can. Cr. Cas. 264; *R. v. Suck Sin*, 18 Can. Cr. Cas. 266; *ex parte Wilson*, 15 Can. Cr. Cas. 264; *ex parte Horsman*, 15 Can. Cr. Cas. 281.

The circumstance that in imposing a fine for a violation of the Canada Temperance Act the public fund from which the magistrate's fees are paid is thereby increased, will ordinarily be too remote an interest to disqualify him from entertaining a complaint for a violation of the Act. *R. v. Holyoke, ex parte McIntyre*, 21 Can. Cr. Cas. 422, 13 D.L.R. 225, 13 E.L.R. 210; *ex parte McCoy*, 33 N.B.R. 605; *ex parte Gorman*, 34 N.B.R. 397, 4 Can. Cr. Cas. 305; *ex parte Driscoll*, 27 N.B.R.

216. But it will be otherwise if it be shown that he is specially assigned to take trials of prosecutions under that Act. *R. v. Woodroof*, 20 Can. Cr. Cas. 17.

It has been held (but *quære*) that a justice is not disqualified from trying a charge under a liquor statute in one judicial district although he is an inspector under that statute in another judicial district. *Ex parte Michaud*, 4 Can. Cr. Cas. 569.

A justice of the peace who accepts the offices of clerk of the peace and clerk of the county court is not disqualified from trying an offence charged under the Liquor License Act on the ground that the offices are incompatible. *R. v. Plant*; *ex parte Morneault*, 37 N.B.R. 500.

The magistrate trying a case under a liquor license law was held not disqualified because of his being a ratepayer in the district. *Ex parte Hebert*, 4 Can. Cr. Cas. 153, 34 N.B.R. 455; *ex parte Gorman*, 4 Can. Cr. Cas. 305 (N.B.); *R. v. Fleming*, 27 Ont. R. 122; *R. v. Hart*, 2 B.C.R. 264; *ex parte McCoy*, 1 Can. Cr. Cas. 410; *R. v. Suck Sin*, 18 Can. Cr. Cas. 266.

A justice of the peace is not disqualified by the fact that he and the counsel for the prosecution are partners in the business of attorneys provided they have no joint interest in the fees earned by the counsel for the prosecution or in any fees payable to the justice on the trial of the information. Neither is it a ground of disqualification that the justice was appointed and paid by the town council at whose instance the complaint was made and the prosecution carried on his salary being a fixed sum, not dependent on the amount of fines collected. *R. v. Grimmer, re Macdonald* (1886), 25 N.B.R. 424.

*Indirect interest in prosecution; class interests*—

Every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that unconsciously to himself a bias adverse to the due administration of justice might take possession of his mind. *R. v. Justices of Great Yarmouth* (1881), L.R. 8 Q.B.D. 525; *R. v. Farrant*, 20 Q.B.D. 58; *R. v. Chapman* (1882), 1 Ont. R. 582; *R. v. Eli*, 13 A.R. 526 (Ont.).

A magistrate who is engaged in the same kind of business as a trader prosecuted under a transient traders' license law is thereby disqualified from adjudicating upon the charge. *R. v. Leeson* (1901), 5 Can. Cr. Cas. 184 (Ont.).

Defendant was convicted of a breach of a by-law in selling land by auction without license; two of the four convicting justices were licensed auctioneers for the county and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice. It was held that they were indirectly interested in the result of the case, in so far as it was to their interest either to limit the number of persons acting as auctioneers in the town, or to confine

the business of selling lands by auction to persons holding, as they did, auctioneer's licenses, and the conviction was quashed with costs against the two justices. *R. v. Chapman* (1882), 1 Ont. R. 582.

The magistrate must not unite in his own person the functions of judge and prosecutor. *Monson's Case*, [1894] 1 Q.B. 750.

If a prosecution be brought for the benefit of a small class of privileged persons, of whom the magistrate is one, the conviction will be quashed on the ground of the pecuniary interest of the justice. *R. v. Huggins*, [1895] 1 Q.B. 563; *Daignault v. Emerson*, 20 Que. S.C. 310; *R. v. Leeson*, 5 Can. Cr. Cas. 184. But if the ordinary members of the society or association on whose behalf the prosecution is brought have no control over or responsibility for any prosecution brought by the society, the fact that the magistrate is one of the ordinary members will not suffice to disqualify him. *Allinson v. General Council*, [1894] 1 Q.B. 750. So where a prosecution was brought at the instance of the Incorporated Law Society, and a conviction obtained for falsely pretending to be a solicitor, but no part of the fine was payable to the society, it was held that the fact of one of the magistrates being a member of the society furnished no reasonable ground for supposing that he was biased, nor did it constitute him a party on whose behalf the prosecution was taken or give him a pecuniary interest therein, although the society was under the liability of having an order for costs made against it. *R. v. Burton*, [1897] 2 Q.B. 468; *R. v. Mayor of Deal*, 45 L.T. 439; *R. v. Handsley*, 8 Q.B.D. 483.

The justice of the peace before whom the information was laid, and who issued the summons was alleged to be interested; but the hearing took place before, and the adjudication and conviction were made by another justice whose qualification was not attacked, while the defendant pleaded to the charge and raised no objection to the validity of the proceedings until the application for a *certiorari*; it was held that the conviction could not be impugned. (*R. v. Gibbon*, 6 Q.B.D. 168, distinguished); *R. v. Stone* (1892), 23 Ont. R. 46.

When the magistrate's position would be a good ground of challenge to a juror for favour, he is disqualified to act. *Ex parte Wallace*, 27 N.B.R. 174; *Ex parte Jones*, 27 N.B.R. 552; *Ex parte Hannah Gallagher* (1898), 4 Can. Cr. Cas. 486, 34 N.B.R. 413.

It is sufficient to show that the magistrate might have been influenced, and it need not appear that he was in fact influenced. *R. v. Milledge*, 4 Q.B.D. 332; *R. v. Gaisford*, [1892] 1 Q.B. 383; *Tessier v. Desnoyers*, 12 Que. S.C. 35.

A magistrate is disqualified from trying an information for an offence punishable on summary conviction where there is a *bona fide* action pending against him brought by the husband of the accused for alleged malicious conduct as a judicial officer and for assault. *Ex parte Hannah Gallagher* (1898), 4 Can. Cr. Cas. 486, 34 N.B.R. 413.

If the action against the justice is not *bona fide* but a mere sham to attempt to disqualify him, its pendency will not operate as a disqualification. *Ibid.*; *Ex parte* Scribner, 32 N.B.R. 175.

The disqualification of a justice arising from an action pending against him ceases when he has recovered judgment, though an execution has issued which is unsatisfied. *Ex parte* Ryan (1894), 4 Can. Cr. Cas. 485 (N.B.).

With the exception of where a magistrate acts upon view of an offence, he should not be a promoter of the prosecution, or be interested personally in the matter he is called on magisterially to investigate. It is contrary to natural justice that the judge should be interested in securing the conviction of the accused, or be influenced by any bias other than that produced by the evidence on the mind of one unprejudiced by any kind of interest to have his judgment so warped as to prevent his giving an impartial decision. If such an interest exists, the magistrate is disqualified from acting judicially, be the interest never so small. The court cannot weigh the interest or estimate its force. *R. v. Sproule* (1887), 14 Ont. R. 375, 381.

The mere fact of a magistrate being a druggist, and in that capacity filling medical prescriptions containing small quantities of liquor, would not constitute a disqualifying interest in a prosecution for unlawfully selling intoxicating liquor. *R. v. Richardson* (1891), 20 Ont. R. 514.

The connection of the magistrate with a society, which supplied funds part of which were used to make the purchase upon which the prosecution of illegal sale of liquor was based, because of his being an honorary member of the society but not entitled to take any part in its affairs, is not a ground of disqualification. *R. v. Herrell* (1898), 1 Can. Cr. Cas. 510, 12 Man. R. 15.

Where a conviction is set aside on the ground of disqualification of the magistrate costs are not generally given against him. *R. v. Meyer*, 1 Q.B.D. 173; but they may be if he has been guilty of some gross impropriety in the exercise of his summary jurisdiction. *R. v. Goodall*, L.R. 9 Q.B. 557, per Cockburn, C.J.; *R. v. Klemp* (1885), 10 Ont. R. 143, 158.

*Mere possibility of bias not enough to disqualify*—

Though any pecuniary interest, however small, in the subject matter disqualifies a justice from acting in a judicial inquiry, the mere possibility of bias in favour of one of the parties does not *ipso facto* avoid the justice's decision; in order to have that effect the bias must be shown at least to be real. If a justice has such an interest as might give him a real bias in the matter, he should not only take no part in the decision, which would render it void, but should entirely withdraw during the whole case. *R. v. Myers*, 1 Q.B.D. 173; *R. v. Rand*, L.R. 1 Q.B. 230; 35 L.J.M.C. 157; *R. v. Sunderland justices*, [1901] 2 K.B. 357; 70 L.J.K.B. 946, 599.

If the mere fact of existing litigation is relied on as the disqualification of a presiding justice on the ground of bias, the litigation must be really pending. Service of a notice of action not followed by an action is not sufficient. *Rex v. Byron*, 37 N.B.R. 383; *R. v. Kay*; *Ex parte Gallagher*, 38 N.B.R. 498, 14 Can. Cr. Cas. 38; *R. v. Batson* (1906) 1 E.L.R. 364.

The court will inquire into the circumstances and ascertain whether an action brought by the applicant against the justice reasonably leads to the inference of bias. *Ex parte Scribner*, 32 N.B.R. 175.

Calling one of the magistrates as a witness will not alone disqualify him. *R. v. Sproule*, 14 Ont. R. 375.

*Relationship to prosecutor may disqualify magistrate*—

The justice is disqualified if his son is the prosecutor and would be entitled in the event of a fine being imposed to a share of the fine. *R. v. Longford*, 15 Ont. R. 59.

It was held in *Ex parte Wallace*, 27 N.B.R. 174, that a justice was disqualified from hearing a case against his daughter-in-law after the death of her husband, the death of the husband not having affected the relationship between the justice and his son's widow. In *Ex parte Jones*, 27 N.B.R. 552, the conviction was quashed where the grandfather of the justice was a brother of the defendant's great grandfather, following the common law principle that judicial officers should not act if related within the ninth degree of consanguinity. The reason usually given for this rule is that such relationship may reasonably create a bias in favour of the party with whom the relationship exists. But Hanington, J., in *Ex parte McEwan*, 12 Can. Cr. Cas. 97, said that perhaps that is too limited a reason.

But the magistrate is not disqualified because he and the prosecutor are married to sisters. *R. v. Major*, 29 N.S.R. 273.

Where one of the magistrates trying several connected charges of assault was married to a first cousin of one of the complainants, and the other complainants were acting as servants of the related complainant in the matter in which the assault arose, all the convictions were set aside on the ground of affinity. *Campbell v. McIntosh* (1872), 1 P.E.I. Rep. 423.

*Application of Part.*

**Applies within authority of Parliament to all cases of summary conviction.**—To all cases where an order can be made summarily.

**706.** Subject to any special provision otherwise enacted with respect to such offence, act or matter, this Part shall apply to,—

- (a) every case in which any person commits, or is suspected of having committed, any offence or act over which



the Parliament of Canada has legislative authority and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment;

- (b) every case in which a complaint is made to any justice in relation to any matter over which the Parliament of Canada has legislative authority, and with respect to which such justice has authority by law to make any order for the payment of money or otherwise.

*Origin*—Sec. 840, Code of 1892; R.S.C. 1886, ch. 178, sec. 3.

*"Subject to any provision"*—Whenever by the same clause of a statute an offence is declared and a special mode of prosecution for such offence is provided, that mode is presumed to be exclusive. So a theft of growing trees of a value of less than \$25 from farm woodland is not an indictable offence, but a matter of summary conviction under Code sec. 374, except for a third offence, as thereby provided. *R. v. Beauvais*, 7 Can. Cr. Cas. 494.

*Legislative authority*—The procedure of Part XV will apply "subject to any special provision otherwise enacted," where the Parliament of Canada has legislative authority. So an appeal from a summary conviction under the Lord's Day Act in force in Nova Scotia prior to Confederation and remaining unrepealed is controlled by the provisions of Part XV and not by the Provincial Summary Convictions Act as the subject of Sunday Observance is a part of the criminal law. *R. v. Bellefontaine*, (1914) 22 Can. Cr. Cas. 140; *Attorney-General v. Hamilton By. Co.* (1903) 7 Can. Cr. Cas. 331, [1903] A.C. 524; *Ouimet v. Bazin*, 20 Can. Cr. Cas. 458, 46 S.C.R. 502; *R. v. Laity*, 21 Can. Cr. Cas. 417, 18 B.C.R. 443.

*Sub-sec. (b)*—"Authority to make any order for the payment of money or otherwise"—The Indian Act, R.S.C., ch. 81, makes provision for the seizure of trees cut without authority on Indian lands or on a reserve. Any officer or agent acting under the superintendent general of Indian affairs may make the seizure in the name of the Crown, and the power of seizure includes the wood or other products of the trees. Any judge of any superior, county or district court, or any stipendiary magistrate, police magistrate or Indian agent, is authorized by sec. 85 of that Act to try and determine such seizures in a summary way under the provisions of Part XV of the Criminal Code.

*Animal Contagious Diseases Act*—Offences under this statute, R.S.C., ch. 75, are by sec. 48 thereof to be prosecuted before any two justices of the peace or any magistrate having the power of two justices of the peace. This is an example under the first sub-sec. of sec. 707 of a direction by the Act or law upon which the information is framed that two justices must hear the case.

*Canada Temperance Act*—See R.S.C. 1906, ch. 152; statutes 1908 Canada, ch. 71; 1910 Canada, ch. 58; 1914 Canada, ch. 53; 1916 Canada, ch. 14.

*Dairy Industry Act, 1914, Can.*—Special enactments are made by this statute as to summary prosecutions for offences such as the sale of deteriorated or diluted milk to a milk bottling establishment or to manufacturers of dairy products. The same Act deals with the offences of making and selling butter substitutes, oleomargarine, butterine, etc., and of re-manufacturing butter to produce "process butter," or "renovated butter," and the sale of "skimmed milk cheese." 4-5 Geo. V, (Can.), ch. 7.

*Department of Railways and Canals*—By the Department of Railways and Canals Act, R.S.C., ch. 35, sec. 29, all pecuniary penalties imposed thereunder or by any regulation made under the authority of that Act shall be recoverable with costs before any justice of the peace for the district, county, or place in which the offence was committed, under Part XV of the Criminal Code, and if sufficient distress cannot be found, and such penalty is not forthwith paid, such justice may, by warrant under his hand and seal, cause the person offending to be imprisoned for such term as such justice directs, not exceeding thirty days, unless such penalty and costs are sooner paid.

*Electric Light Inspection Act*—See the special provisions regulating procedure in offences against this statute in R.S.C., ch. 88, secs. 37 and 38.

*Fisheries Act, 1914, Canada*—Except in so far as in the Fisheries Act is otherwise specially provided, all penalties and forfeitures incurred under it are enforceable under Part XV of the Criminal Code.

*Fish Inspection Act, Canada*—Penalties under this Act, 4-5 Geo. V, ch. 45, effective from May 1, 1915, are enforceable by sec. 29 thereof on summary conviction under Part XV of the Criminal Code.

*Gold and Silver Marking Act*—Offences are punishable on summary conviction and minimum penalties provided, Can. Stat. 1913, ch. 19; Can. Stat. 1915, ch. 15; Can. Stat. 1918, ch. 23.

*Immigration Act Regulations*—These regulations are enforceable by summary conviction. See Orders-in-Council of 5 May, 1913 and 10 May, 1913, printed with 1914 Canada Statutes (page 52 of Orders).

*Indian Reserve Regulations*—Part XV of the Criminal Code applies to proceedings for the imposition of punishment under regulations made by Indian chiefs in reference to the control of Indian reserves under sec. 98 of the Indian Act, R.S.C., ch. 81.

*Inland Revenue Act*—See R.S.C. 1906, ch. 51, and amending Acts; B. v. Young [1917] 3 W.W.R. 1066, 24 B.C.R. 482.

*Inspection and Sale Act, Canada*—For offences punishable on summary conviction under the Inspection and Sale Act (Can.), see R.S.C. 1906, ch. 85, and amending Act, 4-5 Geo. V, ch. 36, in force January 1, 1915.

*Intoxicating Liquors Act, Can.*—Offences are punishable on summary conviction. 6-7 Geo. V, Can., ch. 16, sec. 3; 7-8 Geo. V, Can., ch. 30.

A prosecution for any offence under this Act may be brought and carried on and a conviction had in the city, town or other place from which any intoxicating liquor is unlawfully sent, shipped, taken or carried as aforesaid. 7-8 Geo. V, Can., sec. 2, adding secs. 4A, 4B, 4C and 4D to the principal Act.

*Migratory Birds Convention Act*—Offences are punishable on summary conviction, Can. Stat., 1917, ch. 18, sec. 12; Convention with U.S.A., December 7, 1916, for the protection of migratory birds in Canada and the United States.

*Montreal Pilots Court*—This court has the jurisdiction and powers of a stipendiary or police magistrate for offences under Part VI of the Shipping Act, R.S.C., 1906, ch. 113, punishable by summary proceedings of Part XV of the Code. See sec. 528 of the Shipping Act. Penalties imposed under Part VI of the Shipping Act may be prosecuted summarily before a stipendiary magistrate, police magistrate or two justices of the peace, or by civil action. See sec. 560 of the Shipping Act.

*North-West Territories*—Unless otherwise therein specially provided proceedings for enforcing any Territorial Ordinance to the North-West Territories by the fine, penalty or imprisonment, may be brought summarily before the justice of the peace under the provisions of Part XV of the Criminal Code.

*Shipping Act*—Part XV of the Code is to apply to and govern summary proceedings under the Shipping Act, R.S.C. 1906, ch. 113.

*Timber Culling in Ontario and Quebec*—As to summary proceedings under Part XV of the Code, see the Cullers Act, R.S.C., ch. 84, sec. 54.

*Tobacco Restraint Act*—The Statute 7-8 Edw. VII, Can., ch. 73, provides for the enforcement by summary conviction of its provisions against the use of tobacco by juveniles and for the regulation of the use of automatic vending machines so that they may not be used by children under sixteen to procure tobacco products.

*War Charities Act, 1917*—Summary conviction procedure applies, but proceedings, except for offences against sec. 9 (protection of badges), are not to be instituted except with the consent of the Secretary of State of Canada or the Minister assigned to exercise powers under the Act.

*War Revenue Act, 1915*—This affects the sale of drug preparations and provides for stamps being affixed to the packages, etc. 5 Geo. V, Can., ch. 8; *Patenaude v. Dubé*, 26 Que. K.B. 431; *Minister of Inland Revenue v. Nairn*, 11 O.W.N. 422, 28 Can. Cr. Cas. 1; *Ethier v. Minister of Inland Revenue*, 27 Can. Cr. Cas. 12 (Que.).

*Water Meters Inspection Act*—Penalties are recoverable under this statute on summary conviction before one justice of the peace if the

penalty does not exceed twenty dollars, and before two justices of the peace if the penalty does exceed twenty dollars, R.S.C., ch. 89, sec. 33.

*Weights and Measures Act*—Subject to the provisions of the Weights and Measures Act, R.S.C., ch. 52, Pt. XV of the Code applies to all prosecutions for penalties thereunder.

*White Phosphorus Matches Act, Canada*—Penalties under this Act, 4-5 Geo. V (Can.), ch. 12, are recoverable on summary conviction. Sec. 5 prohibits the sale or use of matches made with white phosphorus.

### *Jurisdiction.*

**Hearing to be by one or more justices.—May be by one justice unless special Act provides otherwise.**

**707.** Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf.

2. If there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose: Provided that every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling or procuring was committed.

*Origin*—Sec. 842, Code of 1892; R.S.C. 1886, ch. 178, sec. 4.

*Every complaint and information*—The words "every complaint or information" mean a complaint or information under the summary convictions clauses. *R. v. Edwards* (1898), 2 Can. Cr. Cas. 96, 100 (Ont.).

*Mandamus to justice to hear and determine*—In cases where a magistrate has authority to hear and determine a matter, but refuses to do so to the frustration of justice, the court has jurisdiction in the exercise of its mandatory authority to direct him to hear and determine. But while the case is under consideration by him the court will not issue a mandamus to control his conduct of the case, or to prescribe to him the evidence which he shall receive or reject as the case may be. *R. v. Carden* (1879), 5 Q.B.D. 1, 5; *R. v. Connolly* (1891), 22 Ont. R. 220, 226; *R. v. Case*, 7 Can. Cr. Cas. 204; and see *Wong Tun*, 10 W.W.R. 15; *R. v. Fields* [1917] 1 W.W.R. 149 (Alta.); *Collison v. Kokatt* (1915), 8 W.W.R. 561, 32 W.L.R. 245.

Where an applicant seeks relief by way of prerogative order of mandamus the proceedings should be styled in the name of the sovereign *ex relatione* the applicant against the respondent; in such a case the applicant must have a legal right to the performance of some duty of a public, and not merely of a private, character, and there must be no other effective lawful method of enforcing his rights. *Frankel v. Winnipeg*, 3 W.W.R. 405, 23 Man. R. 296; *Hutchings v. Canada National* [1917] 2 W.W.R. 41; and see sec. 576 and notes to same.

"*Heard, tried, determined and adjudged*"].—Where two justices are required by the special Act, both must attend to give judgment; it is not enough for one to attend and read a conviction signed by both. *R. v. Haines, ex parte McCorquindale* (1908), 39 N.B.R. 49. But acts preliminary to the hearing and subsequent to the adjudication may be done by one justice. Code sec. 708.

If, on the hearing, counsel for the complainant and for the accused agree that judgment may be served without fixing a date for same, other than that the decision shall be given within one week, and shall be notified to the respective solicitors, and the magistrate acquiesces in and conforms to such arrangement, he does not thereby lose jurisdiction, and a conviction made within the week should not be set aside. *R. v. McKenzie*, 44 N.S.R. 474, 17 Can. Cr. Cas. 372.

It is not competent for magistrates, where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information. *R. v. Dungey*, 5 Can. Cr. Cas. 38, 2 O.L.R. 223.

"*By one justice or two or more justices as directed*," etc.]—Apart from any statutory provision a charge need not be laid or dealt with by the nearest justice. *R. v. Tally*, (1915) 7 W.W.R. 1178.

Where two justices are specified in the special Act, they may ask another or others to sit with them and take part in the trial. Such statutes are construed as providing a minimum number of justices and not as interfering with a recognized practice to call in other justices. So also where a single justice may try the case as he may where there is no direction to the contrary, it is held that he may call in other justices to sit with him and assist in the adjudication, and a conviction made and signed by them all is valid. *R. v. Leconte*, 11 O.L.R. 418.

When an accused person is summoned to appear before a justice of the peace having jurisdiction to conduct the proceedings, other justices of the peace are not entitled to be associated with the summoning justice, except at the latter's request. *R. v. McRae* (1897), 2 Can. Cr. Cns. 49, 28 O.R. 569.

A summary conviction by the magistrate who summoned the accused and heard the charge will be supported, although three other magistrates attended the hearing and purported to dismiss the charge, if the latter

magistrates sat without the request or consent of the summoning magistrate. *R. v. McKae*, supra.

Under various statutes of special application certain officials have the powers of two justices as regards prosecutions under the special statute affecting his line of duty, for instance the Indian Act.

Summary conviction before two justices of the peace, with a penalty of from \$50.00 to \$1,000.00, is provided under the Immigration Act, R.S.C., ch. 93, sec. 45, for false representation to induce or deter immigration into Canada.

A parish court commissioner appointed under the laws of New Brunswick with the power of two justices of the peace is authorized to try prosecutions under the Canada Temperance Act and is a "magistrate" under sec. 131 thereof, which confers jurisdiction on magistrates having the power of two justices. *Ex p. Monahan*, 17 Can. Cr. Cas. 53, sub nom. *R. v. Alexander*, *Ex parte Monahan*, 39 N.B.R. 430.

*Judicial acts of magistrate must be done within territorial jurisdiction*—A justice of the peace cannot exercise his judicial functions outside the limits of his territorial jurisdiction. *R. v. Hughes*, 17 N.S.R. 194.

*"Territorial division where the matter of the complaint or information arose"*—These words in the second sub-sec. of sec. 707 apply to fix the venue if there is no direction to the contrary contained in the statute which declares the offence or in some other law applicable to the case; see *R. v. Dowling*, 17 Ont. R. 698. An example of a more extended jurisdiction is contained in the Animal Contagious Diseases Act, R.S.C. (1906), ch. 75, under sec. 47, of which it is directed that offences against that Act or against official regulations made thereunder may be prosecuted or tried either in the place in which such offence was committed or in any place in which the person charged happens to be.

A summary conviction for an offence in the magisterial district is not supported by evidence which designates the locality of the offence by a name which applies to a section of country extending partly within the limits of the magisterial district and partly outside of such limits; it will not be presumed that the portion of the designated locality within the magistrate's jurisdiction was intended. *R. v. Oberlander* (1910) 16 Can. Cr. Cas. 245, 15 B.C.R. 134.

The creation by statute of a new judicial district gives to the officers of the new district exclusive jurisdiction, and there is not concurrent jurisdiction remaining in judicial officers of the former territory from part of which the new district was formed. *R. v. Harrington* (1910), 17 Can. Cr. Cas. 62, 16 O.W.R. 169.

*Provincial justices bound by duties imposed by federal law*—The decision in *re Vancini*, 34 S.C.R. 621, must be accepted as affirming the principle that the Dominion Parliament can, in matters within its sphere, impose judicial duties upon any subjects of the Dominion.

whether they be officials of provincial courts, other officials or private citizens. *R. v. Le Bell* (1909) 39 N.B.R. 468, 475.

A federal law may confer trial jurisdiction upon justices in respect of offences under federal authority, although the justices are appointed by the province and not by the Dominion. *R. v. Whipper*, 34 N.S.R. 202; *re Vancini*, 34 S.C.R. 621.

*Magistrate with power of two justices*—See Code secs. 2 (18) and 604. Sub-section (2) of sec. 18 declares that a "justice" means a justice of the peace, and also a police magistrate, a stipendiary magistrate, and any person "having the power or authority" of two or more justices of the peace. And by sec. 604 under the heading of "powers general of certain officials" (Part XII), police magistrates and district magistrates (*inter alia*) and every magistrate "authorized by the law of the province in which he acts to perform acts usually required to be done by two or more justices," may do *alone* whatever is authorized by the Code to be done by any two or more justices.

A stipendiary magistrate is none the less a justice of the peace because he receives a stipend, nor is he any the less a justice because the policy of the legislature has been to give him the powers of two justices in order to facilitate the transaction by him of the business which would otherwise fall on the other justices. *R. v. McFadden* (1885), 6 N.S.R. 426.

The fact that a man is a police magistrate does not debar him from calling in another justice of the peace to sit with him in a case where two justices or a magistrate with powers of two justices are required; and there is nothing to oust the general jurisdiction of justices in the fact that a stipendiary magistrate has been appointed for the district, if his authority is not specifically made exclusive. *R. v. Irwin*, 16 O.L.R. 454.

Where a magistrate with the powers of two justices is presiding and another justice sits with him, but withdraws from taking any part in the decision on their differing in opinion, the conviction by the stipendiary alone will be authorized if he might legally have conducted the hearing alone. *R. v. Thomas, ex parte O'Hare* [1914] 1 K.B. 32, 23 Cox C.C. 687.

*Substitute justices empowered for emergencies*—Where justices make a summary conviction which they have jurisdiction to make only if acting at the request of the police magistrate, or in case of his absence or illness, the conviction should properly show on its face the fact on which their jurisdiction depends. *R. v. Ackers* (No. 3), 16 Can. Cr. Cas. 222, 21 O.L.R. 187; *R. v. Duerling*, 2 O.L.R. 593, 5 Can. Cr. Cas. 135. But the defect may not be fatal. Code secs. 1120, 1124, *R. v. Ackers*, 21 O.L.R. 187; *R. v. Tally* (1915), 7 W.W.R. 1178, 23 Can. Cr. Cas. 449 (Alta.); *R. v. McGregor*, 26 Ont. R. 115, 2 Can. Cr. Cas. 410; *R. v. Perrin*, 16 Ont. R. 446.

A deputy stipendiary in Nova Scotia appointed by a town council under R.S.N.S., ch. 71, sec. 115, has jurisdiction only in the event of the stipendiary's absence from town or of incapacity, through illness, interest, or otherwise, of the stipendiary. *R. v. Morris*, 16 Can. Cr. Cas. 1 (N.S.).

The city of Moncton Incorporation Act, 53 Vict. (N.B.), ch. 60, sec. 65, provided that a sitting magistrate may act for the police magistrate of the city of Moncton when he is temporarily absent or ill, or "is any way disqualified by being a witness, or from relationship or otherwise." It was held that a conviction by a sitting magistrate stating that he was acting for the police magistrate, "he being disqualified," and not alleging the grounds of disqualification, was sufficient on its face. *R. v. Steeves; Ex parte Gallagher*, 39 N.B.R. 4, 15 Can. Cr. Cas. 239.

A statute authorizing another magistrate to act in the place of a police magistrate in the latter's "absence" is to be construed as conferring jurisdiction in a case in which the police magistrate was unable to preside because his attendance was required before another tribunal and asked the other magistrate to sit for him, and this notwithstanding the presence of the police magistrate in the courtroom during a part of the proceedings. *Ex parte Cormier* (1909) 17 Can. Cr. Cas. 179 (N.B.); *Brunet v. The King* (1918) 57 S.C.R. 83, 30 Can. Cr. Cas. 16.

In *Cormier's* case an affidavit of the police magistrate was read, giving his reasons for being absent and saying that in consequence of his enforced absence from the court he asked the sitting magistrate to attend to the business of the court. The absence intended by the Act, 53 Vict. (N.B.), ch. 60, sec. 65, is not actual absence from the jurisdiction or even from the place of trial, but it includes inability to attend to the business of the court, through his necessary attendance at an official enquiry under a commission.

Absence may mean absence from the bench, not necessarily absence from the court or jurisdiction. *Brunet v. The King*, 57 S.C.R. 83; *Bryne v. Arnold*, 24 N.B.R. 161 at p. 164; *Reg. v. Perkin*, 7 Q.B. 165; and see *ex parte Gallagher*, 39 N.B.R. 4; *Beg. v. McDonald*, 5 Can. Cr. Cas. 97. It is an ambiguous term; *Brunet v. The King*, *supra*; and in some cases may, and in others may not, import prior presence. *Brunet v. The King*, *supra*; *Asbury v. Ellis* [1893] A.C. 339, 345; *Buchanan v. Rucker*, 9 East 192.

Where the statute confers powers on the substitute magistrate in case of the other's "absence or inability to act," the word absence should be construed as meaning something different from "inability to act"; and as connoting physical non-presence from whatever cause. *Brunet v. The King*, (1918) 57 S.C.R. 83. 30 Can. Cr. Cas. 16, 24; see 5 Geo. V (Que.), ch. 52, sec. 3, R.S. Que., art. 3262 (a).

Where a magistrate refrains from trying a case on the ground of personal objection on the part of a relative of the accused, he may be



taken to have inferentially consented and requested the magistrate, who did actually try the case, to so do. *R. v. Tally* (1915) 7 W.W.R. 1178.

*Magistrates appointed with exclusive jurisdiction*—The appointment of a county police magistrate does not necessarily supersede a like previous appointment of another person, but both will have jurisdiction unless the latter appointment is expressed to be in the place and stead of the former. *R. v. Spellman* (1906) 12 Can. Cr. Cas. 99, 13 O.L.R. 43; and see *R. v. Holmes*, 12 Can. Cr. Cas. 235, 14 O.L.R. 124; *Hunt, qui tam, v. Shaver*, 22 A.R. (Ont.) 202; *Robertson v. Freeman*, 22 U.C.Q.B. 298; *Smyth v. Latham*, 9 Bing. 692.

*De facto justices*—A conviction made by a *de facto* justice of the peace who, in good faith, exercises his function, will not be set aside although he has not complied with all the formalities relative to his qualification. *Hogle v. Rockwell*, 20 Que. S.C. 309.

As to *de facto* officers generally, see *O'Neil v. Attorney-General*, (1896) 26 S.C.R. 122, 1 Can. Cr. Cas. 303; *Handfield v. College of Physicians*, 45 Que. S.C. 140.

*Exclusive jurisdiction of first justice taking up the case*—It is a principle of law that where magistrates duly authorized act in any matter within their jurisdiction, their doing so excludes the jurisdiction of all other justices; and the acts of other justices, except in conjunction with the first, are void. *Glen on Summary Jurisdiction* (6th ed., 1887), page 32.

By statute ch. 5 of 1907 (Alta.), s. 9, amending the Act respecting police magistrates and justices of the peace (Alta.), it is enacted that: "Jurisdiction in any particular case shall exclusively attach in the first justice of the peace or where more than one justice is required the first justices to the required number duly authorized who has or have possession and cognizance of the fact: Provided that at the request of any such justice or at the unanimous request of any such justices where more than one justice is required any other justice or justices may take part in any case."

S. 9, s.s. (5) of ch. 13, 1906 (Alta.), declares that "It shall not be necessary for the police magistrate or justice who acts before or after the hearing to be the police magistrate or justice or one of the justices by whom the case is to be heard and determined."

Under the Alberta statutes it has been held that where a police magistrate requests another magistrate to take an information, and intimates that he will take sole charge of the rest of the case, the acquiescence of the magistrate is equivalent to a counter request that the police magistrate will take charge of the hearing. *R. v. Cruikshanks* (1914), 6 W.W.R. 524, 23 Can. Cr. Cas. 23, 7 Alta. L.R. 92, 27 W.L.R. 759.

*Presence of accused and jurisdiction over offence*—

In *Reg. v. Hughes*, 4 Q.B.D. 614, 48 L.J.M.C. 151, a warrant was issued informally and without oath; the defendant having no knowledge

of the defect, made no objection to the hearing of the charge. After being twice argued in the court for Crown cases reserved, it was decided that where a charge is made in the presence of the accused, who is then and there called to answer it, it is immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused is before them voluntarily or otherwise, or on a legal or illegal process. Later, Lord Coleridge, C. J., in commenting on the authorities cited for the above proposition, says in *Dixon v. Wells*, 125 Q.B.D. 249, 255, 59 L.J.M.C. 116: "First, in all the cases to which our attention has been called, there was no protest made by the person who appeared, and the courts said, applying a well-known rule of law expounded centuries ago, that faults of procedure may generally be waived by the persons affected by them. They are mere irregularities, and if one who may insist on them waives them, submits to the judge and takes his trial, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time. . . . Although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in *Reg. v. Hughes*, 4 Q.B.D. 614—although perhaps not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in *Reg. v. Shaw*, 34 L.J.M.C. 169, they seem to assume that if the two conditions precedent of the presence of the accused and jurisdiction over the offence were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in *Reg. v. Hughes*, although something like that is said in one of the cases."

It is pointed out in *re Paul* (No. 2) (1912), 2 W.W.R. 927, that the effectiveness of a protest is recognized both in *Dixon v. Wells*, *supra*, and in *Pearks v. Richardson* [1902] 1 K.B. 91, 71 L.J.K.B. 18.

Even if the defendant had not by entering upon a full defence waived the irregularity in the summons and his right to an adjournment (sec. 724), the refusal of an adjournment would not go to the jurisdiction; *R. v. Le Bell*, *ex parte Farris* (1910), 39 N.B.R. 468, 473; unless under circumstances which made it a denial of the right to make defence and contrary to natural justice. *R. v. Irving*, 18 O.L.R. 320, 14 Can. Cr. Cas. 489.

*R. v. Hughes*, *supra*, was applied in *R. v. Hanley* (1917), 41 O.L.R. 177, 30 Can. Cr. Cas. 63, to a prosecution under a provincial law, it being held that it was unnecessary because of the law laid down in *R. v. Hughes*, to consider an objection raised to a summary conviction under the Ontario Temperance Act, 6 Geo. V, Ont., ch. 50, sec. 41, on the ground of the accused having been wrongfully arrested without warrant.

See also *ex parte Giberson*, 34 N.B.R. 538; *R. v. Hurst*, 7 W.W.R. 994, 23 Can. Cr. Cas. 389; *re Paul* (No. 1), (1912) 2 W.W.R. 892.

*Commissioners of Dominion police*—The Dominion Police Act, R.S.C. 1906, ch. 92, authorizes the appointment under federal authority of commissioners of police for any district territory or province, but provides that every such commissioner shall be subject, except as the Act provides otherwise, to the law of the particular province or territory respecting police magistrates and the office of justice of the peace. R.S.C. 1906, ch. 92, sec. 3. Each commissioner is to perform such duties as the Governor in Council may assign, and keep minutes of every proceeding had before him. Sec. 5.

Every such commissioner of police shall, for the purpose of carrying out the criminal laws and other laws of Canada only, have and exercise, within the limits of his jurisdiction: (a) All the powers and authority, rights and privileges by law appertaining to justices of the peace generally; (b) within any province, all the powers and authority, rights and privileges by law appertaining to police magistrates of cities in the same province; (c) in any of the territories or districts of Canada, all the powers and authority, rights and privileges by law appertaining to stipendiary magistrates in the same district or territory. R.S.C. 1906, ch. 92, sec. 3.

The authority so conferred has been held to be within the legislative powers of Parliament. *Ex parte Le Bell*, 16 Can. Cr. Cas. 363, 39 N.B.R. 468; *re Vancini*, 8 Can. Cr. Cas. 228, 34 S.C.R. 621.

*Juvenile courts*—Where juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30, and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age.

*Nova Scotia magistrates*—Two justices of the peace appointed for the entire county and holding a session at the police office established in an incorporated town within the county under the Towns Incorporation Act, N.S., have concurrent jurisdiction with the stipendiary magistrate of the town to try a charge of selling intoxicating liquor in contravention of the Nova Scotia Temperance Act, 1910. *R. v. Coady*, 23 Can. Cr. Cas. 484; *R. v. Giovanetti*, 5 Can. Cr. Cas. 157, 34 N.S.R. 505.

*Ontario police magistrates*—Under the Police Magistrates Act, Ont., conferring power on the Lieutenant-Governor in Council to appoint police magistrates, the effective act of appointment is the Order-in-Council, and police magistrates so appointed have jurisdiction to act as such before their commissions are issued. *R. v. Reedy*, 18 O.L.R. 1, 14 Can. Cr. Cas. 256. A police magistrate for a town correctly describes himself as making the conviction as police magistrate, although, in making it, he was acting in his capacity as *ex-officio* justice of the peace for the district or county in which the town was situate. *R. v. Reedy*, 18 O.L.R. 1, 14 Can. Cr. Cas. 256.

A police magistrate can only sit as such within the limits of the territory for which he is appointed. When sitting elsewhere in the

county, by virtue of his *ex-officio* status as a justice of the peace under the Police Magistrates Act (Ont.) he may exercise the powers of two or more justices of the peace, though not then sitting as police magistrate. When sitting elsewhere than in the city or town for which he is police magistrate, though not divested of his individuality as a police magistrate, and, in fact, exercising jurisdiction because he is a police magistrate, and therefore *ex-officio* a justice of the peace for the county, his powers and jurisdiction are merely those of two or more justices of the peace; and what two or more justices of the peace are not authorized to do he may not do. If a police magistrate for a city or town were empowered to sit as and to exercise the functions and jurisdiction of a police magistrate throughout the entire county in which such city or town is situate, though his commission should purport to appoint him police magistrate for the city and town only, it would in fact make him police magistrate for the county and every part of it. This is not the effect of the statutory extension of his jurisdiction as a justice of the peace. *R. v. Holmes*, 14 O.L.R. 124, 12 Can. Cr. Cas. 235 at 239; *Begina v. Gully* (1891), 21 O.R. 219; *R. v. Riley*, 12 P.R. 98, 104; *R. v. McLean*, 3 Can. Cr. Cas. 323; *Hunt v. Shaver*, 22 A.R. 202; *R. v. Duerling*, 2 O.L.R. 593, 5 Can. Cr. Cas. 135.

*Quebec magistrates*].—Special powers are conferred by sec. 604 on certain judges and magistrates, including judges of the sessions courts at Montreal and Québec, to do alone whatever is authorized by the Code to be done by any two or more justices.

In the absence of a special enactment, the Court of King's Bench in Quebec has no concurrent jurisdiction to try offences punishable on summary conviction. *R. v. Beauvais*, 28 Que., S.C. 498, 7 Can. Cr. Cas. 494.

*Jurisdiction over corporations*].—Proceedings under Part XV may be taken against a corporation. Code sec. 720A (8-9 Edw. VII, Can., ch. 9, sec. 2); Interpretation Act, R.S.C. 1906, ch. 1; *R. v. Toronto Ry. Co.* (1898) 26 A.R. 491 (Ont.); *R. v. Dominion Coal Co.*, 41 N.S.R. 149. A decision *contra* in *ex parte Woodstock Electric Light Co.*, 34 N.B.R. 467, is superseded by the new sec. 720A.

**One justice may do all acts before and after hearing.—Justices must be present together when acting.**

**708.** Any one justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more justices.

2. After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon.

3. It shall not be necessary for the justice who acts before or after the hearing to be the justice or one of the justices by whom the case is to be or has been heard and determined.

4. If it is required by any Act or law that an information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices shall be present and acting together during the whole of the hearing and determination of the case.

*Origin*—Sec. 842, Code of 1892.

*"Justice"*—See definition in sec. 2 (18).

*Sub-sec. 3—Jurisdiction before and after hearing*—This enactment has reference to cases in which there is both a hearing and a determination of the information or complaint; and has no reference to preliminary enquiries for indictable offences, the procedure governing which is to be found in Part XIV. *Re Holman and Rea* (No. 2), 27 O.L.R. 432, 23 O.W.R. 428, 4 O.W.N. 434, 21 Can. Cr. Cas. 11, reversing *re Holman and Rea* (No. 1), 4 O.W.N. 207, 21 Can. Cr. Cas. 7.

Under sub-sec (3) it is not necessary that the justice who took the information should also try the charge when the proceedings are under Part XV of the Code. The statutory form of summons is one requiring the accused to attend before the justice issuing the same "or before such other justice or justices of the peace for the same county as shall then be there." Code form 5. The other justice must, however, have the necessary jurisdiction to act in respect of the particular case, and it is not unusual to find restrictions in that respect enacted by the provincial legislature under whose authority the appointments of justices, as well as of police magistrates, are made. So where jurisdiction is by a provincial law to attach exclusively to the first justice taking cognizance of the case, but at his request another justice may take part, an implied request is sufficient. *R. v. Tally*, 7 W.W.R. 1178 (Alta.); *R. v. Cruikshanks*, 6 W.W.R. 524 (Alta.); Alta. stat. 1907, ch. 5, sec. 9.

*Where special Act requires two justices for trial*—When two justices are required, both justices should attend on the delivery of judgment; a conviction signed by both during the adjournment and read by one of them in the other's absence on the day to which adjournment had been made is irregular. *R. v. Haines, ex parte McCorquindale*, 39 N.B.R. 49, 15 Can. Cr. Cas. 187. But sec. 708 enables the justice before whom the information was laid to adjourn the hearing of a summary conviction matter, although he would not alone have jurisdiction to try the case. *R. v. Miller*, 15 Can. Cr. Cas. 98, 19 O.L.R. 125; *R. v. Graves* (No. 2), 16 Can. Cr. Cas. 345.

*One justice may receive the information, although two required for trial under special Act*—The form of this enactment does not dispense with the necessity of both justices concurring in the direction for the issue of a summons although the signature of one justice is sufficient for the summons, if the special Act not only requires a trial before two justices, but that the information itself should be considered by two justices before issuing process thereon. *R. v. Ettinger*, 32 N.S.R. 176; *R. v. Hennessy, ex parte Pallen* (1907) 3 E.L.R. 427, overruling *ex parte White*, 34 N.B.R. 838.

**Assault or battery.—Title to lands coming into question.—Questions of insolvency or court process involved.**

**708.** No justice shall hear and determine any case of assault or battery, in which any question arises as to the title to any lands, tenements, hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

*Origin*—Sec. 842, Code of 1892; R.S.O. 1886, ch. 178, sec. 73; *Offences Against the Person Act*, 1861, Imp., sec. 48.

"Justice"—See definition in sec. 2 (18).

*Assault or battery*—This section is in terms limited to cases of assault or battery; but where the charge is for malicious damage to property or mischief, secs. 510-539, reference is to be had to the limitations of sec. 540 and 541 as to fair claim of right, colour of right, and trespasses in pursuit of game.

*When common assault otherwise a subject of summary conviction*—Code secs. 290, 291, 732-734.

*Assault involving realty rights*—When there is a *bona fide* claim of right material to the decision, as the justices have no jurisdiction to determine the existence of the right, they have no jurisdiction to determine whether in the case before them there has been an excessive user of the alleged right. *R. v. Cork Justices* [1913] 2 Irish R. 391; *R. v. Pearson*, L.R. 5 Q.B. 237.

The justice's jurisdiction is ousted if, by convicting, he would be settling a disputed property right actually raised by a claim which was not a frivolous one. *R. v. French* [1902] 1 K.B. 637; *Burton v. Hudson* [1909] 2 K.B. 564; *Talbot v. Dunne* [1914] 2 Irish R. 125; *Penwarden v. Palmer*, 10 Times L.R. 362; *R. v. Davidson*, 45 U.C.Q.B. 91 (Ont.).

The jurisdiction of the justice is not ousted if the assault was not committed in the assertion of any title to land or in the defence of any such title. *R. v. Shaw, ex parte Kane* (1915), 26 Can. Cr. Cas. 156.

It is not enough that a title to or an interest in land was being asserted by the alleged assault if the title was not disputed. *Lucan v.*

Barrett (1918), 84 L.J.K.B. 2130, 13 L.G.R. 1361, [1915] W.N. 257 (a school expulsion case).

*Prohibition for want of jurisdiction in justices*—See notes to sec. 706, 707.

*Information and Complaint.*

**When complaint need not be in writing.—Or under oath.—Each complaint for one offence or matter only.—May be laid by agent.**

**710.** It shall not be necessary that any complaint upon which a justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by the particular Act or law upon which such complaint is founded.

2. Every complaint upon which a justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may, unless it is by this Part or by some particular Act or law otherwise provided, be made or had without any oath or affirmation as to the truth thereof.

3. Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences.

4. Every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf.

*Origin*—Sec. 845, Code of 1892; R.S.C. 1886, ch. 178, secs. 23, 24, 26.

*Who may be informant*—Subject to any special statutes restricting the laying of informations, any information for a prosecution concerning public morals may be laid by anyone. *Giebler v. Manning* [1906] 1 K.B. 709.

*If warrant to issue information must be sworn*—Before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. *R. v. William McDonald*, 3 Can. Cr. Cas. 287 (N.S.); and see sec. 711; *R. v. Davis* (1912) 3 W.W.R. 1; Code sec. 654.

And if a sworn information is a pre-requisite to the jurisdiction of the magistrate under any special Act, any material alteration of the information will make it necessary that it should be re-sworn before the justice proceeds with the hearing. *R. v. Davis*, supra; *R. v. McNutt*, 3 Can. Cr. Cas. 184; *re Conklin*, 31 U.C.Q.B. 166.

*Jurisdiction*—Code secs. 706, 707.

*Sub-sec. (3); each complaint for one offence only*—The necessities of justice, as well as the provision contained in sec. 710 of the Criminal Code, require that a summary conviction must be for a single and certain charge; and where there is no need for giving evidence of other offences to prove intent, the charge and the evidence at any one trial should be confined to a single offence. *R. v. Roach* (1914), 23 Can. Cr. Cas. 28, 6 O.W.N. 632, distinguishing *Rex v. Sutherland*, 2 O.W.N. 595; and see *Reg. v. Hazen*, 20 A.R. 633 (Ont.) and *R. v. Alward*, 21 O.R. 519; *R. v. Farrar* (1890), 1 Terr. L.R. 308; *R. v. Mabey*, (1875) 37 U.C.Q.B. 248 (Ont.); *R. v. Hoggard*, 30 U.C.Q.B. 152; *R. v. Williams* (1876), 37 U.C.Q.B. 540; *Onley v. Gee*, 30 L.J.M.C. 222; *R. v. Hammick*, (1918) 87 L.J.K.B. 846; *R. v. Wood*, (1918) 87 L.J.K.B. 913.

An alternative description of the identical offence will not make an information or conviction invalid. *R. v. Leconte*, 11 Can. Cr. Cas. 41, 11 O.L.R. 408; *R. v. Irwing*, (1908) 14 Can. Cr. Cas. 489, 18 O.L.R. 320.

The opinion has been expressed that a seaman's "desertion and refusing duty" may be treated as one offence under the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, as amended by Canada statutes 1907, ch. 46. *Re Dalton* (1916) 26 Can. Cr. Cas. 142 (N.S.).

An information or a summary conviction is not to be held to charge two offences or to be uncertain, merely on account of its stating "the offence" to have been committed in different modes or in respect of one or other of several articles either conjunctively or disjunctively. Sec. 725; and see *R. v. Brine*, 8 Can. Cr. Cas. 54.

But sec. 725 does not go to the extent of saying that the conviction will be good where it charges the accused with committing one or other or both of two offences which are quite separate and distinct from one another and are not merely the same offence committed in one or other of two different ways. *R. v. Toy Moon* (1911), 1 W.W.R. 50, 53 (Man.), per *Perdue, J. A.*

*Intermixing of trials in summary matters*—Courts do not give any countenance to the notion that justices may mix up two or more criminal charges and convict or acquit in one of them with any reference to the facts appearing in the others. *R. v. Austin*, 10 Can. Cr. Cas. 234, 1 W.L.R. 571. Such a course would be contrary to law; and undoubtedly as a general rule it will be prudent and right for justices to avoid any course which reasonably bears the aspect of such a mistake. *R. v. Steeves, ex parte Richard*, 42 N.B.R. 596, 24 Can. Cr. Cas. 183. On the other hand, courts should be equally sorry to throw any doubts upon the rights of justices, in any case, for reasons of justice arising out of the circumstances of the case itself, and for its better determination to adjourn or postpone their decision; and if their discretion in this respect be honestly exercised, and not, directly or indirectly, with a view of throwing in facts or evidence which have no legitimate bearing upon



their decision, it must not be interfered with. *R. v. Steeves, ex parte Richard*, supra; *Reg. v. Fry* (1898), 19 Cox C.C. 135, 67 L.J.Q.B. 712, per Wills, J. In *R. v. Fry* there were several charges against the same defendant, but the justices in adjudicating in each case applied to that case the evidence that was given with reference to it and no other. It was held the postponement by the justices of the decision in the first case, until they had disposed of the other cases, did not under the circumstances render the decision in the first case bad in law. *Reg. v. Fry* has been followed in *ex parte Perkins* (1890), 30 N.B.R. 15, and in *Rex v. Alexander, ex parte Monahan* (1909), 17 Can. Cr. Cas. 53, 39 N.B.R. 430.

In *Reg. v. Marsh, ex parte Tennant* (1886), 25 N.B.R. 371, it was held that the onus was on the defendant to prove that the several cases were identical. Where the charges were different as to time and place, taking evidence upon another charge against the same accused, pending the adjournment of the hearing of a former charge, and after part of the evidence therein had been taken, was held not to invalidate the conviction. *R. v. Bullock* (1903), 8 Can. Crim. Cas. 8, 6 O.L.R. 663. See *Rex v. Sing* (1902), 6 Can. Cr. Cas. 156.

Where there is any doubt or discrepancy as to what actually took place, or as to the action of the magistrate in matters of routine, the presumption that all was done rightly should prevail. *Rex v. Hamlink*, (1912) 19 Can. Cr. Cas. 493; *R. v. Strachan*, 20 U.C.C.P. 182 (Ont.); *R. v. Steeves, ex parte Richard*, 42 N.B.R. 596, 24 Can. Cr. Cas. 183; *Reg. v. Bolton* (1841), 1 Q.B. 66.

In *R. v. Reid*, 12 Can. Cr. Cas. 352, the defendant was tried before a stipendiary magistrate on two charges, one of assault and one of pointing a firearm at the complainant. Both charges were tried before any decision was given on either of them, and the magistrate then proceeded to convict defendant for the assault and acquit him on the second charge. It was contended that this was illegal under the decision in *The Queen v. McBurney* (1897), 3 Can. Cr. Cas. 339, and *The Queen v. Burke*, 8 Can. Cr. Cas. 14, both of them decisions of the Supreme Court of Nova Scotia.

Following the English decisions in preference, Russell, J., held that where the offence was clearly proved and no evidence was offered in exculpation, he was not bound to hold the conviction bad on account of the irregularity in trying both cases together, simply because of the shadowy possibility that the judgment of the magistrate may have been influenced against the prisoner by his examination in his own defence on the second charge and his cross-examination by the counsel for the prosecution. Compare *R. v. Fry*, 19 Cox C.C. 135, and *Hamilton v. Walker* [1892] 2 Q.B. 25.

In *R. v. Tally*, 7 W.W.R. 1178, 23 Can. Cr. Cas. 449 (Alta.), separate charges of common assault against each of the defendants were tried together without the consent of the defendants; but the depositions

showed that, had the cases been tried separately, the evidence would have been identical in each case; that the assaults, charged separately against each defendant, both took place as part of one and the same occurrence. Under these circumstances the court on *certiorari* held that no possible injustice could be done to either defendant, and applying the reasoning in the cases of *R. v. Fry*, 19 Cox C.C. 135, 62 J.P. 457, and *The King v. Lapointe*, 20 Can. Cr. Cas. 98, the convictions should stand as against this objection, at all events as it did not appear that any exception was taken at the hearing to this course being taken.

As to taking exception at the trial, see *R. v. Alward*, 25 Ont. R. 519; *R. v. Hazen*, 20 A.R. 633 (Ont.); *R. v. Austin*, 1 W.L.R. 571.

*Waiver of sworn information*—Although a sworn information is necessary to enable the justice to issue a warrant in the first instance, a defendant may so conduct himself upon the trial as to forfeit the right to insist that a *certiorari* shall issue to quash a summary conviction founded upon an unsworn information. *R. v. McNutt*, 3 Can. Cr. Cas. 184 (N.S.). The question of jurisdiction, founded upon the alleged defect, must have been distinctly raised before the magistrate. *Ibid.*; *R. v. McMillan*, 2 Pugs. N.B. 112; *R. v. Mason*, 29 U.C.Q.B. 433; *R. v. Clark*, 20 Ont. R. 642.

Likewise, a defect in not stating particulars of the offence may be waived by plea made without taking exception. *R. v. Ballentine* (1914), 14 E.L.R. 278, 22 Can. Cr. Cas. 385 (N.B.).

*Joinder of defendants*—In *R. v. Littlechild*, L.R. 6 Q.B. 293, it was held that it was in the discretion of the justices to join all the defendants in one information for using a gun on Sunday and that each was liable for the full penalty. The justices might try the defendants together or separately and make out separate convictions. And where two persons who had used nets together were convicted in separate penalties on separate information, but the two cases were heard as one, it was held that the hearing was irregular, but not an excess of jurisdiction warranting a *certiorari*. *R. v. Staffordshire*, 23 J.P. 486; and see *R. v. Hagerman*, 31 Ont. R. 637; *re Roske and Messenger*, [1919] 1 W.W.B. 341.

Two persons separately summoned for an assault on the same person and on the same occasion, but charged at the hearing with a joint assault, may be tried together on such a charge notwithstanding that the defendants object to the two charges being taken as one. *Re Brighton Stipendiary Magistrate* (1893), 9 Times L.R. 522.

*Information by agent of a society*—Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings. *Canadian Society v. Lauzon*, 4 Can. Cr. Cas. 354.

*Describing the offence*—The Code recognizes that popular language

may be used in indictments, and the same rule should be extended to summary proceedings. Code sec. 852; *R. v. Darroch* (1916), 27 Can. Cr. Cas. 402, per Boyd, C.

The description of any offence in the words of the Act or regulation creating the offence, or any similar words, is sufficient in law, Code sec. 723 (3); compare as to indictable offences sec. 852. And the justice, if satisfied that it is necessary for a fair trial, may order that the prosecutor give further particulars. Code sec. 723 (2); compare, as to indictments, secs. 859, 860.

The nature of the crime need only be described in the words of the statute creating it, but time and place and manner are to be specified. *Smith v. Moody* [1903] 1 K.B. 56, 72 L.J.K.B. 43; *re Effie Brady* (1913) 3 W.W.R. 914, 23 W.L.R. 333, 21 Can. Cr. Cas. 123 (Alta.); *R. v. Leconte*, 11 Can. Cr. Cas. 41 (Ont.); *R. v. Trainor* [1916] 1 W.W.R. 415, 418 (under Code sec. 852).

There must be fair and reasonable particularity as to the nature of the offence; *Smith v. Moody*, *supra*; that is, such particulars as to the time, place and subject matter of the charge as with the statutory or other description of the offence also given, will show what the information is for. *Re Effie Brady* (1913), 3 W.W.R. 914, 23 W.L.R. 333, 5 Alta. L.R. 400, 21 Can. Cr. Cas. 123.

*Amending the information*—There is no express power to amend an information which is subject to Part XV; but after an amendment made, it may be treated as a new information. Certain defects and variances are declared by the Code not to be material; secs. 723-725; and the justice may order particulars. Sec. 723 (2). If the justice allows an amendment of a sworn information, it is a preferable practice in all cases to have the information re-sworn. But an information will not be invalidated by failure to have it re-sworn if it does not charge a new offence.

After an amendment which is of such a nature only as to give greater particularity or certainty to the charge and which does not lay a new charge as for a time and place materially different from the first or for a different kind of offence. *R. v. Tally*, 7 W.W.R. 1178 (Alta.). And even where the amendment to the information is of a character that it should be re-sworn, a demand for re-swearing should be made at the time or it may be treated as waived. *R. v. Tally*, 7 W.W.R. 1178 (Alta.), citing *R. v. Lewis*, 6 Can. Cr. Cas. 499, 5 O.L.R. 509.

*What defects not objectionable*—Code secs. 723-725.

*Defects in information cured by the depositions*—See secs. 724 and 1124.

*Certain provincial offences for which multiplicity is permitted*—As regards offences declared by provincial statutes, reference must be had to the statute itself or to the provincial law regulating summary

conviction procedure for offences within provincial legislative power. Many of the provinces have summary convictions statutes which expressly make applicable the procedure of Part XV of the Criminal Code to charges laid under provincial laws except in so far as the provincial statute otherwise declares.

Where a provincial liquor law expressly provided that several charges may be included in the one information and the magistrate adjudged the accused guilty on each charge, it is not necessary that separate convictions should be drawn up, and the fines in such case may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence. *R. v. Whiffin*, 4 Can. Cr. Cas. 141, and see *re Cross*, 4 Can. Cr. Cas. 173.

Where a summary conviction is in form for two separate offences where by statute two offences may be included, and it shows that the penalty adjudged is for both although within the legal limit for one, but one of the offences is defectively described in a manner not cured by statute, the conviction will be quashed on *certiorari*; it cannot be amended by striking out the offence defectively described, as the court has no power to make a fresh adjudication by apportioning the penalty which was discretionary with the magistrate. *R. v. Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.R. 299; *R. v. Aitken*, [1917] 2 W.W.R. 781, 11 Alta. L.R. 573.

*Offences involving a practice or carrying on of business*—The law does not contemplate a single act as constituting the practice of a profession or trade. *Apothecaries Co. v. Jones* [1893] 1 Q.B. 89 at 95; *R. v. Cruikshanks*, 23 Can. Cr. Cas. 23 at 26. So in founding a charge upon two specific acts of practice at different dates upon different persons, the information might more properly have charged the defendant with practising dentistry within the period of the first and second acts, and the specific acts would have constituted the evidence of the practising. *R. v. Cruikshanks*, *supra*.

But the practice of the profession of dentistry is shown by services for only one customer on different dates, *ex. gr.* the taking impressions of the gums and fitting the plates for artificial teeth. *R. v. Cruikshanks*, 23 Can. Cr. Cas. 23; *R. v. Raffenberg*, 15 Can. Cr. Cas. 297; *R. v. Armstrong*, 18 Can. Cr. Cas. 72.

The Quebec Game Laws, by Articles 1405 and 1410, in imposing a fine upon any person found in possession of an animal or part of an animal killed during close season, does not create as separate offences the possession by such person, at the same time, of several of such animals and of their skins. Consequently the person in whose possession are found 775 skins of beavers killed during close season, is liable for one offence only and subject merely to one penalty of from \$10 to \$25, and a conviction against him for 775 offences and 775 penalties is void. *Zimmerman v. Burwash*, 29 Que. S.C. 250.

*Summons and Warrant.*

**Compelling appearance.—Copy of warrant to be served.—Summons.**

**711.** The provisions of Parts XIII and XIV relating to compelling the appearance of the accused before the justice receiving an information for an indictable offence and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of this Part: Provided that whenever a warrant is issued in the first instance against a person charged with an offence punishable under the provisions of this Part, the justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

2. Nothing herein contained shall oblige any justice to issue any summons to procure the attendance of a person charged with an offence by information laid before such justice whenever the application for any order may, by law, be made *ex parte*.

*Origin*—Sec. 843, Code of 1892; R.S.C. 1886, ch. 178, secs. 13, 17, 21.

*Time limitation for 'summary conviction' prosecutions*—Code sec. 1142.

*No warrant if summons likely to be answered*—It is well established that except in very serious cases, justices ought not to issue a warrant in the first instance for an offence punishable by summary conviction, if a summons will probably be equally effectual in securing the appearance of the accused. *O'Brien v. Brabner*, 49 J.P. 227, 78 L.T.N. 409.

*No warrant without sworn information*—Code sec. 653, 654.

If the justice unlawfully issues a warrant of arrest without the sworn information required by law, he acts without jurisdiction and is liable in damages in an action for false arrest. *McCatherin v. Jamer*, 21 Can. Cr. Cas. 116, 41 N.B.R. 367, 11 E.L.R. 527.

*No warrant on mere information and belief without disclosing grounds*—If the information is one of mere information and belief that the accused has committed the offence, the magistrate may issue a summons, but not a warrant unless the grounds for the information and belief are either stated in the information or are disclosed to the justice on his further examining the informant *ex parte* on the application for process. *Ex parte Coffon*, 37 N.B.R. 122; *R. v. Lizotte*, 10 Can. Cr. Cas. 316; *R. v. Lorrimer*, 14 Can. Cr. Cas. 430 (N.S.);

*ex parte* Grundy, 12 Can. Cr. Cas. 65 (N.B.). It becomes the magistrate's duty so to examine the informant before issuing a warrant where the sworn information is one of mere information and belief which does not fix the informant's oath to allegations of facts and circumstances as distinguished from mere belief. *R. v. Lorrimer*, *supra*.

It would seem that an information made upon information and belief need not disclose the name of the informant's informant unless the magistrate requires it. *R. v. Swarts*, 37 O.L.R. 103, 10 O.W.N. 231, 27 Can. Cr. Cas. 90 (information for a search warrant for liquors under the Canada Temperance Act). On the application for process, whether for a summons or a warrant, in a summary matter, the justice is to satisfy himself that there is sufficient cause for issuing the process. *R. v. Kay, ex parte Dolan*, (1911) 26 Can. Cr. Cas. 171 (N.B.); *R. v. Shaw, ex parte Kane*, 26 Can. Cr. Cas. 156 (N.B.); *Murfin v. Sauve*, (1901) 6 Can. Cr. Cas. 275 (Que.).

He may be satisfied to issue a warrant on sworn information if it sets out sufficient allegations of fact, or he may further examine the informant as to his grounds of belief, and, if still unsatisfied, he may hear *ex parte* under sec. 655 witnesses produced by the informant to corroborate his story. *R. v. Lorrimer*, *supra*; *R. v. Mitchell*, (1911) 24 O.L.R. 324, 19 Can. Cr. Cas. 113; *ex parte Archambault*, 16 Can. Cr. Cas. 433 (Que.). Sec. 655, sub-sec. (1), applies to proceedings under Part XV as well as to preliminary enquiries. Sec. 711; *R. v. Lorrimer*, 14 Can. Cr. Cas. 430 (N.S.); *R. v. Kay, ex parte Dolan*, (1911) 26 Can. Cr. Cas. 171 (N.B.); *ex parte Madden*, (1908) 13 Can. Cr. Cas. 273. [Contra, see *R. v. Neilson*, 17 Can. Cr. Cas. 298 (N.S.).]

The justice is to decide as a judicial act whether he will issue a summons or a warrant. *Thompson v. Desnoyers*, (1899) 3 Can. Cr. Cas. 68, 16 Que. S.C. 253; *R. v. McGregor*, 26 Ont. R. 115; *R. v. Ettinger*, 32 N.S.R. 176; *R. v. Neilson*, 17 Can. Cr. Cas. 298 (N.S.).

*Formalities of warrant*—Code secs. 659-664; Code form 6.

*Copy warrant to be served in summary matter*—Sec. 711 (2). Failure to serve at the time of arrest does not go to the jurisdiction of the justice. *Ex parte Madden*, 13 Can. Cr. Cas. 273 (N.B.).

*Executing warrant of arrest on Sunday*—See sec. 661.

*Arrest to be by constable*—Code sec. 661 (2). The fact that the defendant was arrested and brought before the magistrate, who made the conviction, by a constable who was not qualified as required by a provincial law is no ground for a *certiorari*. The improper arrest does not go to the jurisdiction of the convicting magistrate. (*R. v. Hughes*, 4 Q.B.D. 614 applied.) *Ex parte Giberson*, 34 N.B.R. 538, 16 Can. Cr. Cas. 70; C.S.N.B., ch 99, sec. 69.

If the constable has a personal interest in the case, apart from his interest as an officer of the law, he should not be assigned to make the arrest. *R. v. Belyea* (1915) 43 N.B.R. 375.

According to a number of recent decisions an informant constable may execute process in his own case if he prosecutes in his official capacity and has no personal financial interest in the result other than a liability for costs and has no animosity towards the defendant. *R. v. Belyea*, (1915) 43 N.B.R. 375; *R. v. Swarts*, 37 O.L.R. 103, 27 Can. Cr. Cas. 90; *R. v. Lake*, (1916) 38 O.L.R. 262; *ex parte Dewar* (1909) 15 Can. Cr. Cas. 273 (N.B.), distinguishing *ex parte McCleave*, 35 N.B.R. 100, 5 Can. Cr. Cas. 115; and see *Gaul v. Ellice*, 6 Can. Cr. Cas. 15; *Stone v. Vallee*, 18 Can. Cr. Cas. 222 (Que.); *R. v. Lawlor, ex parte Doyle*, (1917) 27 Can. Cr. Cas. 60, 44 N.B.R. 244; *R. v. Heffernan*, (1887) 13 Ont. R. 616. [Contra, see *ex parte McCleave*, (1900) 5 Can. Cr. Cas. 115 (N.B.) (distinguished in *ex parte Dewar*, (1909) 15 Can. Cr. Cas. 273 (N.B.)); *re Kennedy*, (1907) 17 Can. Cr. Cas. 342 (P.E.I.).]

*Endorsement of warrant for execution in another magisterial jurisdiction*—Code sec. 712, 662.

*Summons to be signed by justice*—The summons is to be signed by the justice; Code form 5; but not in blank. Code sec. 658 (3). The defendant is not legally cited to appear when served with an unsigned summons. *Lamontagne v. Lanctot*, 25 Can. Cr. Cas. 449. But this, as well as other defects, may be waived by appearance and plea. *R. v. Kay, ex parte Dolan*, 41 N.B.R. 95, 26 Can. Cr. Cas. 171; *R. v. Thompson*, [1909] 2 K.B. 614; *Dixon v. Wells*, 25 Q.B.D. 249.

*Summons to be directed to the accused*—Code sec. 658; Code form 5, following sec. 1152. Although applied to for a summons only the justice is to satisfy himself that there is sufficient cause for his interference by summons. *R. v. Kay, ex parte Dolan*, (1911) 26 Can. Cr. Cas. 171 (N.B.). He may be satisfied to issue a summons upon an unsworn complaint or may insist upon a sworn information, and if the information does not contain absolute and positive statements leading to the offence such as he should credit for the purpose of issuing a mere summons, he may examine other witnesses *ex parte* as to the complaint. *Ex parte Madden*, 13 Can. Cr. Cas. 273 (N.B.); *R. v. Kay, ex parte Dolan*, (1911) 41 N.B.R. 95, 26 Can. Cr. Cas. 171.

If satisfied to issue a summons without hearing other evidence than that of the informant, or without more than the information as the basis, the justice is not compelled by sec. 655 (1) to give a preliminary hearing of other witnesses for the complainant on the application for process. *R. v. Mitchell*, (1911) 24 O.L.R. 324, 19 Can. Cr. Cas. 113; *ex parte Archambault*, 16 Can. Cr. Cas. 433 (Que.); *ex parte Madden*, 13 Can. Cr. Cas. 273 (N.B.).

*Summons to be served by constable or other peace officer*—Code sec. 658 (4). Irregularity in the service being made by a person not authorized by law, may be waived. *Ex parte Giberson*, 34 N.B.R. 538. It is good service if made by a constable holding over after the expiration of his term and until the appointment of his successor, if he is recognized as a *de facto* constable. *R. v. Pelley*, 27 Can. Cr. Cas. 405 (N.S.).

*Proof of service by oath or affidavit before a justice*—Code sec. 658 (5). The affidavit or oath of service is to be sworn before the justice, not before a commissioner to take affidavits in the provincial Supreme Court. *R. v. Pelley*, 27 Can. Cr. Cas. 405 (N.S.).

A justice has no jurisdiction to hear a complaint *ex parte* unless there is evidence before him to show that the defendant was served with the summons a reasonable time before the return. Sec. 718. A summons issued at ten o'clock in the morning, returnable the same day at one, does not allow the defendant a reasonable time to appear and defend, and a conviction and default of appearance founded on such a proceeding should be quashed on *certiorari*. *R. v. Wathen*; *Ex parte Vanbuskirk*, 38 N.B.R. 529, per Hanington; J.

*Substitutional service of summons*—The magistrate acquires no jurisdiction over the person of the defendant while he is out of the province, and a conviction made on service of the summons upon his wife at his last place of abode in the province (sec. 658), will be removed by *certiorari* and quashed on an affidavit made by the defendant that from a date prior to the laying of the information until after the hearing he had been continuously out of the province. *Ex parte Donovan* (1894), 3 Can. Cr. Cas. 286, 32 N.B.R. 374; *R. v. Dimond*, 9 Sask. L.R. 106, 33 W.L.R. 803, 25 Can. Cr. Cas. 107; *Ex parte Fleming*, 14 C.L.T. 106; *R. v. Webb* [1896] 1 Q.B. 487; *R. v. Farmer*, 61 L.J.M.C. 55. Where substitutional service is relied on, there must be proof that the person served for the defendant was an inmate of the defendant's last or most usual place of abode, and that such person was apparently of the age of sixteen years or upwards, and service on a hotel clerk at the hotel of which the defendant was the proprietor and in which the proprietor usually resided was held insufficient without proof that the hotel clerk made the hotel his place of residence. *Ex parte Wallace*, 19 C.L.T. 406. But service on a person proved to be of the required age and to be resident at the defendant's house, is sufficient to justify proceeding *ex parte* only if the justice is satisfied that the summons came to defendant's notice. *R. v. Smith*, L.R. 10 Q.B. 604.

If the summons is not served personally the nature of it must be explained to the person with whom it is left. *R. v. Smith*, (1875) L.R. 10 Q.B. 604. It must also be shown by affidavit or oral testimony that the defendant could not be conveniently met with, so as to effect personal service. *R. v. Carrigan*, 17 C.L.T. 224.

The jurisdiction of the magistrate to proceed *ex parte* only attaches on proof that the summons was duly served and the court has power to enquire into the validity of the service, and will grant a *certiorari* if it be shown that the service was invalid. *Reg. v. Farmer*, [1892] 1 Q.B. 637. 61 L.J.M.C. 55; *R. v. Franey*, (1909) 16 Can. Cr. Cas. 441, 44 N.S.R. 163.

The proof of substitutional service of a summons returnable on the following day should show the hour and place of service, for without



any evidence of the distance the accused would have to travel to answer the summons and of the time when service was made giving such short notice, the justice would have no evidence on which he could adjudicate upon the question of reasonable notice which necessarily arises in case of default of appearance, i.e., whether the summons was duly served a 'reasonable time before the time appointed for appearance' (sec. 718). *Re O'Brien*, 10 Can. Cr. Cas. 142 (P.E.I.).

Substitutional service is to be made at the last or most usual 'place of abode' of the defendant. Sec. 658 (4). This does not include an office address, but means place of residence. *R. v. Lilley*, (1910) 75 J.P. 95; *R. v. Rhodes*, (1915) 79 J.P. 527.

As to proceeding *ex parte* in default of appearance, see sec. 718.

*Summons to corporation*—Code sec. 720A.

*Defects in summons or warrant cured*—Code sec. 724.

*Attendance of witnesses; compulsory process*—Code secs. 671-678, 713.

*Witnesses on appeal from justice's decision*—Under the provisions of secs. 676 and 711 of the Code, it is competent for a judge to make an order for the issue of a subpoena to witnesses in another province to compel their attendance upon an appeal under secs. 749, 752, to the General Sessions from the decision of the justice. *Reg. v. Gillespie*, 16 P.R. 155 (Ont.).

*The taking of evidence*—Code secs. 682, 721. The magistrate's clerk may take down the depositions in longhand without being sworn. *R. v. McKinley*, [1917] 2 W.W.R. 1069, 28 Can. Cr. Cas. 294 (Alta.).

The accused may waive the taking down in writing of the evidence given against him. *R. v. Poirier*; *Re Janeau*, 31 Que. S.C. 67; same case *sub nom. R. v. Janeau*, 12 Can. Cr. Cas. 360; but otherwise the omission of the magistrate to have the evidence taken in writing is fatal to the conviction. *R. v. McGregor*, 11 B.C.R. 350, 10 Can. Cr. Cas. 313.

In all cases before the recorder of the City of Montreal other than civil actions the provisions of the Criminal Code apply generally and the evidence must be taken down in writing. *Lacroix v. Weir*, 8 Que. P.R. 186, 12 Can. Cr. Cas. 297.

*Stenographer taking down the depositions*—Some courts declare that failure to swear the stenographer (sec. 683) is fatal to a summary conviction depending on depositions certified by the stenographer. *R. v. Johnson*, (1912) 1 W.W.R. 1045 (Man.).

If the justice does not take down the depositions in longhand, he may appoint and swear in a stenographer for the purpose of taking the depositions in shorthand. Sec. 683. If there is a duly sworn official court stenographer attached to the tribunal exercising the powers of a justice under Part XV, he will not have to be specially sworn to truly and faithfully report the evidence. Sec. 683.

Where the provisions of the Criminal Code as to taking down the depositions have not been complied with in a summary matter and the

record, as returned by the justice to a *certiorari* shows that the so-called depositions were merely the summary afterwards prepared by the magistrate, the decision of the magistrate cannot stand. *Dierks v. Altermatt*, [1918] 1 W.W.R. 719, 726 (Alta.). "It might even on appeal seriously prejudice a defendant's rights if he was unable in any way to refer to the previous evidence." *Dierks v. Altermatt*, *supra*, per Stuart, J.

*Sub-sec. (2)—Ex parte orders*—Sub-sec. (2) relates to summary orders as distinguished from summary convictions; compare sec. 731 as to service of orders of justices. If the special Act authorizes the making of a summary order of a particular kind, either on summons or *ex parte*, the justice may either grant or refuse it *ex parte*, or may issue a summons if he so chooses.

*Finding sureties to keep the peace*—The procedure of Part XV is applicable also to proceedings under Code sec. 748 (2) on complaint of threats and reasonable ground of fearing personal injury. Sec. 748 (3).

### Backing Warrants.

**712.** The provisions of sec. 662 relating to the endorsement of warrants shall apply to the case of any warrant issued under the provisions of this Part against the accused, whether before or after conviction, and whether for the apprehension or imprisonment of any such person.

*Origin*—Sec. 844, Code of 1892; 52 Vict., Can., ch. 45, sec. 4; R.S.C. 1886, ch. 178, sec. 22.

*Endorsement of warrants of arrest*—The endorsement should recite proof of the signature of the issuing justice. *Reid v. Maybee*, 31 U.C.C.P. 384.

*Endorsement of warrants of commitment*—The omission to endorse a warrant of commitment under sec. 739, will not be effective for the prisoner's release on habeas corpus if a valid commitment is returned in answer to the writ. *R. v. Whiteside*, (1904) 4 O.W.R. 113, 8 Can. Cr. Cas. 478; *Southwick v. Hare*, 24 Ont. R. 528.

### Summons for witness out of jurisdiction.—Summons and warrant served by peace officer.

**713.** A summons may be issued to procure the attendance, on the hearing of any charge under the provisions of this Part of a witness who resides out of the jurisdiction of the justice before whom such charge is to be heard.

2. Every such summons and every warrant issued to procure the attendance of a witness, whether in consequence of refusal

by such witness to appear in obedience to a summons or otherwise, may be respectively served and executed by the constable or other peace officer to whom the same is delivered or by any other person, as well beyond as within the territorial division of the justice who issued the same.

*Origin*—Sec. 848, Code of 1892, 51 Vict., Can., ch. 45, secs. 1, 3.

*Subpœna to witness in another magisterial jurisdiction*—Sec. 713 makes special provision for a summons to a witness out of the magisterial jurisdiction. Sec. 671, which by sec. 711 is to be applied to summary proceedings "so far as applicable," enacts that if it appears to the justice that any person being or residing *within the province* is likely to give material evidence either for the prosecution or for the accused on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, and to bring with him any documents in his possession or under his control relating thereto. Code sec. 671; Code form 11. The special provisions of sec. 676 would apply under sec. 711 to witnesses living in Canada, but outside of the province where the proceedings are being taken, unless sec. 713 is to be construed as applying throughout Canada and not merely in the same province. It is suggested that sec. 713 is limited to the province; and that it is necessary to obtain a judge's order under sec. 676 for a subpœna to witness in another province if his attendance is required at a hearing under Part XV.

### *Trial.*

#### **Hearing in open court.**

**714.** The room or place in which the justice sits to hear and try any complaint or information shall be deemed an open and public court, to which the public generally may have access so far as the same can conveniently contain them.

*Origin*—Sec. 849, Code of 1892; R.S.C. 1886, ch. 178, sec. 33.

*Place of hearing deemed an open and public court*—Notwithstanding the declaration of sec. 714, the acts of the magistrate are not acts of a "court," the section being directed to the publicity of the proceedings rather than their legal effect. See *R. v. Walker*, 23 Can. Cr. Cas. 179 (Que.).

*Exclusion of public in certain cases*—Code sec. 645.

*Exclusion of public in cases under Juvenile Delinquents Act*—See 7-8 Edw. VII, Can., ch. 40, sec. 10.

*Trials may be held on holidays other than Sundays*—Amongst other days specially named, Easter Monday is to be held a legal holiday in the interpretation of Dominion laws; R.S.C. 1906, ch. 1, sec. 34 (11).

but that does not prevent a trial and summary conviction on that day under a Dominion statute. *Ex parte* Cormier, R. v. Kay, (1907) 12 Can. Cr. Cas. 339, 38 N.B.R. 231.

*Trials not to be held on Sundays*—Sunday is not a *dies non* for all purposes pertaining to legal proceedings; *Child v. Edwards*, [1909] 2 K.B. 753; but trials and other judicial acts, as distinguished from ministerial acts, were not permitted on Sunday unless expressly authorized by statute. See Code sec. 961, validating verdicts on indictments. Except as varied by statute, ministerial acts done on Sunday come within the restrictions applied by the Sunday law of 29 Car. II, ch. 7, sec. 6, (1677) in provinces where it is still operative under R.S.C. 1906, ch. 153, sec. 16. Subject to the operation of any Sunday law, acts which were ministerial and not judicial, in legal proceedings might legally be done on a Sunday. *R. v. Winsor*, (1866) L.B. 1 Q.B. 289, 10 Cox C.C. 276. Sec. 661 (in Part XIII), declares that every *warrant* "authorized by this Act" may be issued and executed on a Sunday or statutory holiday. Code sec. 661, sub-sec. (3). This probably includes warrants of commitment in summary matters as well as other classes of warrants; but see contra, *R. v. Frecker*, (1897) 33 C.L.J. 248 (N.B.); and the decision in *R. v. Myers*, 1 Term. R. 265, under the Sunday Observance Act of 1677, would, in that case, be superseded by Code sec. 661.

*Preserving order during proceedings before a justice*—Justices of the peace as such have no power to commit for contempt. *Ex parte* Hyndman, 50 J.P. 151, 2 Times L.B. 345. But a justice may order that a person disturbing the proceedings in his court, and refusing to desist, be removed from the court. *Clissold v. Machell*, 26 U.C.Q.B. 422; *R. v. Brompton*, [1893] 2 Q.B. 195; *R. v. Lefroy*, L.R. 8 Q.B. 134; *Young v. Saylor*, 20 A.R. 645 (Ont.); *Armour v. Boswell*, 6 U.C.R. (O.S.) 153, 352, 450 (Ont.). As to finding sureties for keeping the peace, if the interruption is a breach of the peace, see *R. v. Lee*, 12 Mod. R. 514. By sec. 604 certain officials are given the powers of two justices, and by sec. 607 some of these including all police magistrates, district magistrates and stipendiary magistrates, have conferred upon them such and like powers and authority to preserve order in "courts" held by them during the holding thereof in like manner as a judge of any court in Canada. But sec. 607 may not apply to a session by a police magistrate, etc., while exercising the powers of a justice under Part XV, or even while exercising the powers of two justices under Part XV where two justices are by a special Act required to adjudicate upon a summary conviction matter.

*Ontario*—A justice of the peace has the right, unless another suitable place is provided by the municipality, to use the town hall of any municipality which has no police magistrate for the hearing of cases brought before him, but not so as to interfere with its ordinary use. R.S.O. 1914, ch. 87, sec. 19.

**Counsel for parties.**

**715.** The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor or agent on his behalf.

2. Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf.

*Origin*—Sec. 850, Code of 1892; R.S.C. 1886, ch. 178, secs. 34, 35; 11-12 Vict., Imp., ch. 43.

*Defendant not in default if his counsel appears in proceeding under Part XV*—The cases of *Rex v. Thompson*, [1909] 2 K.B. 614, 100 L.T.R. 970, and *Rex v. Montgomery*, 102 L.T.R. 325, taken together determine that so full and complete is the power given by the two sections (715 and 720) to counsel to represent the person charged, that the presence of counsel in court prevents the magistrate from enforcing the appearance of the accused there, and that where there is a proper appearance by counsel, attorney, or agent, the justices are bound to hear and determine the same, and, on a plea of guilty, to convict the offender. *R. v. McDonald*, 21 Can. Cr. Cas. 229, 230, 12 E.L.R. 166, (P.E.I.). But an unauthorized plea of guilty will not bind the accused. See *infra* "authority of counsel."

"*Full answer and defence*"—This phrase appears in Code secs. 715, 786 and 942, dealing respectively with summary conviction matters, summary trials and trials on indictment.

The words "full answer and defence" mean that the accused can invoke every means both in law and in fact to meet the charge; the word "answer" being specially applicable to a defence on the facts and the word "defence" applying both to matters of testimony and matters of law. *R. v. Romer*, 23 Can. Cr. Cas. 235.

There may be a refusal of the right of full defence under some circumstances by refusing an adjournment after the trial has begun for the purpose of bringing other witnesses in defence. *R. v. Dominion Drug Stores* [1919] 1 W.W.R. 285 (Alta.).

The fact that through an oversight a magistrate sentences a prisoner before hearing evidence for the defence does not deprive the prisoner of an opportunity to defend himself, if the magistrate at once corrects the error by offering to hear the defence. *R. v. Cyr*, [1917] 3 W.W.R. 849, 29 Can. Cr. Cas. 77 (Alta.), affirming *R. v. Cyr*, [1917] 2 W.W.R. 1185 (Alta.).

The accused is not denied the right to make "full answer and defence" to the charge by reason of the magistrate having stated, after

hearing the evidence for the prosecution, that a denial on oath by the accused would not alter his opinion as to her guilt. *R. v. McGregor*, (1895) 26 Ont. R. 115, 2 Can. Cr. Cas. 410.

Where one of two magistrates hearing an information was called as a witness for the defence but refused to be sworn and give evidence, and the associate magistrate refused to use his authority to require him to be sworn, it was held that the defendant was thereby deprived of the right of making a full defence, and his conviction was quashed on this ground. Calling a magistrate as a witness did not of itself disqualify him from further acting in the case. *R. v. Sproule* (1887), 14 Ont. R. 375. That case was, however, disapproved in *R. v. Brown* (1888), 16 Ont. R. 375, where it was held that the defendant is not entitled to show by witnesses at the hearing that the magistrate had a disqualifying interest in the case.

Where in summary proceedings it is desired to call the presiding magistrate as a witness, the application should be supported by an affidavit stating not only that the magistrate is a necessary and material witness, and that the application is made in good faith, but disclosing specifically what the party proposes to prove by the magistrate's testimony. *Ex parte Hebert*, (1898) 34 N.B.R. 455, 4 Can. Cr. Cas. 153.

Where the presiding magistrate is called as a witness for the defence but refuses to be sworn, a summary conviction made without his evidence should not be quashed unless it is shown that the request to have the magistrate called as a witness was made in good faith by the defence, that the magistrate could give material evidence and that the accused was therefore prejudiced. *Ex parte Flannagan*, (1897) 2 Can. Cr. Cas. 513 (N.B.).

Section 722 shows that the question of the adjournment of the hearing is in the discretion of the magistrate. What sec. 715 (1) of the Code says is that the person against whom the complaint is made or the information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor or agent on his behalf. A similar right is given to the complainant or informant by sub-sec. (2). *R. v. Irving* (1908) 18 O.L.R. 320. In *Reg. v. Biggins* (1862), 5 L.T.N.S. 605, it was held upon a similar enactment, the origin of that found in our Code, that it did not touch the discretionary power of the magistrate in the conduct of the trial, and that he was not bound to adjourn to enable the accused to procure counsel, and that, although the accused had the absolute right to the assistance of counsel, if he could obtain it, he was not entitled as of right to an adjournment for the purpose of enabling him to do so. The object of the clause was to alter the old law, under which in matters of summary jurisdiction, the parties were not entitled to the assistance of counsel or attorney. *Reg. v. Justices of Cambridge-shire*, (1880) 44 J.P. 168; and see also Paley, 8th ed., p. 117, 119, and *Ex parte Hopwood*, (1850) 15 Q.B. 121.

Whatever remedy the defendant may have by way of appeal to the sessions or by way of criminal information against the magistrate, if he adopted an unusual or unreasonable course for the purpose of preventing the defendant from having legal assistance, the refusal to adjourn for that purpose will not entitle the defendant to have the conviction quashed or to be discharged on habeas corpus. The refusal of the right to examine and cross-examine witnesses stands upon a very different footing: *Reg. v. Griffiths* (1886), 54 L.T.N.S. 280; *R. v. Irving* (1908) 14 Can. Cr. Cas. 489, 18 O.L.R. 320.

The defence may move to dismiss at the end of the prosecutor's case and on the motion being refused may call witnesses; on denial of this right the magistrate loses jurisdiction to convict. *R. v. Dominion Drug Stores* [1919] 1 W.W.R. 285 (Alta.).

*Defendant to be asked if he wants to give evidence*—The accused has a statutory right to be allowed to make his full answer and defence to the charge by his own evidence and the testimony of other witnesses, if present; and he should be distinctly asked whether he desires to give evidence before the charge is adjudicated upon. *R. v. Curry*, (1915) 24 Can. Cr. Cas. 340, 8 O.W.N. 512.

*Right to insist on legal formalities being observed*—A person upon trial for a crime has a right to hear all the evidence adduced against him and to insist as a matter of right, that the formalities of the law as to criminal trials are complied with; and when formal proceedings are in strict law required, *ex gr.*, an arraignment upon a specific charge made known to the prisoner at the hearing before a magistrate, the absence of the required proceedings is a ground for setting aside the conviction without regard to the question whether or not any substantial injustice had resulted to the accused. *R. v. Boach* (1914) 23 Can. Cr. Cas. 28, 6 O.W.N. 630; *Martin v. Mackonachie*, 3 Q.B.D. 730, 770, applied.

*Interpreting to accused foreigner*—As to the right of a foreigner at his trial to have the evidence interpreted, see *Rex v. Meceklette*, 15 Can. Cr. Cas. 17, 18 O.L.R. 408; *Rex v. Sciarrone*, 1 O.W.N. 416.

In *R. v. Meceklette*, 15 Can. Cr. Cas. 17, 18 O.L.R. 408, the return to a habeas corpus following defendant's summary conviction, was good upon its face, showing a warrant of commitment, which recited the conviction of the defendant for unlawfully committing an act of indecency in a public place; and there was ample evidence to support the conviction; but the defendant attempted to show by affidavits that, not understanding English, he did not know that he was on trial, and did not understand the evidence given. This was contradicted by one who was sworn as an interpreter at the trial, and by a policeman. It was held that the capacity of the interpreter and all matters connected with the interpretation of the evidence were questions for the magistrate, and his finding could not be attacked by habeas corpus. *R. v. Meceklette*, 18 O.L.R. 408, 15 Can. Cr. Cas. 17. *Seemle*,

that there is no inherent right in any foreigner that the proceedings taken in the courts of this province shall be made wholly intelligible to him, even though he should be charged with crime. Cases in which a contrary doctrine is laid down turn upon some statutory or constitutional provision. *Rex v. Meceklette*, 18 O.L.R. 408, 15 Can. Cr. Cas. 17.

The proceedings must be fairly conducted, and refusal to adjourn a case against a Chinaman for half an hour so that he could get an interpreter to assist him in his defence was held to invalidate a summary conviction made under the Public Health Act, Alta. *R. v. Lee Kee*, [1918] 3 W.W.R. 767 (Alta.).

*Taking "view" of locus in absence of parties to assist in determination*—In a summary proceeding for an illegal sale of liquor under the Indian Act, a conviction will be quashed if, after the close of the evidence, the magistrate went alone and took a view of the place of sale, and so stated when giving his judgment, and this notwithstanding that the defendant was present when the view was had. *Re Sing Kee*, 5 Can. Cr. Cas. 86, 8 B.C.R. 20.

*Compelling defendant's attendance for trial at place remote from place of offence and from his place of residence*—Sec. 2 of ch. 13 of 1906, Alta. stat., says that the Lieutenant-Governor in Council may appoint justices of the peace for the province, who shall have jurisdiction as such *throughout the same*. There is no statutory provision in Alberta requiring a charge to be laid or dealt with by the nearest justice. But if it appeared that there was gross abuse of the authority of a magistrate by, for example, compelling the attendance of the accused at a place extraordinarily far from his home and the place where the offence was alleged to have been committed, and where all the witnesses resided, while a competent and impartial justice was available near the place of the alleged offence, the court would have power to intervene and prevent the abuse of the process of the inferior court, on the ground that the defendant was prejudiced in his right to "make his full answer and defence" (sec. 715), and that therefore the magistrate lacked jurisdiction; *R. v. Tally*, 7 W.W.R. 1178, 23 Can. Cr. Cas. 449, 452, and see *Rex v. Farrell*, 15 Can. Cr. Cas. 100.

*Adjournment to get counsel*—If the accused was summoned a reasonable time before the hearing, he cannot claim an adjournment as a matter of right to enable him to obtain counsel to conduct the defence. *R. v. Irwing* (1908) 14 Can. Cr. Cas. 489, 18 O.L.R. 320.

*Adjournment on amending charge in a material respect*—If the charge is amended in a material respect on the return of the summons and, as amended, is for a distinct offence from that alleged in the information and summons although of the same class, the accused will be entitled to an adjournment without being placed on terms as to costs. *R. v. Farrell*, (1907) 15 O.L.R. 100. In such case it is not a matter of discretion (Code sec. 722) whether the justice shall adjourn the trial or not when requested to do so, for the refusal would be a



denial of the right to make "full answer and defence." *R. v. Farrell, supra.*

*Counsel to assist the justice in matters of procedure*—A qualified solicitor appearing at a trial before a justice of the peace ought to assist the tribunal in matters of formal procedure. He ought not to be heard very favorably on asking costs of a *certiorari* motion on the ground of merely formal errors of procedure which he had made no attempt to correct by advising the magistrate at the time. *Dierks v. Altermatt, [1918] 1 W.W.R. 719, 726 (Alta.), per Stuart, J., and see R. v. Cyr [1917] 3 W.W.R. 849, 859, (Alta.).* So if he consents to an illegal adjournment *sine die*, this will be taken into consideration on disposing of a successful motion by his client attacking the jurisdiction of the justice because of same. *Dierks v. Altermatt, supra.*

*Authority of counsel to represent client for whom he appears*—In *R. v. Broadfoot, (1910) 17 Can. Cr. Cas. 71 (N.S.),* it was held by Judge MacGillivray, that a summary conviction made without evidence in the absence of the accused on a plea of guilty entered by a solicitor for the accused, was bad for want of jurisdiction where relied upon as one of the prior convictions in a liquor prosecution for a third offence, there being no proof of the solicitor's authority.

The power of summary conviction is in derogation of the common law and is to be strictly construed. *R. v. Broadfoot, supra.*

In *Hallsworth v. Zickrick, 17 C.L.T. 37,* an attorney appeared for the defendant who was not present when the case was called, and pleaded guilty for her, whereupon the magistrate convicted her of the offence charged. The attorney paid a portion of the fine imposed, but later the defendant applied to quash the conviction on the ground that the attorney had appeared and entered the plea of guilty without her authority or knowledge. It appeared that the summons had not been served on the defendant personally, and that she had not herself instructed the attorney to appear for her, and, as there was some doubt as to whether she had authorized the instructions to the attorney, an order was made quashing the conviction. And see *R. v. Dimond (1916) 9 Sask. L.R. 106, 25 Can. Cr. Cas. 317, 33 W.L.R. 803.* Counsel represents his client on a charge of a second offence for the purpose of being asked the statutory question whether the accused had been previously convicted as alleged. *R. v. O'Hearon, (1901) 5 Can. Cr. Cas. 187.*

*Ordinary particulars in summary prosecution*—See sec. 723 (2).

**Evidence to be on oath.—Commission to take evidence outside of Canada in certain cases.**

**716.** Every witness at any hearing shall be examined upon oath or affirmation, by the justice before whom such witness appears for the purpose of being examined.

2. A judge of any superior or county court may appoint a

commissioner or commissioners to take the evidence upon oath of any person who resides out of Canada and is stated to be able to give material information relating to an offence for which a prosecution is pending under this Part, or relating to any person accused of such offence, in the circumstances and in the manner, *mutatis mutandis*, in which he might do so under sec. 997; and all the provisions of the said section, in respect of matters arising thereunder, shall apply *mutatis mutandis* to matters arising under this section: Provided that no such appointment shall be made without the consent of the Attorney General.

*Origin*—6 Edw. VII, Can., ch. 5, sec. 1; sec. 851, Code of 1892; R.S.C. 1886, ch. 178, sec. 47.

*Witness "stated to be" able to give material information*—The same particularity is not required as to the proof to be adduced on an application for a commission to take the evidence under sec. 716, of a witness out of Canada who is "stated to be" able to give material information relating to a summary conviction offence as would be required upon an application under sec. 997, to take evidence for use at the trial of an indictable offence or at a preliminary enquiry, in which cases it must be "made to appear" that the evidence of the absent witness is material. *R. v. Murray*, 22 Can. Cr. Cas. 119, 21 O.W.R. 544, 3 O.W.N. 734.

*Use of depositions on appeal*—See sec. 752 (3).

*Stipulation to use depositions in another case*—An agreement to use evidence taken in another case should be properly recorded. *R. v. Davey*, 22 Can. Cr. Cas. 221, 5 O.W.N. 666, 25 O.W.R. 630.

**Proof of exception, etc., by defendant.—Prosecutor need not prove negative.**

**717.** Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and whether it is or is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; sec. 852, Code of 1892; R.S.C. 1886, ch. 178, sec. 38.

*Onus on defendant to prove himself within statutory exceptions*—

Sec. 717 is, as regards summary conviction matters, an exception to the rule that he who alleges a fact must prove it even though the allegation is couched in negative terms, unless the subject of the negative assertion is peculiarly within the knowledge of the accused, in which case it was for him to prove it as a matter of defence, even before sec. 717 was enacted.

Since the Act 9 Edw. VII, Can., ch. 9, amending sec. 717 of the Code, it is not necessary for the prosecutor to negative exceptions in sub-secs. 117 and 127 of the Canada Temperance Act. *R. v. Dibblee, ex parte McIntyre*, 39 N.B.R. 361.

*Negating exceptions in information*—For the prior law on the question of negating exceptions in the description of the offence, see *R. v. Boscovitz*, 4 B.C.R. 132, *R. v. White*, 21 U.C.C.P. 354, (Ont.): *R. v. Strauss*, 5 B.C.R. 486, 1 Can. Cr. Cas. 103, *R. v. Smith*, 3 Can. Cr. Cas. 383, 31 Ont. R. 224; *R. v. Nunn*, 10 P.R. 395 (Ont.); *R. v. Boomer*, 13 Can. Cr. Cas. 98, 15 O.L.R. 321.

**Non-appearance of accused.—Ex parte hearing.—Warrant to procure attendance of accused.**

**718.** In case the accused does not appear at the time and place appointed by any summons issued by a justice on information before him of the commission of an offence punishable on summary conviction then, if it appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed *ex parte* to hear and determine the case in the absence of the defendant, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared in obedience to such summons, or the justice may, if he thinks fit, issue his warrant as provided by secs. 659 and 660 and adjourn the hearing of the complaint or information until the defendant is apprehended.

*Origin*—56 Vict., Can., ch. 32, sec. 1; sec. 853, Code of 1892; *R.S.C.* 1886, ch. 178, sec. 39; 32-33 Vict., Can., ch. 31, secs. 7 and 32.

*Process for compelling appearance*—Code sec. 711.

*In case the accused "does not appear"; appearance by counsel*—In *Rex v. Montgomery*, 102 L.T.R. 325, there was a hearing of a summons for driving a motor car at a speed exceeding the limit. The defendant appeared by his solicitor, who pleaded guilty on his behalf and also to a previous conviction. The justices, on the application of the inspector of police, ordered a warrant to compel the defendant to

appear personally. The warrant was granted improperly, so it was held on appeal, because a valid plea of guilty had been made. Lord Alverstone, C.J., said: "It was not necessary for the purpose of obtaining a conviction or of proving the previous conviction, for the appellant had pleaded guilty to both."

Bucknill, J., said: "The justices were bound to proceed on the appearance and to convict in this case. That was all they had to do on the plea of guilty being made to the offence and to the previous conviction."

The decision in *R. v. Montgomery*, supra, was applied in *R. v. Thompson*, (1915) 23 Can. Cr. Cas. 463 (N.S.); see also *R. v. Thompson*, [1909] 2 K.B. 614, 100 L.T.R. 970; *R. v. Coote*, 22 O.L.R. 269, 17 Can. Cr. Cas. 211; *R. v. McDonald*, (1913) 21 Can. Cr. Cas. 229 (P.E.I.).

*Failure to appear on an adjourned hearing after appearing to the summons*—Code sec. 722.

"*Summons duly served*"—As to manner of service, see secs. 658 and 711.

*Default in appearing to defective summons or defective information*—Sec. 718 applies only to a valid summons and default thereunder; the defendant is not bound to appear to a summons which was not signed. *Lamontagne v. Lanctot*, (1916) 25 Can. Cr. Cas. 449 (Que.).

A summary conviction was set aside where no place of trial was mentioned in the summons and defendant did not appear; *R. v. Wilson*; *ex parte Harrington*, 40 N.B.R. 383; and where the place of the offence was not stated in the information and defendant's counsel appeared only to object to the jurisdiction and then withdrew from the case; *R. v. Hubbard*, *ex parte Monahan*, (1914) 42 N.B.R. 524; although the summons mentioned a place of the offence. *R. v. Hubbard*, supra.

A variance or discrepancy between the day of the week and the day of the month mentioned in the summons does not invalidate it; the day of the month governs. *Ex parte Tompkins*, 37 N.B.R. 534.

The failure to properly state the prior offence in the summons will prevent a conviction for a second offence in default of appearance. *Re Crouse* (*R. v. Crouse* No. 2), (1913) 21 Can. Cr. Cas. 243, 12 E.L.R. 499 (N.S.); *R. v. Grant*, 30 N.S.R. 368.

*Appearance by counsel*—See secs. 720, 720A, and note to 721.

"*If it appears that the summons was duly served*"—The justice's jurisdiction to act under sec. 718 depends on this proof of service; *Lévesque v. Asselin*, 6 Que. P.R. 64, 8 Can. Cr. Cas. 505; and on a "summons" being duly served. *Lacasse v. Fortier*, (1917) 30 Can. Cr. Cas. 87 (Que.). A notice from the complainant of the time and place of hearing accompanied by a copy of the complaint, is not a "summons." *Lacasse v. Fortier*, supra; *Rheume v. Cliche* (1917) 24 Rev. Leg. 61 (Que.).

On motion for a writ of *certiorari* to remove a conviction for a violation of the Canada Temperance Act it appeared that the writ of

summons, which was dated July 26th, 1909, and was returnable two days later, was served by a constable who delivered it to a brother of defendant, the defendant himself being absent from home at the time. The affidavit of the constable showed that the summons was served on the evening of the same day on which it was dated, between the hours of nine and ten o'clock, and that the person to whom it was delivered was of sufficient age, but it was not made to appear that such person was an "inmate" of defendant's last or most usual place of abode, the affidavit merely stating on this point that he stayed there most of the time. It was held that the service was sufficient in point of time, but that, in the absence of evidence to show that the summons was delivered to the defendant personally, or in his absence to an inmate of his last or most usual place of abode, as required by sec. 658, sub-sec. (4), the conviction must be set aside. *R. v. Franey*, 16 Can. Cr. Cas. 441, 44 N.S.R. 163.

The justice may accept as proof of service of the summons a constable's affidavit of service endorsed thereon and sworn before another justice prior to the return date. *R. v. Smith*, 16 Can. Cr. Cas. 425. (This case was disapproved as to another point involved, in *R. v. Mitchell*, 24 O.L.R. 324, 19 O.W.R. 588).

*In default of appearance the justice may proceed ex parte to hear and determine*—The justice has a discretion to exercise which the court will not review on *certiorari*. *R. v. Coote*, 22 O.L.R. 269, 17 Can. Cr. Cas. 211. He is to decide whether he will proceed *ex parte* or adjourn the hearing and issue a warrant. *R. v. Smith*, L.R. 10 Q.B. 614; *R. v. Coote*, *supra*.

It has been held that in proceeding on default, an error in stating the date of the offence in the information may be corrected so long as it does not charge a different offence. *Ex parte Tompkins*, 37 N.B.R. 552. And a change of the date of a liquor selling offence does not in all cases mean that a different offence is charged; there may be such other particulars of time and place disclosed as point to a single occasion and not to a continuous offence. *Ex parte Tompkins*, *supra*.

The defendant is not to be convicted in his absence of an offence distinct from that stated in the information and summons. *Ex parte Doherty*, (1894) 1 Can. Cr. Cas. 84, 33 N.B.R. 15.

On proceeding to try a summary conviction matter in default of appearance and convicting the accused, the justice may also hear evidence and make an adjudication as to whether there are any chattels whereon to levy a distress (Code sec. 744), and if there are none he may dispense with the issue of a distress warrant and with a return of no goods and may issue a commitment in the first instance. *R. v. Degan*, 14 Can. Cr. Cas. 148, 17 O.L.R. 366.

*In default of appearance the justice may issue warrant and adjourn the hearing*—Where the defendant fails to appear, an adjournment of the hearing must nevertheless be to a time and place appointed and

publicly stated at the time the adjournment takes place. *R. v. Smith*, 16 Can. Cr. Cas. 425 (N.S.).

The accused when so brought up on warrant has the same right to make his full answer and defence as he would have had on the original return date. *Levesque v. Asselin*, 6 Que. P.R. 64; same case *sub nom. R. v. Levesque*, 8 Can. Cr. Cas. 305. He has taken the risk that the magistrate would proceed *ex parte* instead of adjourning; but a justice of the peace has no right if he illegally proceeded *ex parte* without proof of service of the summons, to issue a warrant of arrest to bring the accused before him for sentence and pronounce same without allowing further evidence. *Lévesque v. Asselin*, 6 Que. P.R. 64, 8 Can. Cr. Cas. 505.

**Non-appearance of prosecutor.—Dismissal or adjournment.**

**719.** If, upon the day and at the place so appointed, the defendant appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the justice by virtue of a warrant, then, if the complainant or informant, having had due notice, does not appear by himself, his counsel, solicitor or agent, the justice shall dismiss the complaint or information unless he thinks proper to adjourn the hearing of the same until some other day upon such terms as he thinks fit.

*Origin*—Sec. 854, Code of 1892; R.S.C. 1886, ch. 178, sec. 41.

**Proceedings when both parties appear.**

**720.** If both parties appear, either personally or by their respective counsel, solicitors or agents, before the justice who is to hear and determine the complaint or information such justice shall proceed to hear and determine the same.

*Origin*—Sec. 855, Code of 1892; R.S.C. 1886, ch. 178, sec. 41; 11-12 Vict., Imp., ch. 43.

*Other justices not entitled to intervene*—Other justices of concurrent jurisdiction are not entitled to sit as associate justices on a case which the sitting justice has jurisdiction to try alone and desires so to try it. *R. v. McBae*, 28 Ont. R. 569.

*Jurisdiction on appearance by counsel*—In a summary conviction matter, the accused may appear by counsel instead of personally and the magistrate has jurisdiction to proceed without requiring the accused to be personally present. *R. v. Romer*, 23 Can. Cr. Cas. 235; *Denault v. Robida*, 10 Que. S.C. 199; 8 Can. Cr. Cas. 501; *Ex parte Doherty*, 33 N.B.R. 15, 1 Can. Cr. Cas. 84; *Proctor v. Parker*, 12 Man. R. 528, 3 Can. Cr. Cas. 37; *R. v. McDonald*, 8 Can. Cr. Cas. 348 (P.E.I.); *R. v.*

Thompson, [1909] 2 K.B. 614, 100 L.T. 970; R. v. Montgomery, 102 L.T. 325; R. v. Coote, 22 O.L.R. 269, 17 Can. Cr. Cas. 211; R. v. Thompson, (1915) 23 Can. Cr. Cas. 463 (N.S.).

**A corporation defendant must appear "by attorney."** Sec. 720A.

Counsel duly authorized may enter a plea of guilty in the absence of the client. R. v. McDonald (1913) 21 Can. Cr. Cas. 229 (P.E.I.); R. v. Thompson, [1909] 2 K.B. 614; R. v. Montgomery, 102 L.T. 325.

In R. v. Aves, 24 L.T. 64, it was held that an absent defendant may plead guilty through his counsel duly authorized but if counsel without authority so to do pleads guilty for the defendant, the conviction is invalid. It is well, therefore, to have defendant's written authority for such plea and to have such authorization ready to file with the magistrate should he require it. This is particularly desirable where a subsequent offence would entail an increased punishment and would raise the question of the validity of the first conviction; and this although the punishment for the case in hand may be only a fine which is tendered at the hearing. See Hallsworth v. Zickrick, 17 C.L.T. 37; R. v. Broadfoot, 17 Can. Cr. Cas. 31 (N.S.); R. v. Dimond, 9 Sask. L.R. 106.

*Arraignment of accused when personally present*—Code sec. 721.

*Justice cannot enforce personal attendance under Part XV if counsel appears*—So full and complete is the power given by secs. 715 and 720 to counsel to represent the person charged, that the presence of counsel in court prevents the magistrate from enforcing the appearance of the accused there; and where there is a proper appearance by counsel, attorney, or agent, the justices are bound to hear and determine the same, and, on a plea of guilty, to convict the offender. R. v. McDonald, (1913) 21 Can. Cr. Cas. 229 (P.E.I.); R. v. Thompson, [1909] 2 K.B. 614; R. v. Montgomery, 102 L.T.R. 325.

*If charge not admitted, evidence to be taken*—The evidence of witnesses is to be taken in the manner provided by Part XIV. Code secs. 721 (3), 682, 683, 686; but when the proceedings are under Part XV the witnesses need not sign their depositions. Sec. 721 (5).

*Ordering particulars in summary prosecution*—See sec. 723 (2).

*Previous notice of the charge by summons or otherwise*—Unless dispensed with by statute or waived, there must be some previous summons or notice, to the party charged, of the hearing of the charges against him. This may be waived by appearing, pleading and defending. But asking an adjournment for the purpose of procuring evidence is not necessarily a waiver. R. v. Vrooman, 3 Man. R. 509; R. v. Davis (1912) 3 W.W.R. 1 (Alta.); R. v. McNutt, 3 Can. Cr. Cas. 184 (N.S.); and see *ex parte* Dolan, 41 N.B.R. 95, 26 Can. Cr. Cas. 161. But if he examines or cross-examines a witness in proof of his objection, it seems that thereby he submits to the jurisdiction of the magistrate to decide the point and cannot raise it afterwards on *certiorari*. R. v. Doherty, (1899) 32 N.S.R. 235, 3 Can. Cr. Cas. 505.

*Case closed for the complainant; motion to dismiss*].—If the prosecution goes on with the evidence and closes its case, the justice is to determine whether an objection taken by the defence is to be sustained, which takes exception to the sufficiency of the proof. *R. v. Chew Deb*, (1913) 3 W.W.R. 854, 18 B.C.R. 23, 23 W.L.R. 308, 21 Can. Cr. Cas. 20. It is not competent for the justice to give the complainant leave to withdraw the charge so that he may lay a fresh information for the identical offence and adduce new evidence; *R. v. Chew Deb*, *supra*; though he probably would have power to give leave to the complainant to re-open the case in chief and to grant an adjournment for bringing further evidence. On the motion to dismiss being refused, the defence is entitled to call evidence. *R. v. Dominion Drug Stores* [1919] 1 W.W.R. 285 (Alta.)

**Service of summons upon corporation.—Appearance by corporation.**

**720A.** When the defendant is a corporation the summons may be served on the mayor or chief officer of such corporation, or upon the clerk or secretary or the like officer thereof, and may be in the same form as if the defendant were a natural person.

2. The corporation in such case shall appear by attorney, and if it does not appear the justice may proceed as in other cases.

*Origin*].—Can. Stat. 1909, ch. 9, sec. 2.

*Service of summons on corporation*].—Prior to this enactment, notice of the summons was held to be good if given in a manner similar to a notice of indictment of a corporation given under Code sec. 918. *R. v. Toronto Ry. Co.*, 2 Can. Cr. Cas. 471, 26 A.R. 491 (Ont.) Sec. 720A requires service of the summons itself. A similar provision is contained in Part XVI as to certain indictable offences. See sec. 773A.

*Evidence against corporation*].—Membership or the holding of shares in the defendant corporation does not excuse the shareholder from being compelled to give evidence in the charge against the corporation. *R. v. Mayflower Bottling Co.*, 44 N.S.R. 417.

The shareholder may, by active, personal participation in the corporation's offence render himself liable as a party to its offence. *R. v. Glassey*, (1912) 22 Can. Cr. Cas. 71 (N.S.) and see *R. v. Hendrie*, 10 Can. Cr. Cas. 198; *R. v. Hays*, 12 Can. Cr. Cas. 423; *Bernier v. Dequoy*, 33 Que. S.C. 237.

**Arraignment of accused.—Conviction or order if charge admitted. —**

**If charge not admitted.—Evidence in reply.—Under Part XV witness need not sign.**

**721.** If the defendant is personally present at the hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to show why he



should not be convicted, or why an order should not be made against him, as the case may be.

2. If the defendant thereupon admits the truth of the information or complaint, and shows no sufficient cause why he should not be convicted, or why an order should not be made against him, as the case may be, the justice present at the hearing shall convict him or make an order against him accordingly.

3. If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge and for the purposes of such inquiry shall take the evidence of witnesses both for the complainant and accused in the manner provided by Part XIV in the case of a preliminary inquiry.

4. The prosecutor or complainant is not entitled to give evidence in reply if the defendant has not adduced any evidence other than as to his general character.

5. In the hearing under this Part the witnesses need not sign their depositions.

*Origin*—Sec. 856, Code of 1892; R.S.C. 1886, ch. 178, secs. 43, 44, 46.

"*If defendant is personally present*"—This does not make it obligatory upon defendant to attend personally in a summary conviction matter in answer to a summons, for, by sec. 720, he is permitted to appear *either* personally or by counsel; *R. v. McDonald* (1913) 21 Can. Cr. Cas. 229 (P.E.I.); *Bessell v. Wilson*, 1 E. & B. 488; *R. v. Montgomery*, 102 L.T. 325; *R. v. Coote*, 22 O.L.R. 269, 17 Can. Cr. Cas. 211; *R. v. Thompson*, (1915) 23 Can. Cr. Cas. 463 (N.S.); *R. v. Thompson* [1909] 2 K.B. 614; And if he appears by counsel he is not chargeable with non-appearance under sec. 718. An information for one offence may be changed to another in the defendant's presence or he may be called upon to answer to additional charges, but with the right to ask an adjournment. See sec. 724 (4) and sec. 722. If, however, the defendant allows the proceedings to go on upon a new charge without any protest or request for time to answer, he will be bound by them. *R. v. Clarke*, 20 Ont. R. 642; *R. v. Crouch*, 35 U.C.R. 433 (Ont.); *Stoness v. Lake*, 40 U.C.R. 320 (Ont.).

The want of service of a summons as well as any irregularity in the service may be cured by defendant's presence. *R. v. Hughes*, 4 Q.B.D. 614; *R. v. Berry*, 23 J.P. 82, 28 L.J.M.C. 86, 8 Cox C.C. 121; *R. v. Fletcher*, 12 Cox C.C. 77; *R. v. Stone*, 1 East 639; *R. v. Clarke*, 20 Ont. R. 642; *Davis v. Feinstein*, 25 Man. R. 507; *R. v. Bennett*, 3 Ont. R. 45; *R. v. Doherty*, 3 Can. Cr. Cas. 505. When a man appears before

justices and a charge is then made against him, if he has not been summoned he has good ground for asking for an adjournment. If he waives that and answers the charge, a conviction would be perfectly good against him. *R. v. Shaw* (1865) L. & C. 579, 10 Cox C.C. 66, per Blackburn, J.; *Turner v. Postmaster General* (1864) 5 B. & S. 756, 10 Cox 15, 11 Jur. N.S. 137.

The accused by proceeding with the trial without objection may be held to have submitted to the justice's jurisdiction, although illegally arrested under an invalid warrant issued without any sworn information. *R. v. Yaldon*, 17 O.L.R. 179, 13 Can. Cr. Cas. 489.

*The substance of the complaint to be stated to defendant*—The defendant is to be arraigned upon a specific charge made known to him at the hearing. *R. v. Roach*, 6 O.W.N. 630, 23 Can. Cr. Cas. 28; *Martin v. Mackonachie*, 3 Q.B.D. 739, 770. He should not have to ascertain the nature of the charge as the case develops during the taking of evidence. *Nagazoa v. Niquet*, (1917) 24 R. de Juris, 339, 30 Can. Cr. Cas. 77 (Que.). In every case where an individual is accused of an offence for which he may be imprisoned a complaint in writing should be made against him before the case is called and before he is called upon to plead or show cause under sec. 721, sub-sec. (2). *Nagazoa v. Niquet*, supra.

*Defendant to be asked to show cause; pleading to the charge*—Technically speaking, there is no such plea as either "guilty" or "not guilty" contemplated by Part XV. Under sec. 721 of the Code, an accused is to be asked, "if he has any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be." The practice is almost universal, to ask the accused if he be guilty or not guilty, and when an accused pleads guilty such plea may be regarded as an admission of the truth of the information and of the absence of sufficient cause why he should not be convicted or why an order should not be made. *R. v. O'Brien*, [1918] 3 W.W.R. 848, 849, (Sask.). If the same principles apply to a trial under Part XV as to a trial of an indictable offence, before a judge and jury in a superior court, an application after judgment for leave to change a plea is too late. *Rex v. Selbe*, 9 Car. & P. 346.

Even before judgment the court has a discretion in the matter. *Rev. v. Plummer* [1902] 2 K.B. 339, at p. 349, 71 L.J.K.B. 805; *R. v. O'Brien*, [1918] 3 W.W.R. 848 (Sask.).

If the principles applicable to a trial on indictment do not apply to a trial under Part XV, then it seems there is no authority for allowing an accused to withdraw an admission as to the truth of an information and as to the absence of sufficient cause why he should not be convicted. *R. v. O'Brien*, supra.

Although the accused may "admit the truth of the information," he is still to have an opportunity of setting up that the information dis-

closes no offence in law. *Ex parte Richard* (1916) 26 Can. Cr. Cas. 166 (Que.).

*Where the complaint is not properly laid*—An illegal complaint could not give to the justice of the peace the necessary jurisdiction to inquire into it and decide upon it: *Carriere v. Montreal* (1902), 5 Que. P.R. 44; *R. v. Leschinski*, 17 Can. Cr. Cas. 199; *R. v. Code*, 13 Can. Cr. Cas. 372; *R. v. Coulson*, 27 Ont. R. 59, 1 Can. Cr. Cas. 114. So where the War Revenue Act, 1915, provided that the fine must be sued for and recovered in the name of the Minister of Inland Revenue, and the complaint was brought in the personal name of another person, it was held that the complaint was not susceptible of being amended, since the effect of such amendment would not only be to correct the name of the complainant, but to substitute as complainant a person other than the one who has lodged the complaint. *Ex parte Richard*, 26 Can. Cr. Cas. 166 (Que.); *Béland v. Boyce*, (1913) 21 Can. Cr. Cas. 421; *R. v. C.P.R.*, 12 Can. Cr. Cas. 549, 7 Terr. L.R. 443, and an appearance by counsel and a plea of not guilty entered by counsel for defendant in his absence without objection to an alleged irregularity in the information and proceedings upon which the summons was founded, is a waiver of the irregularity and a submission to the jurisdiction of the justice. *R. v. Kay* (1911) 26 Can. Cr. Cas. 171 (N.B.); *Dixon v. Wells*, 25 Q.B.D. 249; *R. v. Thompson*, [1909] 2 K.B. 614.

If the information does not disclose an offence within the magistrate's territorial jurisdiction and the defendant does not attend on the summons either personally or by counsel, the defect cannot be cured so as to give the magistrate jurisdiction to proceed *ex parte*. *R. v. Hubbard*, (1914) 42 N.B.R. 524, 24 Can. Cr. Cas. 127.

An information which purports to be that of one person, but which is signed and sworn to by another person is invalid. *R. v. McNutt*, 28 N.S.R. 377, 3 Can. Cr. Cas. 184.

*Certain defects in the information cured*—Code secs. 723-725.

*Defects in the summons*—Defects in a summons are cured by a personal appearance by the defendant and going to trial on the merits. *R. v. Holyoke, ex parte McIntyre*, 21 Can. Cr. Cas. 422, 13 E.L.R. 210 (N.B.); *R. v. Doherty*, 3 Can. Cr. Cas. 505, 32 N.S.R. 235; *Ex parte Giberson*, 4 Can. Cr. Cas. 537, 34 N.B.R. 538; *McGuinness v. Dafoe*, 3 Can. Cr. Cas. 139, 27 Ont. R. 117.

A summons may be issued upon an information before a justice of the peace for an offence punishable on summary conviction, although the information has not been sworn; but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. *R. v. William McDonald* (1896), 3 Can. Cr. Cas. 287 (N.S.).

If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed

on *certiorari* because it is afterwards shown that the information was not in fact sworn at such time and place. *Ex parte Sonier*, (1896) 2 Can. Cr. Cas. 121, 34 N.B.R. 84.

A person who appears in answer to a summons, and takes his trial and his chance of acquittal, is considered as having waived any objection to the summons. *R. v. Justices of Carrick-on-Suir*, 16 Cox C.C. 571; *R. v. Hazen*, (1893) 20 A.R. 633 (Ont.).

*Appearance without summons or warrant*—There may be an appearance by which a summons is waived; *R. v. Mitchell*, (1911) 24 O.L.R. 324, 19 Can. Cr. Cas. 113; *Geller v. Loughrin*, 24 O.L.R. 18, 18 Can. Cr. Cas. 461; or the right to object because of the illegality of the warrant may be waived. *R. v. Yaldon*, 17 O.L.R. 179, 13 Can. Cr. Cas. 489.

But in a proceeding which is subject to Part XV, if the attendance of the accused before the magistrate has been compelled by his illegal arrest upon a warrant issued without jurisdiction, and objection is taken on the hearing but overruled, the summary conviction will be quashed. *Ex parte Grundy*, 12 Can. Cr. Cas. 65 (N.B.); *Ex parte Boyce*, 24 N.B.R. 247, *Ex parte Coffon* (*R. v. Mills*), 11 Can. Cr. Cas. 48, 37 N.B.R. 122. [Contra: *R. v. Hanley*, 41 O.L.R. 177; *R. v. Baptiste Paul*, 20 Can. Cr. Cas. 159.]

As to raising the objection to a separate charge brought while the accused was in custody under the illegal arrest, see *R. v. Hurst*, (1914) 7 W.W.R. 994, 23 Can. Cr. Cas. 129, 30 W.L.R. 176.

*Where arrest is authorized without a warrant*—If the arrest is made without a warrant upon a charge which is to be tried under Part XV, *e.g.*, vagrancy, the accused is taken to the police station, the charge is entered in the complaint book and unless bailed by competent authority, the prisoner is there detained and brought before the magistrate at the earliest opportunity. The charge is then read, the prisoner pleads, and the case is then tried or inquired into or the prisoner remanded or bailed on the trial being adjourned. *R. v. Jackson*, (1917) 40 O.L.R. 173, 29 Can. Cr. Cas. 352, 362.

*Depositions to be in writing*—The omission of the magistrate to have the evidence taken in writing at the trial is fatal to the conviction; *Re Lacroix*, 12 Can. Cr. Cas. 297, (Que.); *R. v. McGregor*, 11 B.C.R. 350, 10 Can. Cr. Cas. 313; *Denault v. Robida*, 10 Que. S.C. 199; unless the taking of the depositions is waived as it has been held may be done. *R. v. Poirier, re Janneau*, 31 Que. S.C. 67, 12 Can. Cr. Cas. 360; (*William*) *King v. Weir*, 8 Que. P.R. 409.

The omission to take down the depositions is not material if in the course of the hearing the accused changes his plea to one of guilty and is sentenced on that plea. *R. v. Goulet*, (1907) 12 Can. Cr. Cas. 365 (Que.). The taking of the depositions in writing is waived if defendant's counsel knowing of the omission, enters upon his cross-examination without taking objection. *Bedard v. The King*, 22 Rev. Leg. 302, 26 Can. Cr. Cas. 99 (Que.).

As to waiver of depositions in quasi-criminal proceedings under provincial laws, see *R. v. Locke*, (1915) 24 Can. Cr. Cas. 337 (N.S.), *re Piers*, 44 N.S.R. 254; *Rand v. Rockwell*, 2 N.S.D. 199.

*Omission to read depositions over to witnesses*—The provisions of secs. 682 and 721, sub-sec. 3, require the evidence to be read over to the witnesses on the trial of an information or complaint, but such is a matter of procedure, and its omission does not go to the jurisdiction of the magistrate. *R. v. Kay, ex parte Gallagher*, 38 N.B.R. 498; *R. v. Kay, ex parte Steeves*, 39 N.B.R. 2, 15 Can. Cr. Cas. 160; *ex parte Doherty*, 32 N.B.R. 479.

*Signature of deposition by witness not essential under Part XV*—Witnesses are commonly asked to sign their depositions and that practice is called for on a preliminary enquiry (sec. 682), as to depositions not taken down in shorthand (secs. 682, 683); but sub-sec. (5) of sec. 721 makes this unnecessary in proceedings under Part XV, whether the depositions are taken in longhand or in shorthand.

*The justice to sign the depositions*—Whether taken in shorthand or not, the justice is to sign the depositions (sec. 682), the signature being affixed to the transcript when the shorthand notes are extended. Sec. 683.

In New Brunswick it is held that a summary conviction will not be quashed because the depositions signed by the witnesses were not also signed by the presiding justice; and that the omission does not go to the jurisdiction. *Rex v. Kay, Ex parte Gallagher*, 38 N.B.R. 498, 14 Can. Cr. Cas. 38; *Ex parte Budd* (N.B.) 17 Can. Cr. Cas. 236. Sub-sec. 4 of sec. 682 was held to be directory only and the signing by the magistrate a mere matter of procedure. *Ibid.* But see note to sec. 682.

*When depositions taken in shorthand*—Code sec. 683.

Sec. 683 of the Code permits the magistrate, in a preliminary inquiry, to have the evidence taken in shorthand; and, by force of secs. 711 and 721 (3), the same course can be taken on a trial under the summary convictions clauses. *R. v. L'Heureux*, 14 Can. Crim. Cas. 101; *Rex v. Warilow*, 17 O.L.R. 284, 14 Can. Cr. Cas. 117; *R. v. Bond* (1911) 19 Can. Cr. Cas. 96.

*Contradicting the recorded plea*—Whether there was in fact a plea of guilty in a summary conviction matter as stated in the conviction, is a question of fact as to which affidavits may be used on *certiorari* pro and contra; and if satisfied by such affidavits that the plea was wrongly recorded the conviction will be quashed for want of jurisdiction. *R. v. Barlow* [1918] 1 W.W.R. 499 (Alta.); *R. v. Richmond* [1912] 2 W.W.R. 1200, 20 Can. Cr. Cas. 29 (Alta.).

*Appearance by counsel without defendant's personal attendance*—Code sec. 720.

*Hearing in open court*—Code sec. 714.

*Non-appearance of prosecutor*—Sec. 722 (3).

**Adjournment.—Hearing at time to which adjourned.—Prosecutor not appearing.—Defendant may go at large, be committed or put under recognizance.—In event of non-appearance warrant may issue.—No adjournment for more than eight days.**

**722.** Before or during the hearing of any information or complaint the justice may, in his discretion adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective counsel, solicitors or agents then present, but no such adjournment shall be for more than eight days.

2. If, at the time and place to which the hearing or further hearing is adjourned, either or both of the parties do not appear, personally or by his or their counsel, solicitors or agents respectively, before the justice or such other justices as shall then be there, the justice who is then there may proceed to the hearing or further hearing as if the party or parties were present.

3. If the prosecutor or complainant does not appear the justice may dismiss the information, with or without costs as to him seems fit.

4. Whenever any justice adjourns the hearing of any case he may suffer the defendant to go at large or may commit him to the common gaol or other prison within the territorial division for which such justice is then acting, or to such other safe custody as such justice thinks fit, or may discharge the defendant upon his recognizance, with or without sureties at the discretion of such justice, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned.

5. Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance or to which the hearing or further hearing is adjourned the justice may issue his warrant for his apprehension.

*Origin*—Sec. 857, Code of 1892; R.S.C. 1886, ch. 178, secs. 48, 49, 50, 51; 32-33 Vict., Can., ch. 31, secs. 7, 32.

*Application to Part XV only*—Sec. 722 refers to summary conviction procedure and does not apply to a preliminary enquiry for an indictable offence. *Dick v. The King*, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57; Code sec. 798.

*"No such adjournment shall be for more than eight days"*—The adjournment here referred to is an adjournment of the hearing, and

this is to be distinguished from an adjournment after the hearing on a reservation of judgment. See note to sec. 726. At the expiration of the eight days without a further hearing or adjournment, the justice becomes *functus officio*. *Paré v. Recorder of Montreal*, 27 Que. S.C. 424, 10 Can. Cr. Cas. 295. And where the justice has a regularly appointed clerk of his court, the clerk in his unavoidable absence may, it seems, adjourn the court only to a date within the eight day limit from the last adjournment personally made by the justice. *Paré v. Recorder of Montreal*, *supra*.

But the justice having a general jurisdiction over the offence may, it seems, proceed with the charge with the defendant's consent without issuing a fresh summons if the defendant voluntarily attends at a date beyond the eight days after consenting to an adjournment for a longer time. *Bedard v. The King*, (1916) 26 Can. Cr. Cas. 99 (Que.); *R. v. Hazen*, (1893) 20 A.R. 633 (Ont.); *R. v. Heffernan*, (1887) 13 Ont. R. 616. [Contra: *R. v. French*, (1887) 13 Ont. R. 80.]

The hearing may be adjourned from time to time if either party is present. *Proctor v. Parker*, 12 Man. R. 528; *Messenger v. Parker*, (1885) 18 N.S.R. 237, 242. As to adjournment or dismissal on the non-appearance of the prosecutor or his counsel, see sec. 719.

The eight days are to be computed so as to exclude the date when the adjournment was ordered, the following day being the first of the eight. *R. v. Collins*, 14 Ont. R. 613; *Williams v. Burgess*, 12 A. & E. 635.

An adjournment made for more than eight days in the absence of the accused and his counsel is invalid. *R. v. Smith*, 16 Can. Cr. Cas. 425; *Donohue v. Recorder's Court*, 18 Can. Cr. Cas. 182 (Que.).

*Defendant to wait for case to be called*—Although the case is adjourned to a fixed hour on a certain day, the accused is bound to wait until the case is called; and if the justice is not sitting at that hour he must still wait a reasonable time for the session to begin. *R. v. Wipper*, (1901) 34 N.S.R. 202, 5 Can. Cr. Cas. 17.

*Bail on remand*—A defendant has his remedy by way of habeas corpus upon the return of which the court may order bail pending a remand by a magistrate, and this remedy is applicable as well where the charge upon which the remand was made is a subject of summary conviction and not indictable as in respect of indictable offences. *R. v. Vincent and Fair*, 22 Can. Cr. Cas. 98, 5 O.W.N. 141, 25 O.W.R. 104. And the magistrate under sub-sec. (4) has a discretion to free the defendant either on bail or on his own recognizance to appear at the adjourned hearing instead of remanding him in custody.

If the person arrested is admitted to bail and a time and place for the hearing is then stated in his presence, the justice has a discretion to proceed with the hearing on the default of the accused in attendance on the day fixed. Sec. 722 (2); *R. v. Hornbrook, ex parte Madden*, 38 N.B.R. 358, 13 Can. Cr. Cas. 273.

*Adjournment by one justice although special Act requires two for trial*—Code sec. 708 enables the justice before whom the information was laid, to adjourn the hearing of a summary conviction matter although he would not alone have jurisdiction to try the case. *R. v. Miller*, 15 Can. Cr. Cas. 98, 19 O.L.R. 125; *R. v. Graves* (No. 2), 16 Can. Cr. Cas. 345.

*Discretion to adjourn*—The granting of an adjournment in a summary conviction matter is in the discretion of the justice, but such discretion is not to be exercised in such a way as will deprive the accused of a fair trial. *R. v. Luigi*, 16 Can. Cr. Cas. 25 (Ont.).

Although it is usual to give an adjournment for the parties to procure counsel, the justice is not bound to adjourn the case for that purpose; *R. v. Biggins*, 5 L.T.N.S. 605; *R. v. Cambridgeshire*, 44 J.P. 168; *R. v. Tally* (1915) 7 W.W.R. 1178, 30 W.L.R. 396 (Alta.); *R. v. Irving*, (1908) 14 Can. Cr. Cas. 489, 18 O.L.R. 320, 12 O.W.R. 316.

The justice has a discretion to grant an adjournment of the hearing in order that the defendant may obtain counsel, but where the accused failed to ask for counsel or for an adjournment until after the evidence for the prosecutor was closed, the magistrate's refusal to adjourn will not invalidate the conviction. *R. v. Pfister*, (1911) 19 Can. Cr. Cas. 92, 3 O.W.N. 440, distinguishing *R. v. Briabois*, 15 O.L.R. 264, 13 Can. Cr. Cas. 96.

If there is a variance between the information and the evidence, the justice is to decide whether the variance has prejudiced the accused so that he has been "thereby deceived or misled," and if he finds such cause of prejudice he may adjourn the trial and may impose costs upon the prosecutor as a term thereof. Sec. 724, sub-sec. (4). If it is a mere variance, the justice has a discretion, but if the offence is of a distinct class the case is not one of variance and the defendant is not to be held to answer a distinct offence then brought forward for the first time without being given time to bring his witnesses and otherwise to make his full answer and defence. Code sec. 715. But if the special Act permits of prosecutions being brought in general terms for offences between widely separated dates and authorizes the substitution of one offence for another of the same class at trials thereunder, that would tend to show that for the purpose of the special Act the substituted offence should not be considered as a distinct offence. See *R. v. Milkins*, 17 Can. Cr. Cas. 20 (Ont.).

On the trial of an offence under the Canada Temperance Act, the information may be amended or altered, and any other offence under the Act substituted and the trial continued to conviction without an adjournment, if the defendant is present and does not allege he is misled and ask for an adjournment. *R. v. Byron, Ex parte Batson*, 37 N.B.R. 386, 10 Can. Cr. Cas. 240.

A summary conviction for a second offence may be made under sub-sec. (2) on evidence taken in the absence of the accused at an adjourned



hearing made as required by sub-sec. (1). *R. v. Leach*, 14 Can. Cr. Cas. 375, 17 O.L.R. 643.

*When adjournment demandable as of right*—A summary conviction will be quashed, if by the refusal of a reasonable adjournment, the accused has been deprived of an opportunity to make his full answer and defence. *R. v. Lorenzo*, 1 O.W.N. 179, 16 Can. Cr. Cas. 19, 1 O.W.N. 179.

Where the accused was summoned for the day following the service of the summons and the charge was then amended as for another offence, the accused was entitled to an adjournment without being put on terms of paying the costs of the day, and the refusal of the same was a denial of his right to make "full answer and defence," (Code sec. 715). *R. v. Farrell*, 12 Can. Cr. Cas. 524, 15 O.L.R. 100.

Unless it appears that the refusal of a magistrate to grant an adjournment results in the accused being prevented from having a fair trial, from making "his full answer and defence," the magistrate's *bona fide* exercise of discretion cannot be reviewed. *R. v. Tally*, (1915) 7 W.W.R. 1178, 23 Can. Cr. Cas. 449, 30 W.L.R. 396 (Alta.); *R. v. Irwing*, (1908) 13 Can. Cr. Cas. 489 (Ont.).

*Discretion to adjourn on prosecutor's default*—If the prosecutor does not appear, not desiring to proceed with the case, the justices are not bound to dismiss the case but may proceed as if he were present; and if the prosecutor is a necessary witness the case may be adjourned and the prosecutor summoned and compelled to attend by the same process as an ordinary witness would be. *Ex parte Bryant*, 27 J.P. 277; Code sec. 719.

*Right to make full answer and defence*—See sec. 715.

*Waiving an irregular adjournment of summary conviction hearing*—

An irregular adjournment of summary proceedings before a magistrate is waived by the accused afterwards appearing for trial and putting in his evidence without taking objection thereto. *R. v. Miller*, 15 Can. Cr. Cas. 87, 19 O.L.R. 125; *R. v. Graves* (No. 2), 16 Can. Cr. Cas. 345; *R. v. Hazen*, (1893) 20 A.R. 633 (Ont.).

*Adjournment for judgment*—Code sec. 726.

### *Defects and Objections.*

**Proceedings not objectionable on certain grounds.—Particulars may be ordered.—Description of offence in words of Act.**

**723.** No information, complaint, warrant, conviction or other proceeding under this Part shall be deemed objectionable or insufficient on any of the following grounds, that is to say,—

- (a) that it does not contain the name of the person injured, or intended or attempted to be injured; or,

- (b) that it does not state who is the owner of any property therein mentioned; or,
- (c) that it does not specify the means by which the offence was committed; or,
- (d) that it does not name or describe with precision any person or thing.

2. The justice may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such means, person, place or thing, be furnished by the prosecutor.

3. The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3; R.S.C. 1906, ch. 146, sec. 723; sec. 846, Code of 1892; 42-43 Vict., Imp., ch. 49, sec. 39.

*Adjournment on charge being changed from that in information*—See Code sec. 724.

*Variance as to time or place*—See sec. 724.

*Ordering particulars if satisfied that it is necessary*—This may appear from the information itself or the defendant may support his application for particulars with an affidavit intitled in the matter of the information and stating that he is not aware of the nature and particulars of the alleged offence, and that it is necessary for a fair trial of the case that he should be given further particulars, (describing what is required in detail so far as possible). *R. v. Stapylton*, 8 Cox C.C. 69.

*Stating ownership*—Particulars may be ordered under sub-sec. (2) if the magistrate thinks it necessary. And if the information incorrectly describes the ownership it may be amended and an adjournment granted. *Ralph v. Hurrell*, 40 J.P. 119, 32 L.T. 816; Code sec. 724 (4).

*Sub-sec. (3)—Describing the offence*—The words of sub-sec. (3) relate simply to the description of the offence; they do not dispense with the necessity of alleging all matters material to the offence, not being exceptions which under sec. 717 need neither be specified nor negatived.

The leading authorities as to the interpretation of sub-sec. (3) are the English decisions in *Smith v. Moody*, [1903] 1 K.B. 56, and *Cottrell v. Lempriere*, 24 Q.B.D. 639, in conformity with which are the decisions in *R. v. Campbell*, 22 B.C.R. 601, 26 Can. Cr. Cas. 196; *R. v. Harris*, 13 Can. Cr. Cas. 393 (Y.T.); *R. v. McCormack*, 7 Can. Cr. Cas. 135, 9 B.C.R. 497; *Re Wagner*, (1916) 9 W.W.R. 1000 (Alta.); *Re Effie Brady*, (1913) 3 W.W.R. 914, 21 Can. Cr. Cas. 193 (Alta.); *R. v. Code*, 3 Can. Cr. Cas. 372, and see *R. v. Pepper*, 15 Can. Cr. Cas. 314, 19 Man. R. 209.

Cases in which a narrower view has prevailed are *Ex parte Hilchie*, 11 Can. Cr. Cas. 289; *R. v. Leconte*, 11 Can. Cr. Cas. 41, and *R. v. Riddell*, 19 Can. Cr. Cas. 400.

In *Re Effie Brady*, (1913) 3 W.W.R. 914, 5 Alta. L.R. 400, 21 Can. Cr. Cas. 123, at 129, Walsh, J., of the Supreme Court of Alberta, said: "The summary convictions sections of the Code are administered by a body of men, the great majority of whom are without legal training or experience of any kind. It is probably for this reason that sec. 723 (3) of the Code was enacted so that a justice of the peace might not worry over the phraseology to be used by him in describing an offence, but might use the ready-made description of it contained in the section creating it. That being so I think that he should be allowed to do so. Not being a judge or a lawyer, he is not used to picking hidden meanings out of the plain language of statutes nor should he be asked to do so. It surely must be mystifying to a justice of the peace after being told by the Code that he will be all right if he describes an offence in the language of the section enacting it to be told by a judge that he was all wrong in so describing it and that his conviction which follows implicitly the directions of the statute in its description of the offence is no good because he did not put into that description some words which do not appear in the statute. Of course, as Lord Alverstone says, in *Smith v. Moody*, [1903] 1 K.B. 56, 'fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions.' This, I take it, means that such particulars as to the time, place and subject-matter of the charge must be given as with the statutory description of the offence will show upon the face of the conviction exactly what it is for."

A conviction under a by-law which enumerates a large number of offences must specify specifically which offence is intended. *Riopelle v. Desrosiers*, (1900) 3 Que. P.R. 195.

The curative provisions of secs. 723 and 724 do not cure the defect in an information which states on its face that the offence was committed at a date so long past that the prosecution would be barred. *R. v. Le Blanc* (1911) 21 Can. Cr. Cas. 221, 12 E.L.R. 66 (N.B.). And if a statute makes an offence of a "wilful" act or omission, the defect is not cured in a conviction which omits to describe the offence as "wilful" by stating it to be "unlawful," *R. v. Bridges*, (1907) 13 B.C.R. 67, 12 Can. Cr. Cas. 548; *R. v. Tupper*, 11 Can. Cr. Cas. 199; *ex parte O'Shaughnessy*, 8 Can. Cr. Cas. 136, 13 Que. K.B. 178.

Sec. 723 does not cure a defect in a conviction or a warrant of commitment which does not show on its face that it is made by a justice having jurisdiction. *R. v. Gow*, 11 Can. Cr. Cas. 81; *R. v. Graves*, 21 O.L.R. 329, 16 Can. Cr. Cas. 150 and 318; *Hunt v. Shaver*, 22 A.R. 202 (Ont.).

The conviction must show that there was an offence within the territorial jurisdiction of the magistrate and the defect cannot be cured on *certiorari* where there is no evidence to prove such an offence. *Woodlock v. Dickie*, 6 R. & G. 86; *R. v. Aikens*, 23 Can. Cr. Cas. 467.

Sub-sec. (3) of sec. 723 was introduced by ch. 46 of the Canada Statutes of 1910, and supersedes prior decisions to the contrary effect in *R. v. Coulson*, 24 Ont. R. 246, *R. v. Spain*, 18 Ont. R. 385. Compare as to indictments, secs. 852 and 859.

*Describing offence as committed in different modes*—Code sec. 725.

**Variance or defect.**—When not material as to time.—When not material as to place.—If misleading, adjournment.

**724.** No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint.

2. Any variance between the information for any offence or act punishable on summary conviction and the evidence adduced in support thereof as to the time at which such offence or act is alleged to have been committed, shall not be deemed material if it is proved that such information was, in fact, laid within the time limited by law for laying the same.

3. Any variance between the information and the evidence adduced in support thereof, as to the place in which the offence or act is alleged to have been committed, shall not be deemed material if the offence or act is proved to have been committed within the jurisdiction of the justice by whom the information is heard and determined.

4. If any such variance, or any other variance between the information, complaint, summons or warrant, and the evidence adduced in support thereof, appears to the justice present and acting at the hearing to be such that the defendant has been thereby deceived or misled, the justice may, upon such terms as he thinks fit, adjourn the hearing of the case to some future day.

*Origin*—Sec. 846, Code of 1892.

"*Variance*" between information and evidence]—The word 'variance' indicates that it is the same offence erroneously stated in some particular, to which the section is to apply, and not a different offence. *Martin v. Pridgeon*, (1859) 28 L.J.M.C 179, 1 E. & E. 778; *R. v. Brickhall*, 33 L.J.M.C. 156; *Whittle v. Frankland*, 2 B. & S. 49; *Ralph v. Hurrell*, 44 L.J.M.C. 145; *R. v. Lyons*, (1905) 10 Can. Cr. Cas. 130 (N.S.).

*Defects curable by the depositions*—A summary conviction describing an offence in proper form will not be set aside on the ground that the information did not charge any offence known to the law if, in fact, the case was tried out in respect of the legal offence disclosed in the depositions. *R. v. Tally* (1915) 7 W.W.R. 1178, 23 Can. Cr. Cas. 449 (Alta.). Even the omission of the date of a summary conviction offence may be cured under Code sec. 1124 for the purposes of a *certiorari* motion. *R. v. Tally*, *supra*. So also may the omission to state the several acts constituting a "practising" under a provincial law to which that section had been made applicable by provincial legislation. *R. v. Schilling*, (1915) 23 Can. Cr. Cas. 380 (Sask.).

As to defects held to be cured under the corresponding English section, see *Onley v. Gee*, 9 W.B. 662; *Rodgers v. Richards*, [1892] 1 Q.B. 555; *Bartholomew v. Wiseman*, 8 Times L.R. 147.

*Duplicity as a defect in information or conviction*—See secs. 710 (3) and 725.

*Amending the information*—In *Ex parte Tompkins*, 12 Can. Cr. Cas. 552, 37 N.B.R. 534, the defendant was charged with having sold intoxicating liquor without a license on the 24th of November, 1905, and when it came to trial he did not appear and the magistrate amended the information from a charge for selling on the 24th to a charge for selling on the 20th. The court was of opinion the magistrate had a right to do that and to enter a conviction for a sale on the amended information. *Ex parte Doherty*, 33 N.B.R. 15, 1 Can. Cr. Cas. 84, was distinguished; there the charge was for selling and the information was amended to a charge for keeping for sale which was a different offence. The majority of the court there held the defendant could not be convicted on the amended charge.

A mere clerical error in the information may be amended during the hearing although the evidence for the prosecution had been closed. *Bell v. Parent*, (1903) 23 Que. S.C. 235.

An amendment by change of date may be made if it concerns the same offence as was intended to be charged in the information; *Ex parte Tompkins*, (1906) 37 N.B.R. 534; but not to charge a different offence. *R. v. Lyons*, (1905) 10 Can. Cr. Cas. 130 (N.S.).

**Proceedings not objectionable on certain other grounds.—Multiplicity or uncertainty because of stating different modes.**

**725.** No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes. or in respect of one or other of several articles, either conjunctively or disjunctively, for example, in charging an offence under sec. 533 it may be alleged that

'the defendant unlawfully did cut, break, root up and otherwise destroy or damage a tree, sapling or shrub'; and it shall not be necessary to define more particularly the nature of the act done, or to state whether such act was done in respect of a tree, or a sapling, or a shrub.

*Origin*—Sec. 907, Code of 1892; R.S.C. 1886, ch. 178, sec. 107; 49 Vict., Can., ch. 49, sec. 4.

*Charging an offence in different modes*—Referring to sec. 725, Perdue, J. A., said in *R. v. Toy Moon* (1911) 1 W.W.R. 50, 21 Man. R. 527, 19 Can. Cr. Cas. 33, 19 W.L.R. 480: "It will be observed that the above section declares that no information, etc., shall be held to charge two offences or to be uncertain on account of its stating the offence to have been committed in different modes, etc. It is, therefore, necessary, before the section can apply, that an offence be charged; and, upon it being charged, the conviction is not objectionable if it states the offence to have been committed in different modes. The example that is given in the section, I think, clearly shows this. It is made an offence under sec. 533 wilfully to destroy or damage a tree, sapling, or shrub, being things of a similar nature. The offence lies in the injury to the tree, etc., and the fact that the manner in which the offence was committed is stated in the alternative, will not, by the effect of sec. 725, render the conviction bad. In the same way, a conviction "for buying, exchanging, taking in pawn, detaining, or receiving" from a soldier his war medal, is a single offence only, and is not bad for uncertainty: *The King v. Brine*, 8 Can. Crim. Cas. 54. . . . Sec. 725 does not go to the extent of saying that the conviction will be good where it charges the accused with committing one or other or both of two offences which are quite separate and distinct from one another, and are not merely the same offence committed in one or other of two different ways. A conviction would not be good which declared the accused guilty of having stolen or obtained by false pretences a sum of money from the same or different persons." *R. v. Toy Moon*, (1911) 1 W.W.R. 50, 21 Man. R. 527.

In *Johnston v. Needham*, [1909] 1 K.B. 626, Lord Alverstone, delivering the judgment of the Queen's Bench Division held that a conviction for ill-treating, abusing and torturing a horse, would be bad as being for more than one offence. The Canadian decisions, however, especially those in which the aid of sec. 725 has been invoked, are the other way. *Re Wagner*, (1916) 25 Can. Cr. Cas. 406, 9 W.W.R. 1000.

In *Rex v. White*, 34 N.S.R. 436, 4 Can. Cr. Cas. 430, it was held that a conviction for stealing "in or from" a building was for but one offence.

In *Regina v. McDonald*, 6 Can. Cr. Cas. 1, it was held that the objection that a conviction for that the defendant "unlawfully did

distill or rectify a quantity of spirits and did make or ferment a quantity of beer" was for two offences, was disposed of by sec. 725 of the Code.

In *Rex v. Brine*, 8 Can. Cr. Cas. 54, it was held that a conviction for "buying, exchanging, taking in pawn, detaining or receiving from a soldier a military decoration" was cured by this section.

In *Rex v. Brouse*, 21 Can. Cr. Cas. 17, 23 O.W.R. 790, 4 O.W.N. 640, Britton, J., held that a conviction for that the defendant "did unlawfully offer, expose, or have in his possession for sale ten barrels of apples packed contrary to the provisions of sec. 321 of the Inspection and Sale Act" was for only one offence, applying *R. v. McDonald*, 6 Can. Cr. Cas. 1.

In the case of *Rex v. Irwing*, 14 Can. Cr. Cas. 489, 18 O.L.R. 320, in the Ontario Court of Appeal, where the conviction objected to was for being the keeper of "a disorderly house of prostitution or house for the resort of prostitutes," Osler, J.A., said, at p. 321: "'To keep a disorderly house of prostitution' is to keep a 'disorderly house, bawdy house or house of ill-fame,' the latter being one description of the offences in sec. 238 (j) of the Criminal Code; an alternative description of the same thing is by the same clause to keep a house for the resort of prostitutes. All three forms of expression charge the same thing and the point seems to be covered by our recent decision in *Rex v. Leconte*, 11 O.L.R. 408, 11 Can. Cr. Cas. 41."

In *R. v. Monaghan*, 18 C.L.T. 45, it was held that a conviction for that defendant did give and sell intoxicating liquor to an Indian was not a conviction for two offences.

In *Smith v. Moody*, [1903] 1 K.B. 56, 72 L.J.K.B. 43, 20 Cox C.C. 369, the conviction complained of stated that the appellant "did injure the property" of the respondent without specifying the property and this was held insufficient for lack of that information.

In the case of *Rex v. Leconte*, 11 O.L.R. 408, 11 Can. Cr. Cas. 41, in which *Smith v. Moody* was cited, it was held that a conviction of a woman under clause (j) (since repealed) of Code sec. 238 of being "the keeper of a disorderly house, bawdy house or house of ill fame or house for the resort of prostitutes" was not void for duplicity and that the conviction in that form was valid under sec. 723 (3) of the Code because it described the offence in the words of the statute creating it.

A conviction under sec. 238 (i) Criminal Code, which refers to the accused as a common prostitute or night walker, is not bad for duplicity because it does not state to which class she belongs; if, strictly speaking, any duplicity is involved it is but a defect of form within the meaning of sec. 724, and the objection is cured by the provision of that section. *Re Effie Brady*, (1913) 3 W.W.R. 914, 21 Can. Cr. Cas. 123, 23 W.L.R. 333, (Alta.).

*Stating alternative dates for offence*—The general rule is that an offence cannot be charged disjunctively or in the alternative in a con-

viction. If the conviction stated the offence under a liquor law to have been committed between the 23rd and 26th days of the month of December, that would have been sufficient. Stating that the offence was committed on one or the other of the days intervening between the two dates mentioned amounts to practically the same thing. Time is never of the essence of the offence under the Liquor License Act (N.B.), so long as it appears that the information was laid within the time limited for bringing the prosecution. If the conviction were brought up on *certiorari* the court has power to amend the date of the commission of the offence so as to make it conform to the evidence. *Ex parte Jeed*, (1913) 21 Can. Cr. Cas. 255, 12 E.L.R. 497 (N.B.).

Where the special statute expressly provides that several charges may be included in the one information, then if the magistrate adjudges the accused guilty upon each charge, separate convictions need not be drawn up, but the fines may be imposed for each offence in one formal conviction covering all the offences. *R. v. Whiffin*, 4 Can. Cr. Cas. 144, 3 Terr. L.R. 3.

### *Adjudication.*

**Justice may convict, make order, or dismiss.**

**726.** The justice, having heard what each party has to say, and the witnesses and evidence adduced shall consider the whole matter, and, unless otherwise provided, determine the same and convict or make an order against the defendant, or dismiss the information or complaint, as the case may be.

*Origin*—Sec. 858, Code of 1892; R.S.C. 1886, ch. 178, sec. 52.

*Two justices under special statutes*—If the prosecution be under a special statute requiring two or more justices to determine the case, the term "justice," used in the singular in sec. 726 as well as in other sections of Part XV, would have a corresponding plural meaning under the interpretation clause (Code sec. 2, sub-sec. 18). The judgment will be according to the opinion of the majority of the justices present at the hearing in such case, but if the court be equally divided one of the justices may withdraw his opinion leaving the remaining justices in a majority; *Ex parte Evans*, [1894] A.C. 16, 58 J.P. 260. But it would seem that if by special statute at least two justices were required to adjudicate, and only two sat, their disagreement should result in an adjournment for a re-hearing before a reconstituted court or if they refuse to so adjourn the case they should dismiss the charge. *Bagg v. Colquhoun*, [1904] 1 K.B. 554, 68 J.P. 159; *R. v. Ashplant*, 52 J.P. 474.

*Hearing the witnesses*—Every witness at any hearing shall be examined upon oath or affirmation. Sec. 716.



*View*—The magistrate must not, after the close of the evidence and without an adjournment for the purpose of a view with the opportunity for the parties to be represented thereat, go alone and take a view of the locus of the offence to assist in coming to a conclusion; and where such was done and so stated in the adjudication, a summary conviction made under the Indian Act (Can.) was set aside on *certiorari*. *Re Sing Kee*, 8 B.C.R. 20, 5 Can. Cr. Cas. 86.

*Territorial jurisdiction to be proved*—There should be evidence before the magistrate to show that the place of the offence is within the magistrate's territorial jurisdiction. *R. v. Picard*, (1913) 3 W.W.R. 1007 (B.C.); *R. v. Oberlander*, (1910) 15 B.C.R. 134, 13 W.L.R. 643; *R. v. C.P.R.* (1908), 14 Can. Cr. Cas. 1 (Alta.); *R. v. McGregor*, 2 Can. Cr. Cas. 410; *R. v. Cahill*, 35 N.B.R. 240, 6 Can. Cr. Cas. 204; *R. v. McHugh*, 13 B.C.R. 224.

It has been held that the warrant served on the defendant may be looked at to show in explanation of the depositions that the offence he was called upon to answer and of which he was convicted, was committed within the magisterial jurisdiction when such appeared in the warrant, but not in the information or conviction. *R. v. McGregor*, 2 Can. Cr. Cas. 410.

There need not be evidence to prove a fact of local geography if the justice chooses to take judicial notice that the place referred to by name is within the limits of his territorial jurisdiction. *R. v. C.P.R.* 1 Alta. L.R. 341, 14 Can. Cr. Cas. 1. And as judicial notice must be taken of all public statutes of Canada, (Can. Evidence Act, sec. 18) it would follow that the justice would be bound to take judicial notice of the location of places named in a federal Act as constituting part of an electoral division which was included in his commission as a justice. Judicial notice will be taken of local divisions into which a province is divided for purposes of government. *Ex parte Macdonald*, 3 Can. Cr. Cas. 10, 27 S.C.B. 686.

*Insufficiency of prosecutor's case*—If the evidence for the prosecution is not sufficient at the close of the case the magistrate's duty is to dismiss the charge and grant a certificate of dismissal. *Re Green and Chew Deb*, (1913) 3 W.W.R. 854, same case *sub nom.*, *R. v. Chew Deb*, 18 B.C.R. 23, 23 W.L.R. 308, 21 Can. Cr. Cas. 20; *Bradshaw v. Vaughton*, 30 L.J.C.P. 93; Code sec. 730.

*Withdrawal of charge*—The informant cannot withdraw the case for the purpose of instituting fresh proceedings, without the consent of the accused if the merits have been gone into further than the taking of formal evidence. Code secs. 720, 726; *Re Green and Chew Deb*, (1913) 3 W.W.R. 854; same case *sub nom.* *R. v. Chew Deb*, 18 B.C.R. 23, 23 W.L.R. 308, 21 Can. Cr. Cas. 20; *ex parte Wyman*, 34 N.B.R. 608, 5 Can. Cr. Cas. 58; *ex parte Mitchell*, 39 N.B.R. 316; *ex parte Case*, 28 N.B.R. 652.

On the close of the prosecutor's case the defence may rest on the insufficiency of the evidence and require a decision. Having done so, it would be improper for the magistrate afterwards to take the personal consent of the accused in the absence of his counsel, to the withdrawal of the charge, and so to deprive the accused of his right to object, on fresh proceedings being begun, that he had once been put in jeopardy. *Re Green and Chew Deb*, (1913) 3 W.W.R. 854 (B.C.); *Ex parte Wyman*, 34 N.B.R. 608, 5 Can. Cr. Cas. 58, not followed; *Bradshaw v. Vaughton*, 30 L.J.C.P. 93, applied.

*No amendment of charge if defendant fails to attend on delivery of judgment*—A justice cannot, after adjourning a case for the sole purpose of considering his judgment, amend the information in the absence of the defendant at the time and place appointed to give judgment. *R. v. Gough*, 22 N.S.R. 516; *R. v. Grant*, 30 N.S.R. 368.

*The proof necessary for a conviction*—It is a much lesser evil that the guilty sometimes escape than that the innocent be sometimes punished; no one is to be convicted upon suspicion alone, no matter how strong it may be; only those who are duly proved to be guilty, in accordance with the provisions of the law are to be punished. *R. v. Borin*, 22 Can. Cr. Cas. 248, 254, 29 O.L.R. 584, 5 O.W.N. 412.

The magistrate may go behind the form of the transaction to ascertain if the real transaction was of a prohibited kind carried out so as to give the appearance of legality. *R. v. Richardson* (1891) 20 Ont. R. 514; *R. v. Stephens*, 1 Sask. L.R. 509 (pretended separate sales of prohibited quantities of liquor).

The punishment is quite a different thing from the adjudication of guilt. So if the fact of the adjudication of guilt of the previous offence is proved, no defect or invalidity in the punishment awarded can affect the validity of the adjudication as evidence between the prosecution and the accused that the previous offence had been committed when proved on a charge of a second offence. *R. v. Tansley* (No. 2), [1917] 3 W.W.R. 70 (Alta.), affirming *R. v. Tansley* [1917] 2 W.W.R. 25.

*Imprisonment as a direct punishment*—If the accused has proper notice of the proceedings, and is aware that judgment may be pronounced against him, and he might have been present, sentence of imprisonment in the first instance may be imposed in his absence. *R. v. Kay*, *Ex parte Landry*, 38 N.B.R. 332.

*Imprisonment in default of paying fine or in default of distress*—Code secs. 739-749.

*Term of imprisonment under Part XV counts from date of gaoler receiving prisoner*—The period of imprisonment under a summary conviction is to be calculated from the time of actual imprisonment. *R. v. Gregg*, (1913) 4 W.W.R. 1344, 1347, 22 Can. Cr. Cas. 51, 25 W.L.R. 183 (Alta.).

If a summary conviction imposes a penalty in excess of the actual sentence it would seem that the error may be corrected by the return

of an amended conviction and commitment on the issue of a habeas corpus. Code sec. 1124; *R. v. Daignault*, (1916) 10 W.W.R. 374 (Man.); and see *R. v. McGuire*, 13 Can. Cr. Cas. 312.

*Concurrent sentences*—Sec. 746 provides for the case of sentencing a prisoner upon a summary conviction when he is already in prison undergoing imprisonment "upon conviction for any other offence." The former conviction is not necessarily a summary conviction, and the justice making the summary conviction for a later offence punishable by summary conviction is enabled if he thinks fit, to order that the imprisonment for such subsequent offence shall commence at the expiration of the imprisonment to which the defendant was previously sentenced. Code sec. 746, sub-sec. (2).

If the defendant is being sentenced by a justice at the one time upon two separate charges punishable on summary conviction, a sentence of a fixed term upon each will be cumulative unless ordered to be concurrent, *Ex parte Bishop*, (1895) 33 N.B.R. 428.

*Where special Act enables several offences to be tried together and included in one information*—The fact that several offences may be joined under a special Act does not raise a presumption that a complaint for a single offence covers all previous offences of the same class within the limitation period so as to bar separate prosecutions for them. *Wentworth v. Mathieu*, [1900] A.C. 212, 3 Can. Cr. Cas. 429.

*Defendant not to be punished twice for the same offence*—Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act, and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence. Code sec. 15.

*Time for paying fine*—If no time is specified for paying a fine imposed, it is payable forthwith. *R. v. Caister*, 30 U.C.Q.B. 247 (Ont.).

*Separating the penalty as to each of several defendants*—Whether the offence is in its nature single or joint, a joint award of one fine against several defendants is erroneous. It ought to be severed against each defendant, even where the offence is joint, otherwise the effect would be that one who had paid or tendered his proportionate part might be imprisoned till the others had paid theirs or until he paid their proportion. *R. v. Amyot*, 11 Can. Cr. Cas. 232; *Morgan v. Brown*, 4 A. & E. 515.

A summary conviction is invalid if it awards one fine against two or more persons for their separate acts. *Gaul v. Township of Ellice*, 3 O.L.R. 438, 6 Can. Cr. Cas. 15.

A conviction of two persons in partnership for an offence several in its nature, and adjudging that they should forfeit and pay, etc., is bad for a joint conviction in such case is bad; the penalty ought to be imposed on the parties severally. *R. v. Amyot*, 11 Can. Cr. Cas. 232, 234;

*Ex parte* Howard, 25 N.B.R. 191; Mullins v. Bellamere, 7 C.L.J. 228; *Re* Bice, 20 N.S.R. 294; *R. v. Ambrose*, 16 Ont. R. 251; *re* Roske and Messenger [1917] 1 W.W.R. 341 (Alta.).

A conviction against "Messrs. Harrison & Co." was held invalid even as against Harrison for the court could not tell upon the face of the proceedings but that the delinquency of Harrison's partners who were not before the court, might have been imputed to him. *R. v. Harrison*, 8 T.R. 508.

Where the members of a partnership firm are charged with an offence as to which each may be considered guilty the conviction should not describe them in the firm name alone, but should specifically name the persons adjudged guilty in the transaction. *Re McDonald Bros.* (1898), 34 C.L.J. 475 (B.C.).

Two persons who were doing business as co-partners were jointly convicted before a magistrate for keeping for sale intoxicating liquors contrary to the Canada Temperance Act. The conviction was as follows:—"And I adjudge the said G. H. and J. C. for their said offence to forfeit and pay the sum of \$30 to be paid and applied according to law, and also to pay to (the informant) the sum of \$3.60 for his costs in this behalf; and if the said several sums be not paid forthwith, I order that the same be levied by distress and sale of the goods and chattels of the said G. H. and J. C.; and in default of sufficient distress, I adjudge each of them the said G. H. and J. C. to be imprisoned." It was held that the offence charged was not a joint offence, and that the conviction was bad, for the magistrate ought to have adjudged a separate penalty upon each defendant. *Ex parte* Howard and Cringle, (1885) 25 N.B.R. 191.

*Adjournment for judgment*—If the magistrate trying a criminal charge punishable on summary conviction adjourns the case *sine die* for deliberation and does not thereafter give the parties notice of the time and place at which he will give judgment, his decision is made without jurisdiction and will be set aside on *certiorari*. *Dierks v. Altermatt*, [1918] 1 W.W.R. 719, 725 (Alta.); *R. v. Quinn*, 28 Ont. R. 224. *R. v. Morse*, 22 N.S.R. 298.

The justice has no jurisdiction to deliver judgment at a time of which the parties have not been notified so that they may have an opportunity of being present. *Cairns v. Choquet*, (1900) 3 Que. P.R. 25; *R. v. Quinn*, (1897) 28 Ont. R. 224; *R. v. Hall*, (1887) 12 P.R. 142 (Ont.); *R. v. Alexander*, (1889) 17 Ont. R. 458; *R. v. Heffernan*, (1887) 13 Ont. R. 616; *R. v. Morse*, 22 N.S.R. 298; *Therrien v. McEachern*, (1897) 4 Que. S.C. 87, 4 Rev. de Juris. 87.

But an adjournment for judgment only is not an adjournment of "the hearing" within sec. 722, and consequently is not limited to eight days. *Plante v. Cliche*, (1910) 38 Que. S.C. 535, 17 Can. Cr. Cas. 43; *R. v. Alexander*, (1889) 17 Ont. R. 458; *R. v. Hall*, 12 P.R. 142 (Ont.).

If at the close of the hearing, counsel for the complainant and for the accused respectively agree that judgment may be reserved without fixing a date for same, other than that the decision shall be given within one week, and shall be notified to the respective solicitors, and the magistrate acquiesces in and conforms to such arrangement, he does not thereby lose jurisdiction and a conviction made within the week should not be set aside. *R. v. McKenzie*, 44 N.S.R. 474, 17 Can. Cr. Cas. 372.

Where neither the information nor the evidence taken in a case on which the justice had reserved judgment disclosed any offence in law, prohibition may be ordered without waiting for the judgment of the justice. *R. v. Breen*, 8 Can. Cr. Cas. 146.

If the adjudication is to be made by a bench of justices (see secs. 707 and 708), all of the justices should be present on delivery of judgment. *Ex parte McCorquindale*, *R. v. Haines*, (1908) 15 Can. Cr. Cas. 187, 39 N.B.R. 49. It has been doubted whether it is enough that both had signed written reasons for judgment and left it with one of themselves to read it at the time and place to which the case had been adjourned for delivery of judgment. *Ex parte McCorquindale*, *R. v. Haines*, *supra*, per Gregory, J., but such a course was considered proper in the same case by Barker, C.J., and by Boyd, C., in *R. v. Armstrong*, (1916) 36 O.L.R. 2, 9 O.W.N. 472, 26 Can. Cr. Cas. 151.

*Judgment with unauthorized conditions for suspension*—The judgment should not award a penalty along with a direction that the sentence would be suspended if defendant did certain acts which the justice would have no power to directly order him to do. *R. v. Knight* (1916), 11 O.W.N. 190, 27 Can. Cr. Cas. 111.

*Disposal of other charges based on same facts against same defendant*—A conviction may be set aside on the ground that the magistrate had before him at the time of hearing the case, another information against the accused for a similar offence covered by the same facts, and did not dispose of that before entering upon the hearing but kept it still open. *R. v. Iman Din*, 15 B.C.R. 476, 16 W.L.R. 130, 18 Can. Cr. Cas. 82 (B.C.); *R. v. McManus*, [1918] 3 W.W.R. 3, 30 Can. Cr. Cas. 122 (Alta.). A conviction for keeping liquor for sale was quashed where a charge of possessing in illegal premises laid in respect of the same liquor taken at the same police raid was held open for future adjudication. *R. v. McManus*, *supra*.

It is a well-known principle of criminal law that each case ought to stand on its own merits, and should be decided on the evidence given with relation to that particular charge; per Pollock, B., in *Hamilton v. Walker*, [1892] 2 Q.B. 25, at p. 28. In that case the justices had two informations before them, and, having heard the evidence on one charge, they determined to proceed with the hearing of the second, and, having done so, thereupon convicted of the offence charged in the first. The conviction was quashed.

In *Regina v. Fry* (1898), 19 Cox C.C. 135, at the conclusion of the first case the justices postponed their decision thereon, and proceeded to hear the other informations, which related to a different charge of an offence committed on a different day. They dismissed the second and third informations. They then announced that they had decided to convict at the close of the first case, but that they adjourned their decision and the consideration of the amount of the penalty until after the other charges were disposed of, and that in adjudicating on each case they applied to that case the evidence that was given in reference to it, and no other. It was held that the postponement by the justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law.

In *Rex v. Lapointe* (1912), 20 Can. Crim. Cas. 98, 3 O.W.N. 1469, the police magistrate told the solicitor for the defendant that all the evidence on the three charges was set out in the depositions forwarded, and that the said evidence was utilized by him on each and all of the said charges. The one ground taken to quash the conviction was that, having three informations before him, the police magistrate proceeded to hear evidence on all three cases, and did then find the defendant guilty in all three cases. It was held that if any of the evidence could not be applicable to one of the charges the conviction on that charge could not stand. If the evidence in the one case had any effect upon the mind of the magistrate in reaching a conclusion, the defendant was prejudiced in his trial. If the magistrate has not stated whether it had or had not, it is not necessary for the court hearing a *certiorari* to decide what the effect of such a statement might have been; it is sufficient that the defendant may have been prejudicially affected in the result by the admission of irrelevant evidence. *R. v. Melvin* (1916) 38 O.L.R. 231; *R. v. Bracci* (1918) 14 O.W.N. 305, 29 Can. Cr. Cas. 351.

See also *Rex v. Bullock and Stevens*, (1903) 6 O.L.R. 663; *Regina v. Hazen*, (1893) 23 O.R. 387, reversed in appeal, 20 A.R. 633; *Rex v. Haslam*, (1916) 12 Cr. App. R. 10; *R. v. McBerney*, 3 Can. Cr. Cas. 339; *Rex v. Banks*, [1916] 2 K.B. 621; *Perkins v. Jeffery*, [1915] 2 K.B. 702. But the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it was relevant to any point before the Court: *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65; *Rex v. Bond*, [1906] 2 K.B. 389, at p. 409; *Regina v. Ollis*, [1900] 2 Q.B. 758; *Perkins v. Jeffery*, [1915] 2 K.B. 702; *R. v. Christie*, [1914] A.C. 545; *R. v. Kurasch*, [1915] 2 K.B. 749; *Director of Public Prosecutions v. Thompson*, (1918) 87 L.J.K.B. 478.

Where the defendant was summoned to appear before the magistrate to answer two informations for selling intoxicating liquor in violation of the second part of the Temperance Act, and evidence was heard in both cases, and both cases were then adjourned until a subse-

quent day, the judgment then given, convicting defendant under one information and dismissing the other was bad and the conviction was quashed, as the evidence in the one case, although dismissed, was calculated under the circumstances disclosed, to influence the magistrate in the case in which defendant was convicted. *R. v. Burke*, 36 N.S.R. 408, 8 Can. Cr. Cas. 14; *R. v. McBerney*, 26 N.S.R. 327, 3 Can. Cr. Cas. 339.

It is not objectionable to try the same defendant upon several separate charges for similar offences by taking each case separately and announcing a conviction or acquittal as the case may be at the termination of each before commencing the next case, but reserving sentence on the convictions until all the trials are completed. *R. v. Bigelow*, 8 Can. Cr. Cas. 132; *ex parte Monahan*, 17 Can. Cr. Cas. 53.

*Discretion as to penalty within the statutory limits*—Sec. 1028 of the Code applies as well to proceedings under the "Summary Convictions" clauses as to proceedings by indictment. Where both fine and imprisonment are provided as the authorized punishment for a statutory offence upon summary conviction, the magistrate may in his discretion impose either a fine alone or an imprisonment alone or both, unless the particular statute specially provides otherwise. *Ex parte Kent*, 7 Can. Cr. Cas. 447.

*Minimum fine under certain statutes*—If a special Act enacts that a fine may be imposed of "not less than \$50" for a first offence and of "not less than \$100" for a second offence, the magistrate cannot impose a fine of more than \$50 for a first offence. *Re Richard* (1907) 12 Can. Cr. Cas. 204, 38 Can. S.C.R. 394.

It means "\$50 and no less"; *Reg. v. Smith*, 16 O.R. 454; *Reg. v. Porter*, 20 N.S.R. 352; *Reg. v. Rose*, 22 N.B.R. 309.

Where a statute imposes a definite minimum penalty for an offence, a summary conviction awarding a lesser fine, and, in default of payment, a lesser term of imprisonment than that specified, is bad. *R. v. Hostyn*, 9 Can. Cr. Cas. 138, 1 W.L.R. 113.

*Minimum imprisonment under particular statutes*—Where a minimum term of imprisonment in default of paying a fine is imposed by statute, a summary conviction imposing a lesser term will be quashed. *Ex parte Daigle*, *R. v. Charest*, 18 Can. Cr. Cas. 211, 37 N.B.R. 492.

If the particular statute under which the conviction takes place makes a fixed term of imprisonment with hard labour obligatory, the prisoner has a right to object that the imprisonment ordered without hard labour is illegal. *Poulin v. City of Quebec*, 13 Can. Cr. Cas. 391, 33 Que. S.C. 190.

*Formal conviction*—See sec. 727 and note to same.

*Certificate of dismissal*—See sec. 730.

*Commitment in execution of a summary conviction*—Code secs. 739-747.

*Alternative remedies of certiorari or appeal in summary conviction matters*—The mere existence of a right of appeal where no appeal was in fact taken does not absolutely prevent *certiorari* under the Code; *certiorari* in regard to summary proceedings before justices is distinguishable from *certiorari* to an inferior court of record in that the summary proceedings before justices may be removed after judgment. *Dierks v. Altermatt*, [1918] 1 W.W.R. 719, 723, 724 (Alta.). A writ of error was the former remedy for review of the judgment of a court of record. In criminal matters an appeal under Code sec. 1013 *et seq.* has displaced the writ of error. Code sec. 1014; but sec. 1013 applies only to indictable offences where there has been a verdict or judgment of a "court or judge" or of a magistrate acting under sec. 777, and not to proceedings under Part XV.

The existence of a right of appeal is sometimes referred to as a ground for refusing the exercise of the power of *certiorari* as a matter of judicial discretion unless there are exceptional circumstances. *Dierks v. Altermatt*, [1918] 1 W.W.R. 719, 724 (Alta.); and particular statutes will be found which limit *certiorari* thereunder to cases in which an appeal would not afford an adequate remedy. Exceptional circumstances may always be said to exist where there is either (1) lack of jurisdiction, or (2) such irregularity in the proceedings as touches the substantial rights of the party so that he may be said really to have been aggrieved. *Dierks v. Altermatt*, [1918] 1 W.W.R. 719 (Alta.); *ex parte Pelchat*, (1916) 49 Que. S.C. 195, 26 Can. Cr. Cas. 75.

*Defects of form*—See secs. 723, 724, 753, 754, 1124, 1125.

*Review of commitment by habeas corpus*—Habeas corpus lies in respect of commitments in summary conviction proceedings under the Code. *Re Ching How* (1912) 1 W.W.R. 674, 19 W.L.R. 891, 19 Can. Cr. Cas. 176 (Sask.); *R. v. Pepper*, 15 Can. Cr. Cas. 314 (Man.); *R. v. Barnes*, 18 W.L.R. 631 (Man.); *R. v. Dora Johnson*, (1912) 1 W.W.R. 1045, 19 Can. Cr. Cas. 203, 22 Man. R. 426; *re Muschik*, 9 Sask. L.R. 1, 33 W.L.R. 468, 25 Can. Cr. Cas. 170; *R. v. Swett*, (1914) 7 W.W.R. 608; 29 W.L.R. 887, 23 Can. Cr. Cas. 272 (Alta.); *R. v. Leschinski*, 17 Can. Cr. Cas. 199.

*Proceeding on defendant's non-appearance to summons*—Code sec. 718.

*Proceeding in default of complainant's appearance*—Code sec. 719.

#### Minute of conviction or order.—Forms.

**727.** If the justice convicts or makes an order against the defendant, a minute or memorandum thereof may then be made, for which no fee shall be paid, and the conviction or order, in such case, shall afterwards be drawn up by the justice on parchment or on paper, under his hand and seal, in such one of the



forms of conviction or of orders from 31 to 36 inclusive as is applicable to the case, or to the like effect.

*Origin*—Sec. 859, Code of 1892; R.S.C. 1886, ch. 178, sec. 53.

*The memorandum of adjudication*—If it be desirable to postpone the preparation of the formal conviction, the justice may enter a memorandum of adjudication at the time of delivering his oral judgment, and later prepare or fill up the statutory form applicable to the case. The memorandum of adjudication may conveniently be subjoined to the depositions. A warrant in execution may issue thereon prior to the formal conviction being drawn up and may be justified by the latter which will bear the date of the adjudication. *Lindsay v. Leigh*, 11 Q.B. 455; *R. v. McCarthy*, 11 Ont. R. 657.

On pronouncing the conviction and before entering up the minute of adjudication, the justice may, while the accused is still present, correct an error in the amount of costs he had orally imposed although the correction increases the amount the defendant is required to pay. *R. v. Dickey* (1915) 9 W.W.R. 142, 25 Can. Cr. Cas. 55, 32 W.L.R. 404.

The minute or memorandum of conviction which the justice may make under Code sec. 727 at the time of the conviction is a document of a formal character to which reference may subsequently be made, if necessary, before the same tribunal. So it is said that where no formal conviction had been made out, the minute or memorandum will suffice to prove the fact of prior conviction on a charge of a second offence being heard by the same magistrate. *R. v. Tansley*, [1917] 3 W.W.R. 70 (Alta.), affirming *R. v. Tansley*, [1917] 2 W.W.R. 1025, 1026 (Alta.); *Commissioner of Police v. Donovan*, [1903] 1 K.B. 895, 72 L.J.K.B. 545; *London School Board v. Harvey*, 4 Q.B.D. 451. But it was intimated that had the defendant been prosecuted in another court or "before another magistrate in a different place," it would have been necessary to have had the formal conviction made out and either the conviction itself or a certificate thereof would have been required to prove the fact of prior conviction. *R. v. Tansley*, [1917] 2 W.W.R. 1025, 1026 (Alta.).

Where no formal conviction had been drawn up and the minute of conviction only was returned to a *certiorari*, the court may quash the conviction which it records, if it is found that the conviction is bad. *R. v. Mancion*, 8 O.L.R. 24, 3 O.W.R. 756, 8 Can. Cr. Cas. 218.

In the case of a mere "order" enforceable by commitment or distress under Part XV under the authority of some special Act, a copy of the minute of the order is to be first served on the person against whom it is made. Code sec. 731. But that provision does not apply to make it necessary to serve a minute of a summary conviction. *Re Effie Brady*, (1913) 3 W.W.R. 914, 23 W.L.R. 333, 21 Can. Cr. Cas. 123 (Alta.).

*The formal conviction*—A summary conviction need not state the name of the informant. *Ex parte* Van Buskirk, 13 Can. Cr. Cas. 234, 38 N.B.R. 335.

The absence of a seal from a summary conviction renders the conviction invalid as a formal conviction, but when brought up on *certiorari* it is proper to allow a continuance so as to permit of the filing of a conviction under seal. *R. v. Dickey* (1915) 9 W.W.R. 142 (Alta.); *Bond v. Conmee*, 15 Ont. R. 716.

There should be both a direction that the accused shall pay the fine and that the fine shall be forfeited. *R. v. Burtress*, 3 Can. Cr. Cas. 536 (N.S.); *R. v. Cyr*, 12 P.R. 24 (Ont.).

If the jurisdiction depends on the fact of the justice acting at the request of the police magistrate or of his acting in case of absence or illness of another, the conviction should show this on its face as a fact on which his jurisdiction depends. *R. v. Ackers*, (No. 3) 16 Can. Cr. Cas. 222, 21 O.L.R. 187.

The making out of the formal conviction complete in itself, dispenses with the necessity for entering a minute of adjudication on the record of proceedings. *Ex parte* Van Buskirk, 13 Can. Cr. Cas. 234, 38 N.B.R. 335; *ex parte* Flannagan, 2 Can. Cr. Cas. 513, 34 N.B.R. 326.

Although a magistrate has delivered to the defendant a copy of conviction stated to be the justification for the proceedings which followed the adjudication, he is not precluded thereby from drawing up and returning a conviction in a formal shape, and the latter will be taken as the authentic record of the proceedings. *R. v. Gratton*, 17 Can. Cr. Cas. 324, 326 (Que.); *Basten v. Carew*, 5 D. & R. 558; *R. v. Huntington Justices*, 5 D. & R. 588; *R. v. Allan*, 15 East. 333. But in that case the corrected statement must be conformable to the facts as they really took place; *R. v. Simpson*, 10 Mod. 382; *R. v. Gratton*, *supra*; whether the minute of adjudication correctly states these or not. *R. v. McDonald*, 26 N.S.B. 402; and see *R. v. Hartley*, 20 Ont. R. 485; *R. v. Whiffen*, 4 Can. Cr. Cas. 141 (Terr.); *R. v. McAnn*, 3 Can. Cr. Cas. 110, 4 B.C.R. 587; *R. v. Brady*, 12 Ont. R. 363.

So a sentence which made no mention of hard labour when actually pronounced is not to be changed in the absence of the accused by adding the words "with hard labour" to the conviction and commitment respectively. *R. v. Kirwin*, 20 Can. Cr. Cas. 181; *ex parte* Carmichael, 8 Can. Cr. Cas. 19 (N.S.).

*Summary conviction to identify the offence*—The offence is to be definitely described so that it may be pleaded in the event of a second prosecution being brought for the same offence. *R. v. Mabey*, 37 U.C.Q.B. 248 (Ont.); *R. v. Somers*, 24 Ont. R. 244; *R. v. Hoggard*, 30 U.C.Q.B. 152 (Ont.); *ex parte* Dixon, 36 N.B.R. 109; *R. v. Spain*, 18 Ont. R. 385; *R. v. Whelan*, 4 Can. Cr. Cas. 277; *R. v. Leary*, 8 Can. Cr. Cas. 141; *R. v. Smith*, 2 Can. Cr. Cas. 485 (N.S.); *R. v. Van Norman*, 19 O.L.R. 447, 14 O.W.R. 659; *R. v. Mines*, 1 Can. Cr. Cas.

217 (Ont.); *ex parte* Flanagan, 34 N.B.R. 577; *R. v. Marsh*, 25 N.B.R. 371; *ex parte* Whalen, 32 N.B.R. 274.

If a summary conviction is stated to be for defendant's said "offence" (in the singular) and only one penalty is imposed, but two offences are recited, the conviction is bad as it does not appear of which of the two he was found guilty. *R. v. Aitken*, [1917] 2 W.W.R. 781 (Alta.); *R. v. Code*, 1 Sask. L.R. 295, 13 Can. Cr. Cas. 372. The same result follows although one of the offences is improperly charged. *R. v. Aitken*, [1917] 2 W.W.R. 781 (Alta.), in which under a special statute two offences might be joined if certain particulars were included and these were included as to one offence only. The general rule applicable to summary convictions under the Criminal Code is that every complaint or information shall be for one offence only. Cr. Code sec. 710.

A charge of an offence committed "between" dates specified, excludes both dates. *E. v. Emery*, [1917] 1 W.W.R. 337, at 339 (Alta.); and see *ex parte* Wilson, (1908) 38 N.B.R. 503, 14 Can. Cr. Cas. 32.

*Warrant of commitment*—

The issue of a warrant of commitment in execution of a summary conviction which awards imprisonment for the offence is a ministerial and not a judicial act. *Re Lynch*, 12 Can. Cr. Cas. 141 (P.E.I.).

It will not invalidate the commitment that added therein to the term of imprisonment awarded are the words "or until delivered in due course of law." Such words do not indicate a possibly longer term, but a shorter one, as in the event of its being reduced on appeal, *certiorari* or other available methods for reducing the term of imprisonment. *R. v. Young*, 12 Can. Cr. Cas. 109 (N.S.).

*Form of conviction for a penalty to be levied by distress and in default of sufficient distress, by imprisonment*—Code form 31, following sec. 1152.

*Form of conviction for a penalty, and in default of payment, imprisonment*—Code form 32, following sec. 1152.

*Form of conviction when the punishment is by imprisonment, etc.*—Code form 33, following sec. 1152.

*Form of order for payment of money to be levied by distress, and in default of distress, imprisonment*—Code form 34, following sec. 1152.

*Form of order for payment of money, and in default of payment, imprisonment*—Code form 35, following sec. 1152.

*Form of order for any other matter where the disobeying of it is punishable with imprisonment*—Code form 36, following sec. 1152.

*What defects in summary conviction are curable on certiorari*—Code sec. 1124.

**Disposal of penalties when joint offenders.**

**728.** When several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property or the

amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a justice are directed to be applied.

*Origin*—Sec. 860, Code of 1892; R.S.C. 1886, ch. 178, sec. 54.

*Value of property or amount of injury*—Sec. 728 has special relation to the mischief or malicious injury clauses of Part VIII of the Code. See secs. 530, 533, 534, 535, 537 and 539.

**First conviction in certain cases under Parts VI, VII and VIII.—  
Discharge on payment of damages and costs.**

**729.** Whenever any person is summarily convicted before a justice of any offence against Part VI, or Part VII, except sec. 409 and secs. 466 to 508 inclusive, or against Part VIII, except secs. 542 to 545 inclusive, and it is a first conviction, the justice may, if he thinks fit, discharge the offender from his conviction upon his making such satisfaction to the person aggrieved, for damages and costs, or either of them, as are ascertained by the justice.

*Origin*—Sec. 861, Code of 1892; R.S.C. 1886, ch. 178, sec. 55.

*Discretion to remit fine in certain cases if compensation made*—The discretion to remit the fine on a first conviction on compensating the party aggrieved applies to such summary conviction proceedings as are permitted under Part VI (Code secs. 24C-334; or under secs. 335-408, 410-465, 508A, 508B, of Part VII, or secs. 509-541 of Part VIII).

*Exception as to sec. 409*—Sec. 409 deals with the offence of personation at a competitive or qualifying examination held under authority of law or in connection with a college or university.

*Exception of summary convictions under secs. 466-508*—Offences which may be prosecuted under the summary conviction procedure of Part XV, either as the sole method or as an alternative to indictment, include the following:—Trade-mark offences and fraudulent marking of merchandise, secs. 488-491; falsely representing goods as manufactured for the government, sec. 492; unlawful importation of goods liable to forfeiture, sec. 493; wilful breach of certain contracts whereby public safety or service is endangered, sec. 499; intimidation, sec. 501; violence or threats to deter from certain lawful occupations, etc., sec. 503; receiving trading stamps, sec. 508. These offences are amongst those excepted from the conditional power of discharge conferred by sec. 729.

*Summary convictions under secs. 542-545 are excepted*—These are the sections relating to cruelty to animals, cock-fighting, bull-fighting,

failure to provide rest, feed, and water to cattle in transportation. The power to discharge on a first conviction on paying damages and costs is withheld as to these offences.

**Order of dismissal.—Certificate of dismissal.—Form.**

**730.** If the justice dismisses the information or complaint, he may, when required so to do, make an order of dismissal in form 37, and he shall give the defendant a certificate in form 38 which, upon being afterwards produced, shall without further proof, be a bar to any subsequent information or complaint for the same matter, against the same defendant.

*Origin*—Sec. 862, Code of 1892; R.S.C. 1886, ch. 178, sec. 56; 32-33 Vict., Can., ch. 31, sec. 43.

*Bar to any subsequent information or complaint for the same matter*—The dismissal will be an answer to a second information upon the same subject-matter. *Kinnis v. Graves*, (1898) 67 L.J.Q.B. 583, 78 L.T. 502. The defendant must show that the two charges are identical. *R. v. Johnson*, 17 Can. Cr. Cas. 172 (N.S.); *Wemyss v. Hopkins*, 44 L.J.M.C. 101, L.R. 10 Q.B. 378.

It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts. *R. v. King*, [1897] 1 Q.B. 214, 66 L.J.Q.B. 87.

Though not so worded, sec. 730 is said to mean that it is the previous adjudication, of which the certificate is evidence, that constitutes the bar. *Davis v. Feinstein*, (1915) 8 W.W.R. 1003, 1014, 25 Man. R. 507. Bar in law is "a plea or objection of force sufficient to arrest entirely an action or claim at law."

The defence of a previous order of dismissal must, it is true, be pleaded and proved by the defendant, but, when it is established under the common law and the provisions of the secs. 726 and 730 of the Code, it puts an end to the matter in question and removes it from the authority and jurisdiction of the magistrate to try. *Davis v. Feinstein*, *supra*.

Except where it is otherwise provided by statute, a person who has been regularly tried and acquitted by a competent tribunal having full cognizance of his case, is not liable to be again tried for the same offence. *R. v. Reddin*, 16 Can. Cr. Cas. 163 (P.E.I.); *R. v. Quinn*, 10 Can. Cr. Cas. 422, 11 O.L.R. 242.

The dismissal must have been a dismissal upon the merits and not upon a mere informality or a lack of qualification of the informant to lay the information. *R. v. Ridgway*, 1 D. & R. 132, 5 B. & A. 527; *Foster v. Hull*, 29 L.T. 452.

It is not enough that the form of the information would have allowed proof of the second charge instead of the first, if only one charge could be adjudicated under it (sec. 710), and the evidence was in fact

limited to the first. *R. v. Mitchell*, 24 O.L.R. 324, 19 O.W.R. 588, 19 Can. Cr. Cas. 113; *R. v. Johnson*, 17 Can. Cr. Cas. 172 (N.S.); *ex parte Flanagan*, 34 N.B.R. 577, 5 Can. Cr. Cas. 82.

Where charges of selling liquor and of keeping liquor for sale were improperly joined in one information, but the conviction was for keeping only and the charge of selling was not dealt with by the magistrate nor was the information amended, the defendant is not entitled to a certificate that the charge of selling was dismissed. *R. v. Stevens*, 8 Can. Cr. Cas. 76 (N.S.).

Code form 37 provides an alternative form of order of dismissal in case the complaint does not appear, but no corresponding alternative has been inserted in Code form 38, the certificate of dismissal. But sec. 1152 authorizes a variation of the statutory forms to suit the case, and it may be that the certificate will be effective under a varied form corresponding with the part of form 37 applicable to a dismissal on default. *Ex parte Phillips*, (1884) 24 N.B.R. 119 [Contra: *Hall v. Pettin-gell*, 18 Can. Cr. Cas. 196].

The dismissal is upon a trial of the merits if the prosecution failed because of non-compliance with a statutory condition requiring service of a certificate of analysis or the like under a statute regulating the Sale of Foods and Drugs. *Haynes v. Davis*, [1915] 1 K.B. 332, 84 L.J.K.B. 441; *Grimble v. Preston*, [1914] 1 K.B. 270.

When the objection or defence of a previous order or conviction or of a previous acquittal or discharge is raised, it is the duty of the magistrate to hear and determine the facts relevant to that issue. His jurisdiction necessarily goes to that extent. But when once the conclusion is clear that the matter before him has been previously disposed of by a competent tribunal then his jurisdiction is at an end. The offence or cause of action is gone and there is nothing before him to be dealt with. *Davis v. Feinstein*, [1915] 8 W.W.R. 1003, 1015, 25 Man. R. 507, 24 Can. Cr. Cas. 160; *R. v. Quinn*, 10 Can. Cr. Cas. 422.

If a certificate of dismissal of a prosecution for the same alleged offence is relied on as a bar to his proceeding, the justice has a right to inquire whether the previous prosecution was real and *bona fide*, or was instituted fraudulently and collusively, and in the latter case, to hold that it is of no effect. *Ex parte Phillips*, 24 N.B.R. 119.

An appeal lies on the part of the prosecutor from the dismissal of an information on the ground of *autrefois convict*. *R. v. Bombardier* (*Cotton v. Bombardier*), 11 Can. Cr. Cas. 216, 15 Que. K.B. 7.

If a conviction by a justice is quashed on *certiorari* on the ground that it is bad on its face by reason of the sentence pronounced being one which the justice had no jurisdiction to award, the case is to be treated as if the conviction had not been made. The accused may be put on trial again on the same charge, and he cannot successfully avail himself of the objection of *autrefois convict* or *autrefois acquit*, either

of which must have for its basis an adjudication in fact within jurisdiction. *Conlin v. Patterson*, [1915] 2 Irish R. 169.

Compare *R. v. Young Kee*, [1917] 2 W.W.R. 654 (Alta.); *R. v. Carver*, [1917] 2 W.W.R. 1170, 29 Can. Cr. Cas. 122 (Alta.).

*Leave to withdraw charge*—See note to sec. 726.

The dictum in *Pickavance v. Pickavance* [1901] P. 60, at p. 64, that the withdrawal of a summons by leave of the court puts an end to the complaint upon which the summons is founded, does not apply where the withdrawal is owing to a technical informality in the proceedings on the hearing of the complaint; *Davis v. Morton*, [1913] 2 K.B. 479, 82 L.J.K.B. 665, 23 Cox C.C. 359 (applied in *Ethier v. Minister of Inland Revenue*, 27 Can. Cr. Cas. 12 (Ont.) and *Minister, etc., v. Nairn*, 28 Can. Cr. Cas. 1).

*Certificate of withdrawal because of doubt of justice's jurisdiction*—Where the hearing of a summary conviction matter was adjourned after the taking of formal evidence only, and no one appeared for the accused on the adjourned hearing, the prosecutor may be permitted to withdraw the information because of doubt as to the magistrate's jurisdiction; and a certificate of such withdrawal will not be equivalent to a dismissal and will not bar a subsequent prosecution before another magistrate for the same offence. *Ex parte Mitchell*, *R. v. Nickerson*, 39 N.B.R. 316; 16 Can. Cr. Cas. 205; *Ex parte Case*, 28 N.B.R. 652.

*Form of order of dismissal of an information or complaint*—Code form 37, following sec. 1152.

*Form of certificate of dismissal*—Code form 38, following sec. 1152.

*Special provisions as to certificate of dismissal of assault charge*—Code secs. 732-734.

#### Minute of order to be served but not to form part of warrant.

**731.** Whenever, by any Act or law, authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress, for not obeying an order of a justice, the defendant shall be served with a copy of the minute of the order before any warrant of commitment or of distress is issued in that behalf.

2. The order or minute shall not form any part of the warrant of commitment or of distress.

*Origin*—Sec. 863, Code of 1892; R.S.C. 1886, ch. 178, sec. 57; 32-33 Vict., Can., ch. 31, sec. 52.

*Not obeying an "order" of a justice*—The orders here referred to are not "summary convictions" but orders for the payment of money which may be authorized under special Acts. *R. v. O'Leary*, 16 N.B.R.

264; *R. v. Conrod*, 35 N.S.R. 79, 5 Can. Cr. Cas. 414; *R. v. Sanderson*, 12 Ont. R. 178; *re Effie Brady*, (1913) 3 W.W.R. 914, 23 W.L.R. 333, 21 Can. Cr. Cas. 123 (Alta.).

**Common Assault.—Duty when more than common assault.**

**732.** Whenever any person is charged with common assault any justice may summarily hear and determine the charge.

2. If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same.

*Origin*].—Can. Stat. 1900, ch. 46, sec. 3; sec. 864, Code of 1892.

*Common assault*].—Code secs. 290, 291, 709, 732-734.

**Dismissal of complaint for assault.—As justified.—As too trifling for punishment.—Certificate of dismissal.**

**733.** If the justice, upon the hearing of any case of assault or battery upon the merits where the information is laid by or on behalf of the person aggrieved, under the last preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, he shall dismiss the complaint and shall forthwith make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred.

*Origin*].—Sec. 865, Code of 1892; R.S.C. 1886, ch. 178, sec. 74; 24-25 Viet., Imp., ch. 100, sec. 42.

**Assault.—Dismissal or conviction.—Release from further proceedings.**

**734.** If the person against whom any such information has been laid, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprison-



ment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, for the same cause.

*Origin*—Sec. 866, Code of 1892; R.S.C. 1886, ch. 178, sec. 75; 24-25 Vict., Imp., ch. 100, sec. 45; 9 Geo. IV, Imp., ch. 31, sec. 27.

*When disposal of assault case is a bar to further proceedings, civil or criminal*—Sec. 734 applies only to cases of assault on battery (sec. 734), where the information has been laid by or on behalf of the person aggrieved. It does not enure to the benefit of any one but the person against whom the information was laid. *Dyer v. Munday*, [1895] 1 Q.B. 742, 64 L.J.Q.B. 448.

In *Wemyss v. Hopkins*, L.R. 10 Q.B. 378, it was held that the defence of *autrefois convict* is a common law defence available in every case where a man is put in peril more than once for the same act, whether the charges are made before magistrates or tried before a jury; but that applied only to a subsequent criminal charge, while sec. 734 gives a defence also to a civil claim in the circumstances to which it applies.

Even if a second charge for the same cause be differently framed, but based on the same facts, it will be answered by the defence of *autrefois acquit* or *autrefois convict*. See *R. v. Erlington*, 31 L.J.M.C. 14. Compare as to indictments, with sec. 909.

If the assaulted party died from the effects of the assault, after laying the charge for common assault, a homicide charge is not for the same "cause." *R. v. Morris*, L.R. 1 C.C.R. 90; 36 L.J.M.C. 84.

To constitute an answer at common law, the defendant must have been placed in legal peril. *R. v. Marsham, ex parte Lawrence* [1912] 2 K.B. 362; *R. v. Miles*, 24 Q.B.D. 423.

The certificate of dismissal under sec. 734 may be put in in answer to a subsequent indictment for unlawful wounding or other offence of the nature of aggravated assault founded upon the same facts. *R. v. Erlington*, 31 L.J.M.C. 14, 9 Cox C.C. 86, 1 B. & S. 688; *R. v. McIntyre*, 21 Can. Cr. Cas. 216 (N.B.); but the justice is not bound to proceed with the trial under Part XV if he finds that the assault complained of was accompanied by an attempt to commit some other indictable offence, or is of opinion that the assault is, from any other circumstance, a fit subject for prosecution by indictment. Code sec. 732.

If the charge laid was for the indictable offence of assault occasioning bodily harm (sec. 295), the justice would have no jurisdiction without the complainant's consent to turn a preliminary enquiry into a trial under Part XV for common assault. *Twiss v. Curry*, (1915) 24 Can. Cr. Cas. 438; *Miller v. Lea* (1898) 25 A.R. 428, 2 Can. Cr. Cas. 282 (Ont.); *ex parte Duffy*, 8 Can. Cr. Cas. 277; *Goodwin v. Hoffman*, 15 Can. Cr. Cas. 270.

A civil action for damages is barred on payment of the fine imposed on a trial of an information for common assault if the person assaulted laid the charge or some one else did so on his behalf and by his author-

ity. *Hébert v. Hébert* (No. 2), 37 Que. S.C. 339, 16 Can. Cr. Cas. 199, affirming *Hébert v. Hébert* (No. 1) 34 Que. S.C. 370, 15 Can. Cr. Cas. 258. The bar includes not only a personal injury claim, but injury to business occasioned by the assault; *Masper v. Brown*, 1 C.P.D. 97; *Holden v. King*, 46 L.J. Ex. 75; and loss of property from the person and damage to clothing because of the assault, these not being separate from the civil action intended to be barred by the Code: *Hardigan v. Graham*, 1 Can. Cr. Cas. 437, explained in *Larin v. Boyd*, 11 Can. Cr. Cas. 777. Sec. 734 does not apply to a conviction for common assault on indictment for a greater offence. *Clermont v. Lagacé*, 2 Can. Cr. Cas. 1 (Que.).

The civil action is not barred if the magistrate was not acting under Part XV, but under Part XVI, as one of the class of magistrates qualified to try certain indictable offences under Part XVI, if the charge is brought under Part XVI. See *Clarke v. Rutherford*, 2 O.L.R. 206; *Nevills v. Ballard*, 28 Ont. R. 588; *Larin v. Boyd*, 11 Can. Cr. Cas. 777 (Que.); *Green v. Henneghan*, [1918] 3 W.W.R. 658 (Alta.); *Grattillo v. Caporici*, 16 Que. S.C. 44. The decision in *Hardigan v. Graham*, 1 Can. Cr. Cas. 437 (Que.) does not apply under the Code in its present form. *Larin v. Boyd*, *supra*.

One who has been tried summarily for one of the indictable offences specified in sec. 773 (c) is entitled to immunity under sec. 792 "from all further or other criminal proceedings for the same cause," but that is all. *Nevills v. Ballard*, 28 O.R. 588; *Green v. Henneghan*, [1918] 3 W.W.R. 658 (Alta.).

*Certificate on withdrawal of assault charge*—The certificate of dismissal must have been "upon the merits." Sec. 733. A certificate of dismissal by reason of a withdrawal of the charge before the hearing is not a bar to a subsequent indictment in respect of the same assault. *Reed v. Nutt*, 24 Q.B.D. 669, 59 L.J.Q.B. 711.

*Order for recognizance to keep the peace*—If there is neither a conviction nor dismissal on the merits, but merely an order to enter into recognizances and find sureties to keep the peace, the civil action is not barred. *Hartley v. Hindmarsh*, L.R. 1 C.P. 553, 1 H. & R. 607.

#### Costs on conviction or order against defendant.

**735.** In every case of a summary conviction, or of an order made by a justice, such justice may, in his discretion, award and order in and by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said justice seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before justices.

*Origin*—Sec. 867, Code of 1892; R.S.C. 1886, ch. 178, sec. 58.

*Discretion to award costs*—The magistrates, in cases of summary conviction, can order the payment of costs in their discretion, by sec. 735. *R. v. Rudolph*, 17 Can. Cr. Cas. 206 (Ont.).

There is no right to arbitrarily fix an unreasonably large sum for costs and the court on *certiorari* may, if it has the material on which to fix a proper sum, reduce the amount awarded by the magistrate, and, if it has not the material, may amend the conviction by striking out the award of costs. *R. v. Palmer* (1915) 24 Can. Cr. Cas. 20, 25 Man. R. 359.

In *Regina v. Walsh*, 2 O.R. 206, a sum of seven cents was inserted in the conviction over and above the amount of costs fixed by the minute of adjudication; and in *Regina v. Elliott*, 12 Ont. R. 351, a sum for rent of hall was charged. Both convictions were quashed on the ground that they included illegal costs, the court holding in the first case that there was a variance between the conviction and the minute of adjudication; and in the second case that they could not amend, as there would then be a variance between the conviction and the adjudication. Both of these cases were decided before the amendment to the Code giving power to amend where the punishment was in excess of that which might lawfully be imposed.

By sec. 1124 a conviction removed by *certiorari* is not to be held invalid in such a case, but the court shall have the like powers in all respects to deal with the case as seems just, as are by sec. 754 conferred upon the court to which an appeal is taken under the provisions of sec. 749. Section 754, amongst other things, gives the court power to make such order as to costs to be paid by either party as it thinks fit. This gives the court, on a motion to quash, power to amend as to costs, and to provide that the defendant is only to pay such costs as he is legally liable to pay under Part XV of the Code. *R. v. Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.R. 299.

*Distress and commitment*—See sec. 741.

#### **Costs on dismissal.**

**736.** Whenever the justice, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order or dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said justice seem reasonable and consistent with law.

*Origin*—Sec. 868, Code of 1892; R.S.C. 1886, ch. 178, sec. 59.

*Distress and commitment for costs*—See sec. 742.

**Recovery of costs with penalty.**

**737.** The sums so allowed for costs shall, in all cases, be specified in the conviction or order, or order of dismissal, and the same shall be recoverable in the same manner and under the same warrants as any penalty, adjudged to be paid by the conviction or order, is to be recovered.

*Origin*—Sec. 869, Code of 1892; R.S.C. 1886, ch. 178, sec. 60.

*Correcting error in costs awarded*—In *R. v. Dickey* (1915) 9 W.W.R. 144, 32 W.L.R. 404, 25 Can. Cr. Cas. 55 (Alta.), an affidavit on the *certiorari* motion proved that at the time of conviction the defendant was ordered to pay a fine of \$200 and the "costs of the court, \$4.50," and in default was ordered to be imprisoned for six months; but, on paying, the justice insisted on his paying \$8.70 for costs. It was held that the fair inference, in the absence of anything appearing to the contrary, was that the payment was made before the applicant had left the presence of the justice, and that the justice was at liberty to correct any error in the calculation of the amount of the costs and to receive the larger amount, if correct, at least where there was no minute of adjudication.

*Recoverable as "any penalty"*—The association of the terms "paid" and "recover" in secs. 737 and 738 indicate a pecuniary penalty. *R. v. Johnston* (No. 1) 11 Can. Cr. Cas. 6, 1 E.L.R. 95.

**Recovery of costs only.**

**738.** Whenever there is no such penalty to be recovered such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of distress, by imprisonment, with or without hard labour, for any term not exceeding one month.

*Origin*—Sec. 870, Code of 1892; R.S.C. (1886), ch. 178, sec. 61.

*Costs where no fine imposed*—On a summary conviction for common assault, the recovery of costs ordered under sec. 735 in addition to a term of two months' imprisonment awarded under Code sec. 291, but without any fine, would be subject to sec. 738. *R. v. Daignault* (1916) 10 W.W.R. 374, 34 W.L.R. 221 (Man.).

Costs ordered against a defendant on the hearing of a complaint to have a person bound over to keep the peace because of threats made by him are controlled by sec. 738. *R. v. Power*, 6 Can. Cr. Cas. 378 (N.S.); Code sec. 748 (2).

**Conviction or order involving payment of money.—Justice may adjudge.—Distress and imprisonment in default.—Imprisonment in the first instance in default.—Hard labour.**

**739.** Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction, or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge,—

- (a) that in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, shall be levied by distress and sale of the goods and chattels of the defendant, and if sufficient distress cannot be found, that the defendant be imprisoned in the manner and for the time directed by the Act or law authorizing such conviction or order or by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, and the costs and charges of the distress and of the commitment and of the conveying of the defendant to gaol are sooner paid; or,
- (b) that in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the same and the costs and charges of the commitment and of the conveying of the defendant to jail are sooner paid.

2. Whenever under such Act or law, imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; R.S.C. 1906, ch. 146, sec. 739; 63-64 Vict., Can., ch. 46, sec. 3; 57-58 Vict., Can., ch. 57, sec. 1; sec. 872, Code of 1892; R.S.C. 1886, ch. 178, secs. 62, 66, 67, 68.

*Alternative methods of enforcing fine*—Par. (b) deals only with imprisonment, on default of payment and without distress. Distress is dealt with under par. (a). Where distress is ordered and in default imprisonment, the magistrate is bound to order as the condition of discharge from the warrant of commitment which is to issue on default, that the accused pay not only the fine ordered and costs, if any, but also the costs and charges "of the distress and of the commitment and of the conveying of the defendant to gaol." Code sec. 739, sub-sec. (a); *B. v. Vantassel* (No. 1) 34 N.S.R. 79; *B. v. Beagan*, 36 N.S.R. 208. These may be ordered in the formal conviction, although not noted in the minute of conviction, as sub-sec. (a) imposes the absolute duty of ordering them upon the magistrate and he has no discretion in the matter. *B. v. Vantassel*, supra. But even an irregularity or excess in the punishment is now curable on *certiorari* (sec. 1124) as well as upon appeal (sec. 754).

A magistrate trying a case under the summary convictions clauses may, under this section, award imprisonment in default of payment of the fine without directing that a distress shall first be made upon the defendant's goods and chattels. *Ex parte Gorman* (1898), 4 Can. Cr. Cas. 305 (N.B.); *ex parte Casson*, 34 N.B.R. 331.

*Sub-sec. (1)*—"Whether the Act or law . . . does or does not provide a mode"—The Acts or laws here referred to are federal laws including provincial laws passed prior to Confederation, but in respect of which the Parliament of Canada has legislative authority. See sec. 706, and sec. 2, sub-sec. (1). A provincial legislature may by its own legislation adopt such of the provisions of Part XV as it chooses for regulating procedure and for enforcing summary convictions for provincial offences. So it may be found in many provinces that the procedure of Part XV of the Code is made a part of the provincial law for the collection of fines thereunder, but with a limitation or exception in general terms that its application is subject to any express provisions of the provincial statutes. In that event a direction of the provincial law making imprisonment the sole alternative for enforcing the fine thereunder would, it seems, render inapplicable the alternative provision of sec. 739 for a distress. See *Zimmerman v. Burwash*, 29 Que. S.C. 250. In Saskatchewan, the general application of Part XV was held

effective so that sec. 739 would apply to the enforcement by imprisonment in default if so ordered by the justice without any distress upon a conviction under a provincial law, although the provincial law provided a special mode of collecting the fine by distress. *R. v. Schilling*. (1915) 23 Can. Cr. Cas. 380 (Sask.); R.S.S., ch. 108, sec. 51; R.S.S., ch. 62, sec. 8; R.S.S., ch. 1, sec. 52.

*Sub-secs. (a) and (b)*—*If the Act authorizing the conviction "does not specify imprisonment," etc.*—Sec. 739 will apply where the Act under which the conviction is made does not specify what is to follow in default of payment of the money payment although it does specify a term of imprisonment which may be imposed in the first instance in lieu of a fine. *R. v. Horton*, 3 Can. Cr. Cas. 84, 31 N.S.R. 217.

*Commitment to enforce fine is a ministerial act*—The commitment in execution of the conviction is quite distinct from the adjudication in the conviction. The latter is a judicial act, the former is a ministerial one, being the authority to constables and jailers to take and hold the offender, that the sentence of the court may be enforced. So in *R. v. McKinnon*, 12 Can. Cr. Cas. 414, it was held by Judge MacGillivray distinguishing the decision in *Re Thomas Lynch*, 12 Can. Cr. Cas. 141, that a warrant of commitment for non-payment of a fine was not invalidated by a delay of 29 days in issuing it.

*Levied by distress*—The distress is to be made by a constable or peace officer; see sec. 741 (2).

*Power to detain or require recognizance pending attempt to levy on distress warrant*—Code sec. 745.

*Dispensing with distress warrant in cases of hardship*—Code sec. 744.

*Stay of distress warrant on tender of amount*—Code sec. 747 (1).

*Endorsing distress warrant for levy in another magisterial jurisdiction*—Code sec. 743.

*Costs of commitment and conveying to gaol*—The amount of the costs and charges of conveying the accused to gaol in default of payment of the fine need not be fixed in the summary conviction, but may be ordered in general terms; they may be fixed and stated in the warrant of commitment subsequently issued. *R. v. Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.R. 295; *R. v. Corbett*, 2 Can. Cr. Cas. 499, 19 C.L.T. 251; *R. v. McDonald*, (1898) 2 Can. Cr. Cas. 504 (N.S.).

The making up of the costs of commitment and conveying to gaol is a ministerial act, which does not go to the jurisdiction. If the magistrate, in making up the costs, has not acted *bona fide*, he is liable criminally; or if, with dishonest intention, he takes too much for costs, he may be made to refund, but the conviction is good: *Ex parte Howard* (1893), 32 N.B.R. 237; *Ex parte Rayworth* (1896), 34 N.B.R. 74, 2 Can. Cr. Cas. 230; *Ex parte Richard*, (1914) 24 Can. Cr. Cas. 183 at 207, 42 N.B.R. 596, per Barry, J.

The court on *certiorari* has power under Code sec. 1124, to amend the conviction by reducing the costs to the proper amount. *R. v. Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.R. 295; *R. v. Gage* (No. 2), (1916) 27 Can. Cr. Cas. 330 (Ont.).

If the commitment includes unauthorized costs to be paid as a condition of release, the court on habeas corpus will not discharge the prisoner on that ground alone, but will remand him for a sufficient time to have the erroneous judgment corrected. *R. v. Smith*, 16 Can. Cr. Cas. 425 (N.S.); or leave him to his civil action if the excess is not large; *R. v. Berrigan*, (1906) 17 Can. Cr. Cas. 329 (N.S.). And if excessive costs have been included the court may on the return of a habeas corpus amend the commitment and the conviction brought up on *certiorari* by reducing such costs to the proper amount and then remand the prisoner. *R. v. Morris*, 16 Can. Cr. Cas. 1 (N.S.).

In an action against a justice of the peace to recover the sum of \$15 paid to him as fine and costs, upon a conviction which was afterwards quashed, it must be presumed, in the absence of evidence of the facts, that the moneys were properly applied, and the costs paid over to the complainant for whom they were received by the justice on behalf of the complainant as agent. There is no duty imposed on the justice in such case to obtain a refund. The justice's personal fees when retained by him are in effect paid to him by the complainant against whom he had the right to retain them. *Kaulitzki v. Telford*, 5 Terr. L.R. 488.

The costs of conveying the defendant to gaol were formerly included without specific reference to the costs "of the commitment" the inclusion of which is now validated. See under the prior law, *R. v. Townsend*, 11 Can. Cr. Cas. 153 (N.S.); *R. v. Doherty*, 32 N.S.R. 235, 3 Can. Cr. Cas. 505; *re J. W. King*, 4 Can. Cr. Cas. 426 (N.S.); *R. v. Cantillon*, 19 Ont. R. 197.

If the defendant delivers himself up at the place of imprisonment before the warrant is made out, under a conviction imposing imprisonment in default of paying a fine, the justice if aware of that fact should not include any costs of conveying to gaol in the warrant. *R. v. Mitchell*, (1911) 24 O.L.R. 324, 19 Can. Cr. Cas. 113.

*Indian Act (Can.)*—A conviction for illegally selling intoxicants to an Indian in contravention of the Indian Act (Can.) may, under Code sec. 739, adjudge costs of commitment and conveying to gaol in default of payment of the fine. *R. v. Verdi*, 23 Can. Cr. Cas. 47 (N.S.).

*Concurrent commitments*—If several commitments are issued at the one time by the same justice for enforcing fines under several convictions of the same defendant, there should be included the costs of conveying to gaol in one commitment only. *Ex parte Richard*, (1914) 42 N.B.R. 596, 24 Can. Cr. Cas. 183.

*Computing time of imprisonment under summary conviction*—The time from which the imprisonment is to be computed would seem to be the



time when the prisoner is lodged in the gaol, which date may in outlying districts be several days later than the date when he is delivered to an officer to be conveyed to gaol. See Code forms 41, 42, 44, 46; 2 Hawk, P.C., ch. 18, sec. 4; 52 J.P. 419. The justice can, of course, take this into consideration in fixing the term of imprisonment to be ordered, it being essential that the warrant of commitment shall of itself give definite information to the gaoler as to the time of detention in the gaol. *Henderson v. Preston*, 21 Q.B.D. 362.

*Imprisonment in default of paying fine may exceed that authorized as a direct punishment*—Although under the special Act a sentence of imprisonment in the first instance for the offence could not be for a term as long as three months, there is power under sec. 739 to make the imprisonment in default of paying the fine for any term not exceeding three months, unless the special Act makes express provision for the term which may be imposed on such default. *Ex parte Richard*, R. v. Steeves, (1914) 42 N.B.R. 596, 24 Can. Cr. Cas. 183; R. v. Blank, 38 N.S.R. 337; R. v. Horton, 34 N.S.R. 217; R. v. Stafford, 1 Can. Cr. Cas. 239 (N.S.); R. v. Leach, *ex parte* Fritchley, [1913] 3 K.B. 40, 82 L.J.K.B. 897.

*Discharge from commitment issued for non-payment, on paying gaoler*—Code sec. 747, sub-secs. (2) and (3).

*Costs awarded with imprisonment in first instance*—On a summary conviction awarding imprisonment, costs may also be awarded, and in default of payment imprisonment for a further term not exceeding three months. *Ex parte Tierney*, 14 Can. Cr. Cas. 194, 17 Que. K.B. 486.

*Appeal where imprisonment ordered in default*—See sec. 750.

*Stay of warrant of commitment pending an appeal*—If an appeal has been duly lodged against the summary conviction and security given (sec. 750), the appellant cannot be re-arrested on the original warrant as its operation is suspended by the appeal. *Rex v. Trottier*, 22 Can. Cr. Cas. 102, 25 W.L.R. 663.

*Forms*—Distress warrants under sec. 739 (a), Code forms 39 or 40. Distress warrants under sec. 739 (b), Code forms 41 or 42. See sec. 741.

*Sub-sec. (2)—When imprisonment to collect fine may be with hard labour*—Imprisonment in default of payment or of distress may be with hard labour only where hard labour might have been imposed because of "imprisonment with hard labour" being a "part of the punishment" in the first instance; sub-sec. (2) applies where the special Act authorizes not only a fine but imprisonment with hard labour in addition to the fine. In that event the imprisonment for not paying the fine may be with hard labour in the same way as the imprisonment of first instance imposed as part of the punishment for the offence. *R. v. McIver*, 7 Can. Cr. Cas. 183; *R. v. Riley*, (1905) 14 Can. Cr. Cas. 346 (N.S.); *R. v. Clark*, 12 Can. Cr. Cas. 17 (N.S.). The phraseology of sub-sec. (2) on that interpretation refers to phrase "part of the punishment" not to the words "hard labour," but to the phrase "imprisonment

with hard labour." If it were intended that the enactment should apply when hard labour was part of the punishment, one would expect instead of the words "imprisonment with hard labour" the words "hard labour on imprisonment."

*Excess of punishment may be corrected on certiorari*—Code sec. 1124. Case under prior law: *R. v. Gavin*, 30 N.S.R. 162, 1 Can. Cr. Cas. 59, referred to in *R. v. Brindley*, 12 Can. Cr. Cas. 170 (N.S.); *R. v. Vantassel*, 34 N.S.R. 79, 5 Can. Cr. Cas. 128, 133; *R. v. Beagan*, 36 N.S.R. 208.

*Mandamus to justice to issue commitment pursuant to the conviction*—The court has a discretion to refuse a mandamus to justices to issue a warrant of commitment on a conviction; *Re Williams*, 9 Q.B. 976; and a mandamus may be refused if there is a reasonable foundation to suppose that if the warrant be issued he will be subjected to an action of which the issue is doubtful; *R. v. Buckingham Justices*, 1 B. & C. 485; *R. v. Broderip*, 5 B. & C. 239; *R. v. McConnell*, 6 U.C.Q.B. (O.S.) 629 (Ont.); *ex parte Gilbert*, 10 Can. Cr. Cas. 38 (N.B.); or if the conviction were open to grave objections going to his jurisdiction. *R. v. Ray*, (1878) 44 U.C.Q.B. 17 (Ont.).

*Special statutes*—Where a fine is imposed under sec. 808 of the Shipping Act, R.S.C., 1906, ch. 113, upon a pilot instead of cancelling or suspending his license, payment may be ordered in instalments. Sec. 808 of the Shipping Act further provides for recovery of penalties thereunder in the name of His Majesty in a summary manner with costs under the provisions of Part XV of the Code.

By Con. Stat., N.B., c. 90, s. 11, it was enacted that, "where the plaintiff shall be entitled to recover in any action against a justice, he shall not have a verdict for any damages beyond two cents, or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted, etc." In an action of false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in the payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge. It was held that the evidence was properly received and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate on the trial of the information. *Labelle v. McMillan*, 34 N.B.R. 488.

*Warrant of distress*—It is not essential that a warrant of distress should be dated, and if it is not issued too soon, it is not material that it bears too early a date. *R. v. Sanderson* (1886), 12 O.R. 178; *Newman v. Earl of Hardwicke*, 3 N. & P. 368.

It is not necessary that the bailiff should go to the premises and search for goods on which he might distrain if he was otherwise satisfied that it would be useless to do so. *R. v. Sanderson* (1886), 12 O.R. 178.

A distress to enforce payment of a fine upon a conviction under the

Canada Temperance Act is not a proceeding in right of the Crown, but goods seized under a distress warrant therefor are not repleviable unless the magistrate who issued it acted without jurisdiction. *Hannigan v. Burgess* (1888), 26 N.B.R. 99.

If there is not sufficient distress to cover the penalty and costs, the return upon the warrant of distress should state that fact, and upon that a warrant of commitment may issue, but if a portion of the penalty has been paid the amount should be returned to the party who paid it before the alternative punishment of imprisonment is resorted to. *Sinden v. Brown* (1890), 17 A.R. 173, 176 (Ont.).

For example, if one-half of the penalty had been made by distress the party convicted cannot be made to suffer imprisonment for a term in addition; and there is no provision in the law to graduate or reduce the term of imprisonment in proportion to the amount paid upon the penalty. *Sinden v. Brown* (1890), 17 A.R. 173, 176, per Burton, J.A.

*False return to distress warrant*—The court cannot in *certiorari* proceedings try the truth of the return on affidavits. *R. v. Sanderson* (1886), 12 O.R. 178.

The magistrate is justified in acting upon the bailiff's return that sufficient distress cannot be found although it should subsequently appear that the return was untrue. *R. v. Sanderson* (1886), 12 O.R. 178; *Hill v. Bateman*, 2 Strange 710; *Moffat v. Barnard*, 24 U.C.Q.B. 498, 502. But the bailiff will be liable to an action if he makes an untrue return knowing it to be false. *R. v. Sanderson*, supra. But it may be shown that the constable's return to the warrant of distress, that there was not sufficient property to satisfy it, was known to the magistrate to be false, in which case the commitment may be set aside. *Ex parte Fitzpatrick* (1893), 5 Can. Cr. Cas. 191; 32 N.B.R. 182.

*Commitment in lieu of distress*—See sec. 744.

*Defective warrant cured by valid conviction*—Code sec. 1024. The warrant of commitment is subject to review on *certiorari* only upon grounds affecting the conviction. *R. v. Melanson, ex parte Bertin*, (1904) 36 N.B.R. 577. Where both the conviction and the commitment are brought up on *certiorari*, the warrant will not be quashed if the conviction is held valid. *R. v. Melanson*, supra; Code sec. 1124.

Habeas corpus is the appropriate process for determining the validity of detention under the warrant; *R. v. Melanson*, supra; but the various curative clauses of the Code applicable to the case have to be considered in determining whether or not the warrant of commitment is objectionable or insufficient. See Code secs. 723-725, 1124 (2).

If the warrant of commitment alone is attacked on habeas corpus, it seems that the prosecutor may apply for a *certiorari* to remove the conviction as well as the warrant, and then set up the validity of the conviction in answer to the habeas corpus motion and otherwise obtain the benefit of sec. 1124. See *R. v. Gage* (No. 1), 36 O.L.R. 183, 26

Can. Cr. Cas. 385; *R. v. Gage* (No. 2), (1916) 27 Can. Cr. Cas. 330 (Ont.).

The court would thus be enabled to ascertain from the depositions whether the power of amendment conferred by sec. 1124 should be exercised, as it may be, in like manner as upon an appeal from the conviction. *R. v. Gage* (No. 2), (1916) 27 Can. Cr. Cas. 330 (Ont.).

**Imprisonment when ordered in addition to fine.—This and section 739 construed as if in special Act.**

**740.** Where, by virtue of an Act or law so authorizing, the justice by his conviction adjudges against the defendant payment of a penalty or compensation, and also imprisonment, as punishment for an offence, he may, if he thinks fit, order that the imprisonment in default of distress or of payment, shall commence at the expiration of the imprisonment awarded as a punishment for the offence.

2. The like proceeding may be had upon any conviction or order made in accordance with this or the last preceding section as if the Act or law authorizing the conviction or order had expressly provided for a conviction or order in the terms permitted by this or the last preceding section.

*Origin*—Sec. 872, Code of 1892; R.S.C. 1886, ch. 178, secs. 62, 66, 67, 68.

#### *Enforcing Adjudication.*

**Distress warrant.—Warrant of commitment.**

**741.** The justice making the conviction or order mentioned in paragraph (a) of sec. 739 may issue a warrant of distress in form 39 or 40, as the case requires, and in the case of a conviction or order under paragraph (b) of the said section, a warrant in one of the forms 41 or 42 may issue.

2. If a warrant of distress is issued and the constable or peace officer charged with the execution thereof returns (form 43) that he can find no goods or chattels whereon to levy thereunder, the justice may issue a warrant of commitment in form 44.

*Origin*—Sec. 872, Code of 1892; R.S.C. 1886, ch. 178, secs. 62, 66, 67, 68.

*Goods levied upon to be removed*—A constable seizing goods as a distress should remove the goods immediately unless the defendant consents to his remaining with the goods and using the premises of the

defendant for storing them or holding the sale. He will be liable for trespass if he remains on the defendant's premises an unnecessarily long time. Paley, 6th ed., 319. On that account it is advisable that any consent obtained should be in writing and signed by the defendant, and that his voluntary assent should further be capable of being verified by calling in some disinterested witness when the consent is taken.

*Stay of proceedings by appealing and giving security*—Code sec. 750; *R. v. Trotter*, 22 Can. Cr. Cas. 102, 25 W.L.R. 663.

*Form of warrant of distress upon a conviction for a penalty*—Code form 39, following sec. 1152.

*Form of warrant of distress upon an order for the payment of money*—Code form 40, following sec. 1152.

*Form of warrant of commitment upon a conviction for a penalty in the first instance*—Code form 41, following sec. 1152.

*Form of warrant of commitment on an order in the first instance*—Code form 42, following sec. 1152.

*Form of constable's return to a warrant of distress*—Code form 43, following sec. 1152.

*Form of warrant for commitment for want of distress*—Code form 44, following sec. 1152.

#### **Distress and commitment for costs.—Term of imprisonment.**

**742.** When any information or complaint is dismissed with costs the justice may issue a warrant of distress on the goods and chattels of the prosecutor or complainant, in form 45, for the amount of such costs; and, in default of distress, a warrant of commitment in form 46 may issue.

2. The term of imprisonment in such case shall not exceed one month.

*Origin*—Sec. 873, Code of 1892; R.S.O. 1886, ch. 178, sec. 70.

*Form of warrant of distress for costs upon an order for dismissal of an information or complaint*—Code form 45, following sec. 1152.

*Form of warrant of commitment for want of distress*—Code form 46, following sec. 1152.

#### **Endorsement of warrant for distress.**

**743.** If, after delivery of any warrant of distress issued under this Part to the constable or constables to whom the same has been directed to be executed, sufficient distress cannot be found within the limits of the jurisdiction of the justice granting the warrant, then upon proof being made upon oath or affirmation of the handwriting of the justice granting the warrant.

before any justice of any other territorial division, such justice shall thereupon make an endorsement on the warrant, signed with his hand, authorizing the execution of the warrant within the limits of his jurisdiction, by virtue of which warrant and endorsement the penalty or sum and costs, or so much thereof as has not been before levied or paid, shall be levied by the person bringing the warrant, or by the person or persons to whom the warrant was originally directed, or by any constable or other peace officer of the last mentioned territorial division, by distress and sale of the goods and chattels of the defendant therein.

2. Such endorsement shall be in form 47.

*Origin*—Sec. 874, Code of 1892; R.S.C. 1886, ch. 178, sec. 63.

*Form of Endorsement in backing a warrant of distress*—Code form 47, following sec. 1152.

**When distress would be ruinous to defendant and family.—When defendant admits he has no goods.—Committal without distress.**

**744.** Whenever it appears to any justice that the issuing of a distress warrant would be ruinous to the defendant and his family, or whenever it appears to the justice, by the confession of the defendant or otherwise, that he has no goods and chattels whereon to levy such distress, then the justice, if he deems fit, instead of issuing a warrant of distress, may commit the defendant to the common gaol or other prison in the territorial division, there to be imprisoned, with or without hard labour, for the time and in the manner he would have been committed in case such warrant of distress had issued and no sufficient distress had been found.

*Origin*—Sec. 875, Code of 1892; R.S.C. 1886, ch. 178, sec. 54.

*"Whenever it appears to the justice that defendant has no goods"*—If the defendant appears he is entitled to be heard on the question of dispensing with the distress. *R. v. Rawding*, 7 Can. Cr. Cas. 436; but if he defaults in appearing, the justice, if he convicts on an *ex parte* hearing, may also hear evidence and make an adjudication as to whether there are any chattels whereon to levy a distress, and if there are none he may, under sec. 744, dispense with the issue of a distress warrant and may issue a commitment in the first instance. *R. v. Degan*, 14 Can. Cr. Cas. 148, 17 O.L.R. 366.

**Proceedings pending execution of distress warrant.—Requiring recognizance for appearance on return of distress warrant.**

**745.** Whenever a justice issues a warrant of distress as hereinbefore provided, he may suffer the defendant to go at large, or verbally, or by a written warrant in that behalf, may order the defendant to be kept and detained in safe custody, until return has been made to the warrant of distress, unless the defendant gives sufficient security, by recognizance or otherwise, to the satisfaction of the justice, for his appearance, at the time and place appointed for the return of the warrant of distress, before him or before such other justice for the same territorial division as shall then be there.

*Origin*—Sec. 876, Code of 1892; R.S.C. 1886, ch. 178, sec. 65.

**Commitment when party in prison.—Cumulative punishment.**

**746.** Whenever a justice, upon any information or complaint, adjudges the defendant to be imprisoned, and the defendant is then in prison undergoing imprisonment upon conviction for any other offence, the warrant of commitment for the subsequent offence shall be forthwith delivered to the gaoler or other officer to whom it is directed.

2. The justice who issued the same, if he thinks fit, may award and order therein that the imprisonment for the subsequent offence shall commence at the expiration of the imprisonment to which the defendant was previously sentenced.

*Origin*—Code of 1892, sec. 877; R.S.C. 1886, ch. 178, sec. 69; Summary Jurisdiction Act, 1848, Imp., sec. 25.

*"And the defendant is then in prison undergoing imprisonment upon conviction for any other offence"*—In *R. v. Martin* (1911) 75 J.P. 425. Pickford, J., said: "It was decided in *R. v. Cutbush*, (1867) L.R. 2 Q.B. 379, that at any rate two sentences may be passed, the second to commence at the expiration of the first. The reasoning on which that decision was based was that as sec. 25 of the Summary Jurisdiction Act, 1848 (Imp.), provides that where the justices adjudge the defendant to be imprisoned and the defendant is then in prison undergoing imprisonment upon a conviction for any other offence, the justices may order that the imprisonment for the subsequent offence shall commence at the expiration of the imprisonment to which the defendant shall have been previously sentenced, the defendant being in court and being under

such restraint that he may be considered to be imprisoned as soon as the first sentence has been passed, and the section then comes into operation and a second sentence can be passed to take effect upon the expiration of the first. But imprisonment for the second sentence does not begin till the expiration of the imprisonment for the first sentence, and therefore the defendant cannot be said to be in prison under the second sentence, and therefore there seems to me to be no power to impose a sentence beginning at the expiration of the second, because he cannot be said to be in prison under the second sentence as it, by its terms, does not begin till the expiration of the first. Therefore, there is no power to impose more than a second sentence to run consecutively to the first." *R. v. Martin*, 75 J.P. 427.

There is, however, sec. 1055 of the Criminal Code which directs that when an offender is convicted of more offences than one, before the same court *or person* at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court *or person* passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another.

**Tender or payment on distress warrant.—Payment when party in prison to keeper.—By him to justice.**

**747.** Whenever a warrant of distress has issued against any person, and such person pays or tenders to the peace officer having the execution of the same, the sum or sums in the warrant mentioned, together with the amount of the costs and charges of the distress up to the time of payment or tender, the peace officer shall cease to execute the same.

2. Whenever any person is imprisoned for non-payment of any penalty or other sum, he may pay or cause to be paid to the keeper of the prison in which he is imprisoned, the sum in the warrant of commitment mentioned, together with the amount of the costs and charges therein also mentioned, and the keeper shall receive the same, and shall thereupon discharge the person, if he is in his custody for no other matter.

3. Such keeper shall forthwith pay over any moneys so received by him to the justice who issued the warrant.

*Origin*].—Sec. 901, Code of 1892; R.S.C. 1886, ch. 198, secs. 97, 98.



*Sureties to Keep the Peace.*

**Recognizance to keep the peace on a trial under Part XV.—And in case of complaint if threats made.—Procedure.—Imprisonment in default of sureties.—Forms.**

**748.** Whenever any person is charged before a justice with any offence triable under this Part which, in the opinion of such justice, is directly against the peace, and the justice after hearing the case is satisfied of the guilt of the accused, and that the offence was committed under circumstances which render it probable that the person convicted will be again guilty of the same or some other offence against the peace unless he is bound over to good behaviour, such justice may, in addition to, or in lieu of, any other sentence which may be imposed upon the accused, require him forthwith to enter into his own recognizance, or to give security to keep the peace and be of good behaviour for any term not exceeding twelve months.

2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizance, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

3. The provisions of this Part shall apply, so far as the same are applicable, to proceedings under this section, and the complainant and defendant and witnesses may be called and examined, and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaint.

4. If any person so required to enter into his own recognizance or give security as aforesaid, refuses or neglects so to do, the same or any other justice may order him to be imprisoned for any term not exceeding twelve months.

5. The forms 48, 49 and 50, with such variations and additions as the circumstances may require, may be used in proceedings under this section.

*Origin*].—Sec. 959, Code of 1892; 56 Vict., Can., ch. 32, sec. 1; 51

Vict., Can., ch. 47; R.S.C. 1886, ch. 181; Summary Jurisdiction Act, 1879, Imp., sec. 25.

*Recognizance to keep the peace* "for any term not exceeding twelve months"—The recognizance should bind for a definite period. *R. v. Edgat*, 29 Times L.R. 512, 9 Cr. App. R. 13; *re John Doe*, (1893) 3 Can. Cr. Cas. 370 (Que.). If the term exceeds twelve months the recognizance is void. *Re Sarah Smith's bail*, 31 N.S.R. 468.

*Provocation for the threats*—It was said in *Pouliot v. Descroisselles*, 22 Can. Cr. Cas. 243 (Que.), that binding over a person to keep the peace was dependent only upon proof of the complainant's fear of bodily harm based upon some reasonable ground, and that it was not an answer to show that there was provocation for the threats; but if the complainant had himself provoked the threat, it would be a circumstance to be considered by the justice in deciding how far to credit the complainant's story that he was in fear upon some reasonable ground. A conditional threat of violence followed on a subsequent occasion by additional misconduct may be a sufficient ground for requiring sureties where there is a fear of future violence. *Ex parte Hulse*, 21 L.J. 21. Likewise, a threat contingent upon complainant doing something which he had a right to do. *R. v. Mallinson* (1850) 20 L.J.M.C. 33.

*Threats to burn buildings*—Threats verbally made to burn the complainant's buildings are not indictable under the Code, and give rise only to proceedings to force the offender to give security to keep the peace. *Ex parte Welsh* (1898), 2 Can. Cr. Cas. 35 (Que.).

*Jurisdiction of justices as to binding over to keep the peace*—Justices of the peace had jurisdiction under the statute 34 Edw. III, c. 1, upon proper evidence before them that a person is guilty of conduct calculated to incite others to commit offences in violation of the law and in disturbance of the peace, to require such person to find sureties for his good behaviour, and in default of finding such sureties to be imprisoned; and apart altogether from the construction of that statute by the course of authoritative decisions for so many years the courts are now bound to hold that with proper materials before them justices have this power to bind a person over to be of good behaviour. In a recent English case it was said that the justices have this power to bind over; although no complainant comes forward to testify on oath that he has been threatened, or that he is actually under fear of bodily harm from the person sought to be bound over. *Lansbury v. Riley*, [1914] 3 K.B. 229, 83 L.J.K.B. 1236; *Haylock v. Sparke*, 1 E. & B. 471; and see *R. v. Wilkins*, [1907] 2 K.B. 380; *Wise v. Dunning*, [1902] 1 K.B. 167, 71 L.J.K.B. 165, 20 Cox C.C. 121.

The fact that threats, or an assault, which would authorize justices in requiring sureties for the peace and good behaviour, arose by reason of a *bona fide* dispute as to title, does not oust the jurisdiction of the justices to require such sureties. *R. v. Monaghan Justices*, [1914] 2 Irish R. 156.

*Witnesses, etc., "as in the case of any other complaint"*—Sub-sec. (3) follows the English enactment in giving the complete right of examination and cross-examination on the merits of the matter set out in the complaint; see the Summary Jurisdictions Act, 1879, Imp., sec. 27. Such was not the practice prior to that enactment. *R. v. Doherty*, 13 East 171. While sec. 748 is now included in the Summary Convictions part to which it was transferred on the revision of 1906, it was embodied in a separate "part" of the Code of 1892 dealing with sureties.

Formerly all that the defendant was allowed to do in the way of showing cause was to show that the complaint is preferred by malice only, or explain any parts of the complaint that may be ambiguous. In other respects he was not allowed to controvert the truth of the facts stated in the complaint, for in this case there was an exception to the universal principle that a man may always be heard in his own defence. The reason of the exception (now changed by the Code) was that binding over a person against whom articles of the peace are exhibited is not in the nature of a punishment, but it is to prevent the apprehended danger of a breach of the peace being committed. *Pouliot v. Descroiselles*, 22 Can. Cr. Cas. 243; *Rex v. Doherty*, 13 East 171. But if the complaint was for an assault, the defendant will be allowed to put in evidence for his justification, and if found guilty the magistrate might order him to give sureties for the peace if the circumstances justified him to do so in the interests of the peace. *Pouliot v. Descroiselles*, 22 Can. Cr. Cas. 243 (Que.).

*Repetition of offence against the peace feared after a summary conviction*—If a person under recognizance to keep the peace ordered by a justice under sec. 748 (2) on complaint of threats made, is afterwards guilty of a breach of the peace towards a person other than the complainant, the recognizance may be forfeited. *R. v. Walker*, 23 Can. Cr. Cas. 179 (Que.).

Where a court of summary jurisdiction is satisfied that a person who is brought before it has been guilty of inciting others to commit breaches of the peace and intends to persevere in such incitement, the court may order him to enter into recognizances and to find sureties for his good behaviour or to be imprisoned in default of so doing. *Lansbury v. Riley* [1914] 3 K.B. 229.

Whatever the origin of that jurisdiction may be, whether it be derived from the common law, from the commission of conservators of the peace, or from the statute 34 Edw. III, c. 1, or otherwise, the practice of making such orders for the purpose of preventing apprehended breaches of the peace has been too well established for a long period of years to allow of its propriety being questioned at the present day. It is not essential to the exercise of that jurisdiction that the conduct of the defendant should have caused any individual person to go in bodily fear. *Lansbury v. Riley*, [1914] 3 K.B. 229; 83 L.J.K.B. 1226; 23 Cox C.C. 582.

*Commitment on refusal or neglect to give recognizance*—A justice's order that the accused give security to keep the peace for one year, but not fixing any amount nor a term of imprisonment, in default, will not support a commitment thereunder. A warrant of commitment under this section can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subsequently to the order requiring the security, and it must recite such refusal or neglect. *Re John Doe* (1893), 3 Can. Cr. Cas. 370 (Que.).

A warrant of commitment by a justice for default in finding sureties to keep the peace must show on its face that the complainant feared bodily injury because of the defendant's threat, and that the complaint was not made nor sureties required by the complainant from any malice or ill-will, but merely for the preservation of his person from injury. Code form 48; *R. v. John McDonald* (1897), 2 Can. Cr. Cas. 64.

*Release from imprisonment*—After two weeks' imprisonment in default of finding sureties, the defendant may apply to a judge of a superior court under Code sec. 1059 for a release. *R. v. Mitchell*, 13 Can. Cr. Cas. 344 (Y.T.).

*Review of order requiring sureties for the peace*—An appeal does not lie under sec. 749 from a justice's order made under sec. 748 (2) requiring a person to find sureties to keep the peace. *R. v. Mitchell*, 13 Can. Cr. Cas. 344 (Y.T.); *R. v. Doyle*, 12 Can. Cr. Cas. 69; but presumably the entire question of punishment would be reviewable where the finding of sureties was "in addition to or in lieu of any other sentence" in a summary conviction matter by virtue of sub-sec. (1).

Sec. 761, as to stated cases by justices on questions of law, would seem to be available to review on a point of law or excess of jurisdiction only, an order made under sec. 748; *Lort v. Hutton* (1876) 45 L.J.M.C. 95; 33 L.T. 730. While it is not a "conviction," it is an "order, determination or other proceeding of a justice." See. 761.

The court may, on habeas corpus, examine the allegations in the complaint, and if they are on the face of them insufficient, may discharge the prisoner held for default of sureties and supersede the commitment as made without jurisdiction; *R. v. Dunn*, 12 A. & E. 599; but not to review the decision of the justice as to the construction of the threats. *R. v. Tregarthen*, 5 B. & Ad. 678. And it seems probable that the court has jurisdiction to bring up on *certiorari* the order requiring sureties and the recognizance, if any, entered into, and to quash the order if the evidence was insufficient to maintain it. *R. v. London-derry Justices*, 28 L.R. Irish 440; *Bent v. Ingle* (1878) 66 L.T.N. 138.

*Recovery of costs*—See Code secs. 736 and 738.

*Action for maliciously and without cause requiring sureties for the peace*—It is an actionable wrong to falsely and maliciously cause a person to be required to find sureties for the peace. *Steward v. Gromett*, 7 C.B.N.S. 191, 29 L.J.C.P. 170.

*Perjury in respect of false charge of threats*—Upon a charge of

perjury in respect of testimony given before a justice on requiring sureties to keep the peace the false statement may be proved by oral testimony, although not recorded in the minutes of evidence then made by the magistrate. *R. v. Doyle*, 12 Can. Cr. Cas. 69.

*Forfeiture of a peace recognizance in Quebec*—Forfeiture and estreat of a recognizance to keep the peace which had been required on proof of threats under sub-sec. (2) of Code sec. 748 may, in the province of Quebec, be applied for by another individual than the first complaining party or the party threatened, as the case may be; and this without the intervention of any public authority or crown officer. *R. v. Walker*, 23 Can. Cr. Cas. 179 (Que.).

*Form of complaint by the party threatened, for sureties for the peace*—Code form 48, following sec. 1152.

*Form of recognizance to keep the peace*—Code form 49, following sec. 1152.

*Form of commitment in default of sureties*—Code form 50, following sec. 1152.

*Blackmail, threats and intimidation*—See secs. 216 (h), 265, 332, 450, 451, 452, 453, 454, 501, 516, 538, 578, 748.

*Sureties on summary trial of indictable offence*—Where the magistrate is acting under Part XVI of the Code (the summary trials clauses) sec. 1058 will apply with more extended powers as to the time for which the sureties to keep the peace will be required from the accused.

*British Columbia*—For the forms applicable on exhibiting articles of the peace in the Supreme Court of British Columbia see the B.C. Crown Rules (civil); and note to Code sec. 576.

### *Appeal.*

#### **Appeal in summary conviction matter.**

**749.** Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal,—

- (a) in the province of Ontario, when the conviction adjudges imprisonment only, to the Court of General Sessions of the Peace; and in all other cases to the Division Court of the division of the county in which the cause of the information or complaint arose;
- (b) in the province of Quebec, to the Court of King's Bench, Crown side;

- (c) in the provinces of Nova Scotia, New Brunswick and Manitoba, to the county court of the district or county where the cause of the information or complaint arose;
- (d) in the province of British Columbia, to the county court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose;
- (e) in the province of Prince Edward Island, to the Supreme Court;
- (f) in the province of Saskatchewan or the province of Alberta, to the district court at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose;
- (g) in the Northwest Territories, to a stipendiary magistrate; and,
- (h) in the Yukon Territory, to a judge of the Territorial Court.

2. (Repealed by Canada Statutes, 1908, chap. 18.)

3. In the case of the provinces of Saskatchewan and Alberta, and of the Northwest Territories and the Yukon Territory, the judge or stipendiary magistrate hearing any such appeal shall sit without a jury at the place where the cause of the information or complaint arose, or at the nearest place thereto where a court is appointed to be held.

*Origin*—Sec. 879, Code of 1892; 51 Vict., ch. 45, sec. 7; 52 Vict., ch. 45, sec. 6; 4-5 Edw. VII, Can., ch. 3, sec. 16; ch. 10, secs. 1 and 2, ch. 27, sec. 8; ch. 42, sec. 16; R.S.C. 1906, ch. 146, sec. 749; 6-7 Edw. VII, Can., ch. 45, sec. 6; 7-8 Edw. VII, Can., ch. 18, sec. 9.

*Offences under federal law*—The application of sec. 749 and of Part XV generally is controlled and declared by sec. 706. But the same procedure is by sec. 797 declared to apply to the limited appeal which that section affords on certain summary trials for indictable offences. And in many of the provinces of Canada, the procedure of appeal, as well as of trial, under Part XV has been adopted in whole or in part by provincial statute with reference to infractions of penal statutes of the province.

An appeal in Quebec under a pre-confederation statute of the former "province of Canada" relating wholly to matters within the present jurisdiction of the Quebec legislature is controlled by provincial and

not federal law. *Burroughs v. Paradis*, (1915) 24 Que. K.B. 318, 24 Can. Cr. Cas. 343; *Town of Scotstown v. Beauchesne*, 5 Que. Q.B. 554; *The Queen v. Joseph*, 6 Can. Cr. Cas. 144, 11 Que. Q.B. 211; *Lecours v. Hurtubise*, 2 Can. Cr. Cas. 521, 8 Que. Q.B. 439; *Superior v. Montreal, R. v. Superior*, 3 Can. Cr. Cas. 379, 9 Que. Q.B. 138, and *The Queen v. Racine*, 3 Can. Cr. Cas. 446, 9 Que. Q.B. 134.

*Competency of inferior appellate courts designated although not constituted with criminal jurisdiction*—Where the Parliament of Canada has directed by statute that a provincial court may adjudicate on certain matters within federal legislative power, no provincial legislation is necessary in order to enable effect to be given to the federal enactment; *re Vancini*, 34 S.C.R. 621, 8 Can. Cr. Cas. 228; *Gallagher v. Vennesland*, [1917] 1 W.W.R. 860, 863, 27 Can. Cr. Cas. 360 (Alta.). The constitution of the courts is a provincial matter under the B.N.A. Act; but if the court has already been constituted by the province, the added duties may be conferred by federal legislation. *Ibid.* For the sake of conformity these are usually included also in a provincial statute.

*Effect of appeal on other remedies*—The statement of a case under sec. 761 is one form of appeal from a justice, and *certiorari* is prohibited if the defendant has "appealed" (sec. 1122). This applies both to the summary conviction and to the order made on appeal where the appeal is taken to a district or county court under sec. 749. Sec. 1122. And any right of appeal which a party may have under sec. 749, is taken to have been abandoned if he obtains a stated case under secs. 761-764. Code sec. 769.

*When appeal not the appropriate remedy*—An appeal from a summary conviction is a re-hearing upon the merits (sec. 754); and although the court appealed to is to be the absolute judge as well of the facts as the "law" (sec. 752) in respect to the conviction or order appealed from, it is said that the word "law" in this connection refers to the law applicable to the facts adduced in support of or against the proof of the charge and that if the defendant wishes to attack the jurisdiction of the magistrate over the person on the ground of an illegal arrest without warrant, recourse should be had to *certiorari* or *habeas corpus* and not to an appeal which in itself is a submission to a re-hearing "upon the merits" (sec. 754). *Re Ruggles*, 35 N.S.E. 57, 5 Can. Cr. Cas. 163; *Rand v. Rockwell*, 2 N.S.D. 199; *R. v. Miller* (1913) 25 W.L.R. 296 (Alta.). It is to be noted that there was a reference of the latter case to the court *en banc* but this was never proceeded with.

*Any person who thinks himself aggrieved*—The phrase "person who thinks himself aggrieved" means no more than if it read "person aggrieved," except possibly to convey the idea that the appellate tribunal and not the lower one is to determine whether or not he has the necessary status to complain that the decision sought to be appealed from was wrong.

The use of some such phraseology as "person aggrieved," "person who feels aggrieved" or "person who thinks himself aggrieved" is intended to exclude a stranger to the proceedings from taking an appeal in a matter with which he had no concern. *R. v. Frankforth*, (1904) 8 Can. Cr. Cas. 57. In a private prosecution a stranger might desire to intervene if he could because of enmity against the respondent or the magistrate, or from other ulterior motives than the rectification of the decision appealed against, but this is not permitted as the appeal can be taken only by a person who would be "aggrieved" if the decision appealed from happened to be wrong. *Robinson v. Currey*, L.R. 7 Q.B. 465. The person appealing must have "legal ground for saying he is aggrieved." *Harrup v. Bayley*, 6 Ell. & B. 218; *Boyce v. Higgins*, 23 L.J.C.P. 5; *Verdin v. Wray*, 2 Q.B.D. 608, 46 L.J.M.C. 171; *Hollis v. Marshall*, 23 L.J. Exch. 235; *Drapers Co. v. Haddon*, 57 J.P. 200, 9 Times L.R. 36; *Garrett v. Middlesex Justices*, 53 L.J.M.C. 81, 12 Q.B.D. 620; *R. v. Andover Justices*, 55 L.J.M.C. 23, 16 Q.B.D. 711.

The convicted person being directly affected by the conviction would be a "person aggrieved" if the conviction were wrong, but in case there had been no conviction and no order for costs against the private prosecutor it would not follow that in all cases and all circumstances the prosecutor could claim to have been "aggrieved" by the dismissal of the complaint. *R. v. London County Justices*, (1890) 25 Q.B.D. 357, 59 L.J.M.C. 146. Hence the express inclusion of "the prosecutor or complainant," as well as the defendant, in the first paragraph of sec. 749.

Although a person lays a complaint as the agent of a society, it does not follow that the society has a status to appeal in its own name on the complaint being dismissed; but the complainant personally may appeal as he is specially recognized by sec. 749 as a person entitled to appeal. *Canadian Society v. Lauzon*, (1899) 5 Rev. de Jur. 259, 4 Can. Cr. Cas. 354 (Que.).

A person who has pleaded "guilty" to a charge, and has been summarily convicted, may raise a question of law in an appeal under sec. 749, but on such appeal his former plea of "guilty" estops him from calling upon the respondent to prove his guilt. So far as his guilt or innocence is concerned he is not a "party aggrieved" within the meaning of sec. 749. *R. v. Brook*, 5 Terr. L.R. 369, 7 Can. Cr. Cas. 216.

Compare *Harris v. Cooke* (1919) 88 L.J.K.B. 253.

*Effect of stated case*—If a stated case is taken on a point of law under sec. 761, the right of appeal under sec. 749 is gone as regards the person for whom the case is stated. Sec. 760.

*Restriction on certiorari where summary conviction affirmed on appeal*—Code sec. 1121.

*Yukon Territory*—Sub-sec. 3 corresponds with sec. 104 of the Yukon Act, R.S.C., ch. 63.

*Order on finding sureties to keep the peace*—See note to sec. 748.



An order to find sureties is not a "conviction." *R. v. Mitchell*, 13 Can. Cr. Cas. 344; *R. v. Doyle*, 12 Can. Cr. Cas. 69.

*Same procedure on appeals from two justices trying for theft under \$10, under sec. 773(a)*—Code sec. 797.

*Same procedure on appeals in disorderly house cases tried by two justices under sec. 773 (f)*—See Code secs. 228, 229A, 797.

*Court sitting nearest to the place where the cause of complaint arose*—The jurisdiction is limited in some of the provinces to a county or district court the sessions of which are held nearest to the place where the cause of the information or complaint arose. The distance is to be measured by a straight line regardless of the recognized mode of travel. *Fanchaux v. Georgett*, (1915) 9 W.W.R. 458, 8 Sask. L.R. 325, 25 Can. Cr. Cas. 76, 32 W.L.R. 863, (Sask.) reversing *R. v. Georgett*, 23 Can. Cr. Cas. 341 (Sask.). While the court will take judicial notice that a city or town is within a particular judicial district, it has not to take judicial notice of the distance of one place from another; *Collison v. Kokatt*, (1915) 8 W.W.R. 561, 8 Sask. L.R. 167, 24 Can. Cr. Cas. 151. Evidence should be put in to prove the distance and so show that the appeal is being taken to the proper court. *Collison v. Kokatt*, supra. In a matter going to the jurisdiction the court has to be satisfied of its jurisdiction, and it is therefore well to call a witness in proof of the sitting being the nearest to the place or county or district, as the case may be, according to the paragraph of sec. 749 which may be applicable to the particular province; and this although the respondent's counsel admits the fact, unless the judge hearing the appeal also concedes that he will take notice of the fact as a matter of common knowledge.

In case of doubt as to which is the nearer place of sitting, it may be advisable to give two notices of appeal, one for each place. See *R. v. Deer*, [1919] 1 W.W.R. 410 (Sask.).

*Waiving right of appeal*—There may be circumstances under which the right of appeal may be waived by the appellant's conduct; *R. v. Neuberger*, 9 B.C.R. 272, 6 Can. Cr. Cas. 142; as by paying in fine in acquiescence with the decision appealed against without protest; *R. v. Neuberger*, supra. But the right is not to be held to be waived if a protest is made; *ex parte Mason* 13 U.C.C.P. 15; or if payment is compelled as where there is a liability to immediate imprisonment in default. *R. v. Tucker*, 10 Can. Cr. Cas. 217.

**Procedure on appeal.—Notice of appeal.—On conviction with imprisonment appellant remains in custody or gives recognizance or deposit.—Recognizance to value of property, when.**

**750.** Unless it is otherwise provided in the special Act,—

(a) if a conviction or order is made more than fourteen days before a sittings of the court to which an appeal

is given, such appeal shall be made to that sittings; but if the conviction or order is made within fourteen days of a sittings the appeal shall be made to the second sittings next after such conviction or order: Provided that in the province of Nova Scotia the appeal shall be to a sittings of the court in the county where the cause of the information or complaint arose; in the one case to the sittings next after and in the other to the second sittings after the conviction or order;

- (b) the appellant shall give notice of his intention to appeal by filing, in the office of the clerk of the court appealed to, a notice in writing setting forth with reasonable certainty the conviction or order appealed against, and the court appealed to, within ten days after the conviction or order complained of, and by serving the respondent and the justice who tried the case each with a copy of such notice.
- (c) the appellant, if the appeal is from a conviction or order adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal, enter into a recognizance in form 51 with two sufficient sureties before a county judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said court and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or if the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed either remain in custody until the holding of the court to which the appeal is given, or enter into a recognizance in form 51 with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or

order an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and upon such recognizance being entered into or deposit made the justice before whom such recognizance is entered into or deposit made shall liberate such person if in custody;

- (d) in case of an appeal from the order of a justice pursuant to sec. 637 for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the proper sittings of the court, and to pay such costs as are awarded against him.

*Origin*—3-4 Geo. V. Can., ch. 13, sec. 26; 8-9 Edw. VII, Can., ch. 9, sec. 2; R.S.C. 1906, ch. 146, sec. 750; 4-5 Edw. VII, ch. 10, secs. 3 and 4; Code of 1892, sec. 880; 53 Vict., Can., ch. 37, sec. 24; 51 Vict., Can., ch. 45, sec. 8.

*Status of the justice on the appeal*—It would seem that the justice has a *locus standi* to appear as he is served with notice of appeal in like manner as the "respondent" specifically named; and there may be special circumstances in some cases making it desirable that he should do so even at the risk of costs. Ordinarily he will do nothing more but transmit the notice of appeal served on him to the Department of the Attorney-General, if the appeal is in a criminal matter. Although served with the notice of appeal the justice is not subject to an order for costs if he does not appear on the notice. *R. v. Goodall*, L.R. 9 Q.B. 557, 43 L.J.M.C. 119.

*If conviction made more than fourteen days before a sittings*—In *R. v. Johnston* (*R. v. Judge of the County Court*) 13 Can. Cr. Cas. 179, 42 N.S.R. 537, the opinions were in conflict as to the meaning of this phrase, it being held per Townshend, C.J., and Meagher, J., that in computing the time which must intervene between the conviction and the sittings of the court hearing an appeal under Code sec. 750, the term "more than 14 days before the sittings" means that 15 days at least must intervene between the date of conviction and the date fixed for the sittings; but held, per Russell, J.: The term "more than 14 days

before the sittings" means that 14 days only need intervene between the date of conviction and the date fixed for sittings.

It is not clear whether an adjourned sittings is to be considered or not in ascertaining whether a conviction or order was made "within fourteen days of a sitting." See *Cotton v. Bombardier*, 15 Que. K.B. 7, *sub nom.* *R. v. Bombardier*, 11 Can. Cr. Cas. 216. The words "the sittings" which were there in question have since been amended to read "a sittings." (Code amendment of 1909).

*In Nova Scotia appeal to be to sittings in the county, etc.*—This special provision introduced by the Amendment of 1909, was evidently intended to obviate the difficulty incident to the county courts for judicial districts in that province exercising jurisdiction in more than one county with separate sittings in each county. The amendment ensures that the appeal is to be taken to the sittings fixed for the county in which the complaint arose, although there may be a prior sittings of the same "court" in an adjacent county. A division of opinion under the former law had arisen in *R. v. Johnson* (*R. v. Judge of County Court*), 13 Can. Cr. Cas. 179, 42 N.S.B. 537.

*Appeal to be lodged in due form*—See sec. 752, also sec. 755, which refers to the entering of the appeal.

*Form of recognizance to try the appeal*—Code form 51, following sec. 1152.

*Return of recognizance*—See sec. 757. The appellant should see that this recognizance is returned so as to be before the appellate court when he is called upon to maintain the competency of the appeal. See *R. v. Gray*, 5 Can. Cr. Cas. 24; *R. v. Hewa* (1915), 25 Can. Cr. Cas. 386 (Sask.). [Contra: *R. v. McKay*, 21 Can. Cr. Cas. 211.]

*Transmitting the conviction on appeal*—See sec. 757.

*Contents of notice of appeal from summary conviction*—The notice of appeal by the "person aggrieved" need not include a specific statement that the appellant is a "person aggrieved" (sec. 749) by the decision appealed against, at least where such would appear otherwise; *R. v. Austin* (1916) 25 Can. Cr. Cas. 446 (Man.); *Gates v. Renner*, 9 W.W.R. 190 (Sask.); *R. v. McKay*, 23 W.L.R. 369, 21 Can. Cr. Cas. 212 (Sask.); as where either the prosecutor or the defendant is the appellant. *R. v. Jordan*, 9 B.C.R. 33, 5 Can. Cr. Cas. 438; *R. v. Hatt*, (1915) 25 Can. Cr. Cas. 263 (N.S.). Unless the statutory form of notice of appeal from a summary conviction indicates that it should be addressed to the parties to be affected by it; *Keohan v. Cook*, 1 Terr. L.R. 125; *Cragg v. Lamarsh*, 3 Terr. L.R. 91; *Hostetter v. Thomas*, 4 Terr. L.R. 224; the address is not material although it is usual. *Bezancon v. G.T.P. Development Co.*, [1917] 1 W.W.R. 436 (Alta.).

The signature to a notice of appeal, if otherwise complete as a notice, is in like manner a non-essential unless demanded by the statute or a statutory form or rule of court made under statutory authority. *Bezancon v. G.T.P. Development Co.*, [1917] 1 W.W.R. 436 (Alta.);

*R. v. Nichol*, 40 U.C.Q.B. 76 (Ont.); *R. v. Bryson*, 10 Can. Cr. Cas. 398 (N.B.). Signature in the name of the solicitor, described as solicitor for the appellant, is sufficient. *Bezancon v. G.T.P. Development Co.*, *supra*.

The authority to give the notice if not signed by the appellant himself or by his solicitor should be proved. In *Scott v. Dalphin* (1907) 6 W.L.R. 371, an appeal was quashed at the hearing on the ground that it purported to be signed for the appellant by her solicitor per a third party as attorney, such party actually signing being the advocate's clerk. The motion to quash was allowed as no authority for the clerk's signature was proved, thus distinguishing *R. v. Kent Justices*, 42 L.J.M.C. 112. *Wetmore, J.*, held that while the notice of appeal might be signed by the solicitor, it could not validly be signed by the solicitor's clerk "unless it is expressly shown that he had authority to sign." But a notice might be so drawn as to be unintelligible without signature, as where it refers to the appellant as the undersigned, and does not disclose who the appellant is. The notice is to state at what sittings the appeal will be heard. *R. v. Brimacombe*, (1905) 2 W.L.R. 53, 10 Can. Cr. Cas. 168 (Sask.).

*Filing notice of appeal in court appealed to*—The time limit of ten days excludes the date of conviction or order, but if the tenth day falls on Sunday the notice may be given on the Monday. R.S.C. 1906, ch. 1, sec. 31 (*h*); *R. v. Trotter*, 25 W.L.R. 663, 22 Can. Cr. Cas. 102; *Scott v. Dickson*, 1 P.R. 666 (Ont.). It must be filed within the time not merely mailed or otherwise transmitted, so that it would reach the filing office in the ordinary course. *R. v. Green* (1912) 22 Can. Cr. Cas. 155 (B.C.).

*Serving the notice of appeal*—In the interpretation of Code sec. 750, which gives directions as to the notice of appeal on appealing from a summary conviction there may be ground for difference of opinion as to the necessity of serving the notice of appeal within the ten days. It is clear that the notice of appeal must be filed in the office of the clerk of the court appealed to, "within ten days after the conviction or order complained of." This requirement is supplemented by the addition of the words: "and by serving the respondent and the justice who tried the case with a copy of such notice." Commonly all this may be done within the ten days, but it may be that either the prosecutor or the trial justice may be away from the district so that service of both within the ten days would not be practicable. The law requires in any case that where a right of appeal is given the acts required to be done by a party in order to entitle him to appeal must be done by him with reasonable strictness. *Gallagher v. Vennesland*, [1917] 1 W.W.R. 860, 27 Can. Cr. Cas. 360 (Alta.). On the other hand a person does not forfeit his right of appeal unless he omits to do some act which he is expressly required to do in order to retain that right. *Gallagher v. Vennesland*, [1917] 1 W.W.R. 860 (Alta.). In that case it was held that Code sec. 750 (*b*) does not make it obligatory that the

notice of appeal should be served upon the respondent and the convicting justice within ten days after the conviction. The notice must be filed within that time and a time limit is thereby fixed so that the opposing party may search in the clerk's office and ascertain whether an appeal has been launched. *Gallagher v. Vennesland*, *supra*. See to the same effect, *R. v. McDermott*, 7 W.W.R. 165, 23 Can. Cr. Cas. 252 (Sask.). No reference is made in the *Gallagher* case to a prior decision of the same court in *R. v. Wong Tun*, (1916) 10 W.W.R. 15, 26 Can. Cr. Cas. 8 (Alta.), where Simmons, J., delivering the opinion of the Supreme Court of Alberta, said: "Sub-sec. (b) of sec. 750 of the Code requires notice of intention to appeal to be served upon the respondent and upon the magistrate within ten days after the conviction or order complained of." In *R. v. Wong Tun*, *supra*, the application was by the Crown for a mandamus to re-open the dismissal of an appeal and the excerpt above given related to that part of the decision which held that any objection on the ground of want of service of notice on the Attorney-General, if required at all, had been waived by failure to object.

In *R. v. Martinuik* (1914) 6 W.W.R. 405 (Sask.), *sub nom. R. v. Prokopate*, 23 Can. Cr. Cas. 189, 7 Sask. L.R. 95, it was assumed that the notice of appeal must be served within the ten days, and it was held that oral testimony was admissible to show the date on which the conviction actually took place where it was claimed that the conviction had been ante-dated. If the trial was before two or more justices, both or all should be served. *R. v. Edleston*, 17 Can. Cr. Cas. 155; *Hostetter v. Thomas*, 4 Terr. L.R. 224.

Notice of appeal served on the substitute for the time being of a public officer who was the respondent, has been held valid. *R. v. Trotter*, 22 Can. Cr. Cas. 102, 25 W.L.R. 663.

*Cash deposit instead of recognizance on appeal*—If the justice accepts a cheque as the equivalent of money for the cash deposit on an appeal, it will be sufficient in the event of the cheque being paid when presented. *Bezancon v. G.T.P. Development Co.*, [1917] 1 W.W.R. 436, 439 (Alta.). But the justice could not dispense with the deposit nor accept in lieu thereof something that customarily does not pass as money. *Bezancon v. G.T.P. Development Co.*, *supra*. (A diamond ring cannot be accepted as a deposit. *Dictum*, per Beck, J.).

Where imprisonment in default is not directed, a deposit must be made; a recognizance cannot be substituted. *Switzer v. Foichuk*, [1919] 1 W.W.R. 396 (Sask.).

*What are conditions precedent*—Non-compliance with regulations as to appeal may in some cases deprive the appellate court of jurisdiction; the court is to ascertain from the construction of the regulations and the statute whether a regulation that notice of appeal shall be in a prescribed form is directory or imperative. *R. v. Lincolnshire Appeal Tribunal*, *Ex parte Stubbins* [1917] 1 K.B. 1; *Lockhart v. St. Albans*,

21 Q.B.D. 188; *Re West Jewell Tin Mining Co.*, 8 Ch. D. 806. Regulations have in some cases been held to be imperative as to part and directory as to part. *Hughes v. Wavertree Local Board*, 10 Times L.R. 357.

An objection going to the jurisdiction may be raised at any time. *R. v. Crouch*, 35 U.C.Q.B. 433 (Ont.).

If the lack of jurisdiction appears on the face of the proceedings, the respondent cannot effectually waive it and prohibition would lie. *Alderson v. Pallister*, 70 L.J.K.B. 935; *R. v. Doliver Mining Co.* 10 Can. Cr. Cas. 405; *Clarke v. Knowles* (1918) 87 L.J.K.B. 189.

*Where literal compliance with condition precedent is impossible*—Even a condition precedent to an appeal may be dispensed with when compliance is impossible in the nature of things or when it is impracticable, but the onus is upon the person seeking to be relieved from the condition to prove such impossibility or impracticability and to show that this condition arose without any default on his part. *R. v. Hewa*, 9 W.W.R. 689, (Sask.) distinguishing *Wills v. McSherry*, [1913] 1 K.B. 20, 82 L.J.K.B. 71, and disapproving *R. v. McKay*, 21 Can. Cr. Cas. 211; and see *Re McNeill and Saskatchewan Hotel Co.*, 17 W.L.R. 7; *R. v. Turnbull*, 2 Sask. L.R. 186; *R. v. Mack Sing*, (1915) 25 Can. Cr. Cas. 158, 32 W.L.R. 649 (Sask.); *R. v. Lincolnshire Appeal Tribunal*, (1917) 86 L.J.K.B. 292. 'So on an appeal from a summary conviction, if the return of the recognizance had not been made by the justices within the time limit nor was it shown that they had been asked to make the return, the appeal is not filed in due form. *R. v. Hewa*, 9 W.W.R. 689 (Sask.). In the last mentioned case it was suggested that had the justices been asked to return the recognizance and had refused or neglected to do so, it might be necessary to obtain a mandamus order against them before getting the benefit of the maxim "*lex non cogit ad impossibilia aut inutilia*." Ibid. at 693. Compare *R. v. Deer*, [1919] 1 W.W.R. 410 (Sask.).

But in *re Kwong Wo*, (1893) 2 B.C.R. 336, it was held that the hearing of the appeal would not be prevented by the failure of the justice to return the conviction after being required to do so.

*Proving service of notice of appeal*—The appellant is to serve both the respondent and the justice with a copy of the notice. The proof of service of the notice of appeal upon the justice should be more than evidence that some one of the name of the justice was served; there should be evidence that the person served was the justice of the peace who tried the case. *Pahkala v. Hannuksela* (1912) 2 W.W.R. 911, 22 Can. Cr. Cas. 247 (Sask.); *R. v. Gray*, 5 Can. Cr. Cas. 24. It may be made by affidavit instead of calling a witness on the return day of the appeal to prove service. *R. v. Curran*, 22 Can. Cr. Cas. 388.

*Failure to give recognizance*—The giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing and the

conviction may be prosecuted as if no notice had been given. *R. v. Joseph*, 11 Que. K.B. 211, 6 Can. Cr. Cas. 144.

If imprisonment is imposed by the conviction as a direct punishment for the offence, sub-sec. (c) is explicit in requiring that a recognizance shall be given or the defendant shall remain in custody. A deposit of cash in lieu of a recognizance is not then authorized. *R. v. Fraser*, 42 N.S.R. 202. If an appeal has been irregularly entered notwithstanding that the appellant condemned to imprisonment had not given the necessary recognizance, the validity of the entry of the appeal is to be questioned only by a direct and substantive application, as by a motion to the district court to quash the appeal; *R. v. Gregg*, (1913) 4 W.W.R. 1345, 1346 (Alta.); or by an application to the superior court for prohibition; *R. v. Gregg*, (1913) supra; or by *certiorari* to the superior court in a proper case. *R. v. Gregg*, (1913) supra. *Certiorari* might be applicable if the appeal has been disposed of without jurisdiction; but otherwise see Cr. Code secs. 1121 and 1122.

*Recognizance as a stay of proceedings*—A recognizance given in respect of the fine imposed operates as a stay of proceedings for enforcing the payment of the fine until the appeal is disposed of. *Simington v. Colbourne*, (1900) 4 Terr. L.R. 372; *R. v. Trotter*, 22 Can. Cr. Cas. 102. In cases where a fine is imposed and in default of payment imprisonment, the same form of recognizance (form 51), applies as where imprisonment in the first instance is ordered, the conditions being (1) to personally appear, (2) to try the appeal, (3) to abide the judgment of the court thereupon, and (4) to pay costs as awarded. The condition as to abiding the judgment of the court may mean in case of an affirmance in the one case imprisonment forthwith and in the other payment of the fine with a liability to imprisonment in default. In the latter case the appeal is still one from "a conviction . . . whereby a penalty . . . is adjudged to be paid" (sub-sec. (c)); and it is submitted that his recognizance must (in like manner as if he made a cash deposit) cover both the penalty and the costs of the appeal. There is, however, authority for the contrary proposition that the imprisonment fixed in default is sufficient security for the payment of the penalty, and that an appeal is competent if the recognizance is given for the costs of appeal only although the defendant appealing is not in custody for the default and there has been no distress warrant issued as directed by the conviction to levy the fine. *R. v. McDermott* (1914) 7 W.W.R. 165 (Sask.), per Newlands, J.

If a person sentenced to imprisonment upon summary conviction gives a recognizance and is liberated under sec. 750 (a) pending an appeal from the summary conviction, the interval until his return to custody will not count on the term of imprisonment as affirmed on the appeal. *Collette v. The King*, 16 Can. Cr. Cas. 281, 19 Que. K.B. 124.

*On re-hearing, the party supporting the conviction to prove his case*—The appeal may be quashed or formally abandoned, but other-



wise it is a re-hearing and the respondent supporting a summary conviction must prove his case, he being the complaining party. *R. v. Gregg*, (1913) 4 W.W.R. 1345, 1348 (Alta.); *Olson v. Cameron*, 12 Can. Cr. Cas. 193 (Terr.).

*Appellant's liability for costs*—An appellant may formally abandon his appeal (sec. 750); and on failure to prosecute it he is liable to costs (sec. 755).

*Power to adjourn hearing of appeal*—An appeal properly lodged from a summary conviction (secs. 749 and 750) is made to a permanent and continuing court, and it has an inherent power to adjourn in addition to the statutory power to adjourn from one sittings to another. *R. v. Gregg*, 4 W.W.R. 1344, 1347 (Alta.).

*Restrictions on certiorari if appeal taken*—Secs. 1121 and 1122 contain special restrictions on the granting of *certiorari* in respect of summary convictions which have been appealed against. But if the notice of appeal is void for irregularity, *certiorari* is not barred. *R. v. Becker*, 20 Ont. R. 676; *R. v. Caswell*, 33 U.C.Q.B. 303 (Ont.). Where an appeal had lapsed, *certiorari* may be granted. *R. v. Delegarde, ex parte Cowan*, 36 N.B.R. 503, 9 Can. Cr. Cas. 454; *R. v. Alford*, 10 Can. Cr. Cas. 61.

*Certiorari* has been allowed where the appeal judge wrongly decided that he had no jurisdiction to hear the appeal. *R. v. Deer* [1919] 1 W.W.R. 410 (Sask.).

The prior service of a notice of appeal from the conviction will not prevent *certiorari* proceedings attacking the jurisdiction of the magistrate; *Davis v. Feinstein* (1915) 25 Man. R. 507; *Johnston v. O'Reilly*, 16 Man. R. 405, 12 Can. Cr. Cas. 218; *R. v. Starkey*, 6 Man. R. 589; *R. v. Starkey*, 7 Man. R. 47, 489; *re Buggles*, 35 N.S.B. 57; but the *certiorari* proceedings may be a waiver of his appeal. *Denault v. Robida*, 10 Que. S.C. 199, 8 Can. Cr. Cas. 501.

If the appeal was dismissed on the ground that it was not perfected and without a consideration of the merits, the conviction may still be brought up on *certiorari* if the justice acted without jurisdiction as where it was proved before him that the title to land was in dispute on a charge of destroying a line fence. *R. v. O'Brien, ex parte Roy*, 38 N.B.R. 109, 12 Can. Cr. Cas. 533.

*Inspection and Sale Act*—Special provision as to appeals under Part VIII of the Inspection and Sale Act, R.S.C., ch. 85, relating to dairy products, are contained in sec. 317 of that Act. Such appeals are to be brought within ten days after the date of conviction and the trial must be within thirty days from the date of conviction unless the court or judge appealed to extends the time beyond such thirty days. In all respects not specially provided for in that Act the procedure under Part XV of the Code shall apply so far as applicable. A similar regulation affects appeals under Part IX of the Inspection and Sale Act, relating to the packing of fruit. See R.S.C., ch. 85, sec. 335.

*Where affidavit of merits required under special Act as a condition*

*of appeal*].—See *R. v. Curran*, 22 Can. Cr. Cas. 388 (Sask.); *R. v. Marshall* (1915) 24 Can. Cr. Cas. 180, 31 W.L.R. 702; B.C. Game Act, 1914, ch. 30, sec. 56; *R. v. Labbe*, 17 Can. Cr. Cas. 417 (Que.); *R. v. Hyndman*, 17 Can. Cr. Cas. 469; Quebec Motor Vehicles Act, 6 Edw. VII (Que.), ch. 13; *R. v. McLeod*, 4 Terr. L.R. 513; *Cavanagh v. McIlmoyle*, 5 Terr. L.R. 235.

**Hearing of appeal.—Disposal of deposit.—Adjourning hearing.—  
Where conviction quashed, endorsement to be made.**

**751.** The court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the court below, as seems meet to the court, and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

2. In any case where a deposit has been made as provided in paragraph (c) of sec. 750 if the conviction or order is affirmed, the court may order that the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be paid to the appellant; and if the conviction or order is quashed the court shall order the money to be repaid to the appellant.

3. The court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court.

4. Whenever any conviction or order is quashed on appeal, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed.

5. Whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the

same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; R.S.C. 1906, ch. 146, sec. 751; 4-5 Edw. VII, Can., ch. 10, sec. 4; sec. 880, Code of 1892; 51 Vict., Can., ch. 45, sec. 8, 53 Vict., Can. ch. 37 sec. 24.

*Jurisdiction depends on compliance with sec. 750*—R. v. Joseph, 6 Can. Cr. Cas. 144; R. v. Dolliver, 10 Can. Cr. Cas. 410; R. v. Williamson, 7 W.L.R. 491.

The provisions of sec. 750 are imperative, and a strict compliance with the provisions of the section is necessary to give jurisdiction.

In the case of *Kent v. Olds*, 7 U.C.L.J. 21, it was decided that an application to take the appellant's recognizance in court could not be entertained, on the ground that although the recognizance need not be entered into within ten days it must be entered into and filed before the sittings of the court in which the appeal is made. It was also decided in *Re Myers & Wonnacott*, 23 U.C.Q.B. 611, that a failure to comply with these conditions will not be waived by the respondent asking for a postponement after the appellant has proved his notice of appeal on the first day of the court.

After the court is opened for the hearing of the appeal, it is then too late for the appellant to file his recognizance. *Bestwick v. Bell* (1889), 1 Terr. L.R. 193.

*Duty to hear and determine the appeal*—To hear and determine the appeal is not limited to the hearing and weighing of the evidence *pro* and *con* bearing on the subject matter of the appeal. If there is in fact an appeal taken and lodged in due form, it must be heard and disposed of, i.e., the appeal judge must hear it and determine what disposition is to be made of it. *Pahkala v. Hannuksela* (1912) 2 W.W.R. 911, 917 (Sask.). But whether or not sec. 751 can be invoked to support an order dismissing an appeal for want of jurisdiction and ordering costs against the appellant who had given a recognizance, but against whom no notice of appeal is proved, seems not to be settled by authority. A case in favour of the jurisdiction on this ground is *Pahkala v. Hannuksela* (1912) 2 W.W.R. 911, but it was held also that apart from sec. 751 there was jurisdiction by reason of the recognizance, citing *London County Council v. West Ham*, 61 L.J.M.C. 210, [1892] 2 Q.B. 173; *R. v. Parlbay* (1889) W.N. 190, and *Mackintosh v. Lord Advocate*, 2 A.C. 41.

*Motion to quash appeal*—The appeal is to be "lodged in due form" (sec. 752) and in compliance with the requirements of Part XV, sec. 752. The appeal may be quashed for non-compliance with the essential requirements as to notice of appeal or giving recognizance or other security. *R. v. Gregg*, (1912) 22 Can. Cr. Cas. 51, 25 W.L.R. 183 (Alta.).

*Continuances*—Code sec. 751 (3). Where the appeal is to a permanent and continuing court, it has inherent power to adjourn a case from one sittings to another, and may enter a continuance *nunc pro tunc* to carry a case on the list for hearing if justice demands it. *R. v. Gregg*, 25 W.L.R. 183, 22 Can. Cr. Cas. 51 (Alta.); *R. v. Westmoreland Justices*, 37 L.J.M.C. 115; *R. v. Oxfordshire Justices*, 1 M. & S. 446.

A mandamus may be granted to require an inferior court to enter continuances and to hear the appeal if it has improperly refused to hear it on the merits and erroneously held against the sufficiency of the notice of appeal. *Rex v. Trottier*, 22 Can. Cr. Cas. 102, 25 W.L.R. 663.

The recognizance given on the release of the accused pending the appeal will remain in force for the purposes of continuances so ordered on mandamus. *Ex parte Blues*, 24 L.J.M.C. 138; *Rex v. Trottier*, *supra*.

*Appeal where both conviction and information are invalid*—There is a difference of judicial opinion as to the strict form of disposing of an appeal from an invalid summary conviction based on an equally invalid information; some courts affirm the right to quash the conviction for objections appearing on its face and not cured by the depositions returned by the magistrate for the purposes of the appeal. *R. v. Tebo*, 1 Terr. L.R. 196; *R. v. Brook* (1902) 5 Terr. L.R. 369, 7 Can. Cr. Cas. 216; *R. v. Koogo* (1911) 19 W.L.R. 246, 19 Can. Cr. Cas. 56 (Sask.). Other courts disclaim any jurisdiction on an appeal to entertain a motion to quash the summary conviction; *R. v. Dunlap* (1914) 6 W.W.R. 3 (B.C.); but would hear and determine the charge if the appeal has been lodged in due form and try both the facts and the law. *R. v. Dunlap*, *supra*. It has been held that the duty of the court to determine on the merits the charge on which the conviction was made (sec. 754), requires the dismissal of that complaint on the appeal where it does not appear from the papers sent up that the alleged offence took place within a statutory time limit for prosecutions. *R. v. Dunlap*, 6 W.W.R. 3 (B.C.). Code sec. 669 (and 711) do not extend to the appellate court so as to enable it to amend the defective information. *R. v. Dunlap*, *supra*, per Judge Thompson. A person who has pleaded guilty and has been summarily convicted on such plea may appeal and claim that the conviction is bad in law, but if this objection to its validity be based on an objection to the form of the information or complaint, he must have raised the objection before the magistrate or he cannot raise it on the appeal. *R. v. Brook* (1902) 5 Terr. L.R. 369, 7 Can. Cr. Cas. 216. Furthermore the plea of guilty before the magistrate will estop the accused from demanding on the appeal that the informant shall prove him guilty of the charge to which he pleaded. *R. v. Gillis* (1914) 23 Can. Cr. Cas. 160 (Y.T.). *R. v. Brook* (1902) 5 Terr. L.R. 369, 7 Can. Cr. Cas. 216.

*Varied or substituted judgment on appeal*—If, instead of an affirmation, a different judgment has been pronounced on the appeal, the

judgment so substituted may be enforced either by the process of the court appealed to (sec. 754, sub-sec. (3) ), or by process issued by the convicting justice (sec. 754, sub-sec. (2) ). *Collette v. The King*, 16 Can. Cr. Cas. 281, 19 Que. K.B. 124.

*Costs of appeal*—In the matter of appeals from summary convictions or orders four sections of the Criminal Code deal with the question of costs; secs. 751, 754, 755, 760. One of these makes provision for a notice of abandonment of the appeal before the sittings at which it would be heard (sec. 760). Where the appellant fails to proceed with his appeal and has not formally abandoned it by notice, the appellate court may award costs against the appellant on proof of notice of appeal having been given to the person entitled to receive the same whether properly given or not (sec. 755). If the notice of appeal had been given, costs might be awarded against the appellant although he never entered the appeal (sec. 755).

While sec. 751 of the Code gives the court to which the appeal is made power to make such order, with or without costs to either party "as seems meet to the court," and while the allowance of costs is entirely discretionary with the court, yet the section must be interpreted only as giving the court or judge power to allow such costs as are strictly just and reasonable, in respect to the matter under consideration, and the power and discretion of the court should be exercised with caution, and in a manner absolutely just and right between the parties. *R. v. Wilson, ex parte Cronkhite*, 44 N.B.R. 70, 26 Can. Cr. Cas. 224.

The jurisdiction to allow costs against an appellant who fails to prosecute his appeal after giving notice is limited by the express terms of sec. 755 to ordering the costs "at the same sittings for which the notice was given." Other cases are subject to the more general terms of sec. 751, sub-sec. (2). But even in cases under sub-sec. (2) there may have been such a disposal of the case on a prior date as makes the court *functus officio* as to the appeal.

It is well established law that every judgment or order when drawn up, passed and entered, puts an end to the controversy with respect to which it is given, whether it be of procedure or merits, unless and until the judgment is discharged, reversed, set aside or varied according to law. The judge, by whom it is pronounced, is on entry of the judgment *functus officio* as it is passed into matter of record which can be altered only by a higher court. *R. v. Wilson, ex parte Cronkhite*, 44 N.B.R. 70, 26 Can. Cr. Cas. 224.

The costs of the appeal awarded against the defendant may be added to the costs awarded by the conviction, and payment enforced by the convicting justice by distress warrant and imprisonment in default of distress. *R. v. Hawbolt*, (1900) 33 N.S.B. 165.

*No reversal for objection to form of information or of process unless objection taken below*—Code sec. 753.

*No jurisdiction to state a case to provincial court of appeal*—On the hearing of an appeal under Part XV the county court judge has no jurisdiction to state a case for the opinion of the Court of Appeal. *R. v. McIntosh*, 14 W.L.R. 548, 17 Can. Cr. Cas. 295; *Mischowsky v. Hughes*, 2 Sask. L.R. 219, 15 Can. Cr. Cas. 364.

*Unlawful and excessive punishment*—Code sec. 754.

*Raising on appeal a question not raised below*—If the point of law raised by an appellant on an appeal from a summary conviction is not one respecting the information or for any alleged defect therein in substance or in form, it is not subject to the statutory restriction that it must first have been raised before the magistrate. *Upton v. Brown* (1912) 3 W.W.R. 626, 21 Can. Cr. Cas. 190 (Alta.).

It does not apply where a conviction under an ordinance although made on a plea of guilty is bad in law because the municipality which enacted the ordinance had no power to do so; nor does it apply if the objection is that neither the conviction, nor the information, nor the depositions in support disclose any offence. *R. v. Brook*, 7 Can. Cr. Cas. 216 (Sask.). *R. v. Koogo*, 19 W.L.R. 246 (Sask.). In such cases the defendant's appeal from the conviction should be allowed without a re-hearing of evidence, there being no valid charge in the information or in the depositions looked at under sec. 753 in aid thereof, to which the defendant can be called upon to plead. If, however, the real defence has been concealed with the intention of first raising it on appeal, costs of the successful appeal will be refused so as to discourage that practice, although the conviction must be quashed as invalid. *Upton v. Brown* (Alta.), *supra*.

*No reversal for variance between information and evidence unless adjournment asked and refused below*—Code sec. 753.

*Abatement*—On a charge of a criminal offence the appeal from a summary conviction does not abate by the death of the informant. *R. v. Fitzgerald*, (1898) 29 Ont. R. 203. \_

#### **Appeal on facts and law.**

**752.** When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order.

2. Any of the parties to the appeal may call witnesses and adduce evidence whether such witnesses were called or evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry.

3. Any evidence taken before the justice at the hearing below, certified by the justice, may be read on such appeal, and shall have the like force and effect as if the witness was there examined if the court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts.

*Origin*—Sec. 881, Code of 1892; 53 Vict., Can., ch. 37, sec. 25.

*Court appealed to is absolute judge "as well of the facts as of the law"*—The re-hearing is without a jury, although the court is constituted as a jury court. *R. v. Bradshaw*, 38 U.C.Q.B. 564 (Ont.); *R. v. Malloy*, 4 Can. Cr. Cas. 116 (Ont.).

The word "law" here refers to the law applicable to the facts adduced in support of or against the proof of the charge. *R. v. Miller*, 25 Can. Cr. Cas. 151, 25 W.L.R. 296 (Alta.). Sec. 753 applies only to the cases therein specifically mentioned. *R. v. Miller*, 25 Can. Cr. Cas. 151, 25 W.L.R. 296 (Alta.); *Rand v. Rockwell*, (1871) 2 N.S.D. 199.

*Conviction appealed from to be before court hearing appeal*—Code sec. 757.

In *Re Ryer and Plows*, 46 U.C.Q.B. 206, Osler, J., at page 209, said: "There is nothing that I am aware of which makes it necessary that the formal conviction should have been returned and filed before the appeal is entered or even before the hearing has commenced. It must, no doubt, as the authorities show, be proved at some time during the hearing but at what time is a matter of practice and in the discretion of the court."

*Subpoena for witness in another province*—See sec. 676, made applicable by sec. 711.

*Deposition below may be received if witness not available*—Sub-sec. (3) enables the court to receive as evidence the deposition below of any witness whose presence at the re-hearing cannot be obtained. As to this the court is to be satisfied by affidavit or otherwise. If an affidavit has not been prepared, the witness who can testify to the fact should be called to give the preliminary evidence here made necessary. The deposition is admissible if certified by the justice (sub-sec. (3)). This, it is submitted, is provided as a convenient mode of proof not necessarily exclusive of proof by calling the justice as a witness; but see, contra, as to appeals under sec. 797, *R. v. Hornstein* (1912) 19 Can. Cr. Cas. 127 (N.S.).

*Procedure on the re-hearing*—After the notice of appeal has been proved or admitted, the clerk of the court reads the conviction returned by the convicting justice; and if there are any objections raised as appearing on the face of the conviction, the appellant usually begins by stating all his objections thereto at once, so that they may be met by the other side. But if there are no such objections taken, or if when taken they are overruled, the respondent opens his case and calls

witnesses; and, if the court thinks the case thus opened and proved requires an answer, the appellant then opens his case and calls his witnesses. And when the appellant's case is closed, the respondent has a general reply upon the whole case. *R. v. May*, 5 Q.B.D. 382, 49 L.J.M.C. 67, 44 J.P. 538; *R. v. Washington*, 46 U.C.Q.B. 221 (Ont.).

The appellate court tries the case *de novo* upon the merits; *R. v. Baird*, (1908) 13 Can. Cr. Cas. 240 (Sask.); Code sec. 754; and may impose a new sentence at its discretion within the limits provided by law. *R. v. Baird*, *supra*. If the punishment ordered below is greater than that provided by law it must be reduced to conform to the legal requirements; sec. 754; but not necessarily the legal maximum. *R. v. Baird*, *supra*.

The court on appeal will reduce the penalty awarded although affirming the adjudication of guilt if it deems the penalty unreasonably severe. *Sing Kee v. Johnston*, 5 Can. Cr. Cas. 454 (B.C.).

If defendant pleaded guilty before the justice the appellate court will not hear evidence adduced for the purpose of having the punishment reduced unless it appears that the magistrate has acted oppressively. *R. v. Bowan*, 6 B.C.R. 271. The judgment on the appeal under sec. 752 is a final judgment. *R. v. Hamlink*, 2 O.W.N. 186, 17 Can. Cr. Cas. 162 (Ont.); *R. v. Beamish*, (1901) 8 B.C.R. 171.

*Order as to costs*—The judge is to tax or fix any costs he allows on the appeal; *R. v. Hamlink*, 2 O.W.N. 186; 17 Can. Cr. Cas. 162, and direct them to be paid to the clerk of the court who will pay them over to the person entitled. Sec. 758. Payment may be enforced by a justice's distress warrant and in default of distress a commitment. Sec. 759.

The court must determine, on quashing a conviction, whether costs are to be paid; secondly, what costs, that is, costs of the court below, or magistrate's court, or costs of the appeal, or both; and when such costs should be paid. If it has been left to the clerk of the peace to tax the costs during the sessions the taxation is invalid unless adopted by the court. It should be included in the formal order disposing of the case. *Re Rush and the Corporation of Bobcaygeon* (1879), 44 U.C.Q.B. 201.

Where an appeal is heard, and determined against the appellant on the merits the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed *nunc pro tunc* at the next sittings, and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings. *Bothwell v. Burnside* (1900) 31 Ont. R. 695, 4 Can. Cr. Cas. 450.

But if no formal order was ever drawn up, the clerk's certificate of taxation and a subsequent order of the court of general sessions directing a distress for the costs taxed but not purporting to adopt the taxation or to dispose of the appeal, are irregular, and will be quashed on *certiorari* for want of jurisdiction. *Bothwell v. Burnside*, *supra*.



*No reference of case to higher court*—An appeal from a conviction by two justices of the peace having been taken to the district court, and a question having arisen as to the regularity of the proceedings, the district court judge referred such question to the court *en banc*. It was held that in such matters the court appealed to, and in this case the district court, is the absolute judge of facts and law, and the court *en banc* had no authority to advise in the matter. *Mischowsky v. Hughes*, 2 Sask. R. 219, 15 Can. Cr. Cas. 364.

*Certiorari limited in review of order on appeal*—If the appeal be to a court of inferior jurisdiction and it has proceeded without jurisdiction because of conditions precedent to the appeal not having been complied with, its order may be set aside on *certiorari*. See *R. v. Wedderburn*, *Ex parte* Sprague, 36 N.B.R. 213, 8 Can. Cr. Cas. 109.

The effect of Code sec. 1121 is to limit *certiorari* in respect of an affirmed conviction or a conviction amended on appeal, to cases where a want of jurisdiction is shown; and see sec. 1122 as to the conviction appealed from. See *R. v. Chappus*, 38 O.L.R. 576, 28 Can. Cr. Cas. 157, affirmed in *R. v. Chappus*, 39 O.L.R. 329, 28 Can. Cr. Cas. 411.

#### **Limitation as to objections for defect in substance or in form.**

**753.** No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant issued upon any such information, complaint or summons, for any alleged defect therein in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof at the hearing of such information or complaint, unless it is proved before the court hearing the appeal that such objection was made before the justice before whom the case was tried, and by whom such conviction, judgment or decision was given, nor unless it is proved that notwithstanding it was shown to such justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some further day, as in this Part provided.

*Origin*—Sec. 882, Code of 1892; R.S.C. 1886, ch. 178, sec. 79; Summary Convictions Act, 1848, Imp., ch. 43, sec. 1.

*What defects are cured*—The statutory form of summons, Code form 5 (sec. 658) indicates that a summons shall be under seal. The lack of a seal is a defect of form and is cured under sec. 753. *R. v. Garrett-Pegge*, [1911] 1 K.B. 880.

*Limitation of curative provisions*—It has been held that the curative provisions of Code sec. 753 apply only to a variance between the information and the evidence at the hearing of the information or complaint, and not to the evidence on an appeal from such hearing. *R. v. Dunlap* (1914) 6 W.W.R. 3 (B.C.).

A person may plead guilty to an information under the summary conviction procedure, and be convicted on such plea and yet the conviction be bad in law and liable to be quashed. Sec. 753 is silent as to appeals based on other objections in point of law and therefore such appeals are not subject to the limitation that judgment cannot be given for an appellant with respect to them unless he has raised the objection before the justice of the peace, if the point raised by the appellant is not one respecting the information or for any alleged defect therein in substance or in form. *R. v. Brook*, 7 Can. Cr. Cas. 216, 5 Terr. L.R. 369; *Upton v. Brown* (1912) 3 W.W.R. 626 (Alta.); *R. v. Koogo*, 19 W.L.R. 246, 19 Can. Cr. Cas. 56.

In *R. v. Johnson*, 17 Can. Cr. Cas. 172 (N.S.) County Judge Patterson said he would have great hesitation in extending the interpretation of sec. 753 so far as to deprive a defendant of any advantage there might be in an objection (though he had not raised it at the trial) that there had been no valid information, though it did not become necessary in that case to decide the point.

A decision by the appeal judge that the information was insufficient and that the conviction appealed from should therefore be quashed, is not a decision upon a mere preliminary point, but one upon the merits, and whether right or wrong, a mandamus will not lie even where the appeal judge consents, to compel him to re-open the appeal. *Re McLeod and Amiro*, (1912) 27 O.L.R. 232, 25 Can. Cr. Cas. 230; *Long Point Co. v. Anderson*, 18 A.R. 401 (Ont.); *R. v. Middlesex Justices*, 2 Q.B.D. 516; *Strang v. Gellatly*, 8 Can. Cr. Cas. 17 (B.C.).

**Judgment to be upon the merits.—May confirm, reverse or modify.—  
New conviction or order.—Enforcing.**

**754.** In every case of appeal from any summary conviction or order had or made before any justice, the court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and

may by such order exercise any power which the justice whose decision is appealed from might have exercised, and may make such order as to costs to be paid by either party as it thinks fit.

2. Such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice.

3. Any conviction or order made by the court on appeal may also be enforced by process of the court itself.

*Origin*—Sec. 883, Code of 1892; 53 Vict., Can., ch. 37, sec. 26.

*"To hear and determine"*—The powers conferred upon the appellate court (in case of defect in the conviction, or excessive punishment), are: (1) to hear and determine the charge upon the merits; (2) reverse or modify the decision; (3) make such other conviction as the court thinks just.

There is nothing in the expression, "hear and determine," which limits the investigation to oral testimony. The words, "hear," and "hearing," are expressions most commonly used to express the act of the court in disposing of cases upon evidence already taken. The expression, "heard and determined," on appeals from justices, is satisfied without a trial by witnesses. *The King v. Cawston*, 4 Dowl. & Ry., 445. *B. v. McKenzie*, 12 Can. Cr. Cas. 435, 443 (N.S.).

A preliminary motion may be made to quash the conviction appealed from for the lack of any evidence below as to an essential part of the offence. *R. v. Koogo*, 19 Can. Cr. Cas. 56, 19 W.L.R. 246; *R. v. Brook*, 7 Can. Cr. Cas. 216; *R. v. Baird*, 13 Can. Cr. Cas. 242. And if both the information and the conviction are defective in that respect, it has been doubted whether the appeal judge can amend the information for the purpose of the re-hearing even if the depositions show the omitted particulars. See *R. v. Dunlap*, (1914) 6 W.W.R. 3, 22 Can. Cr. Cas. 245; *R. v. Whelan*, 4 Can. Cr. Cas. 277; but see *R. v. Boomer*, 15 O.L.R. 321, 13 Can. Cr. Cas. 98. An omission in the formal conviction of costs which the justice had ordered and had included in his minute of adjudication may be corrected on appeal, for the court is to hear and determine the charge notwithstanding any defect in the conviction. *R. v. Murphy* (1918) 29 Can. Cr. Cas. 445 (N.S.). An objection on a matter of form will not be allowed if the conviction can be supported on the merits. *R. v. Sing Kee* (1909) 14 Can. Cr. Cas. 420 (B.C.).

The court is empowered by sec. 754 to make the order which the justice should have made, and if he imposes costs he may order commitment in default of payment. *Re Sigurdson* (No. 2) 26 Man. R. 209, 34 W.L.R. 53, 25 Can. Cr. Cas. 313. Where the justice overruled an objection that the information charged several offences in contravention of sec. 710, and proceeded to take evidence on all until all but one were abandoned at the close of the prosecutor's case, it was held that the con-

viction should be quashed on appeal. *R. v. Austin* (1905) 10 Can. Cr. Cas. 34, 1 W.L.R. 71 (Terr.); and see *R. v. Alward*, 25 Ont. R. 519.

An information is to be for one offence only (sec. 710), but conviction made on defendant's non-appearance before the justice may be valid if it is for one of the offences only as to which the evidence was limited. If the record of proceedings does not show which of the two offences the conviction is for, it will be quashed on appeal. *Simpson v. Lock*, 7 Can. Cr. Cas. 294.

It is not necessary that the defendant should be personally present to enable the judge to pronounce a modified sentence of imprisonment against him reducing the term imposed below. *Johnston v. Robertson*, 42 N.S.R. 84, 13 Can. Cr. Cas. 452, and see *R. v. Johnston*, 41 N.S.R. 105, 11 Can. Cr. Cas. 10.

At common law in case of misdemeanour, it was not necessary that the accused be present to enable sentence to be imposed, Archbold's Criminal Law, 227, and if not necessary at common law in cases of misdemeanour it can hardly be urged that on appeal under the Summary Conviction Act, it is necessary. *Johnston v. Robertson*, 13 Can. Cr. Cas. 452, at 473. Per Drysdale, J.

*Order to state time and place for paying the costs*—See sec. 758.

*Remitting the conviction as affirmed to the justice*—See sec. 757 (4).

*Order for repayment of fine if conviction reversed*—Upon the allowance of defendant's appeal, repayment of the fine and costs and payment of the costs of the appeal are properly ordered. *Regina v. McIntosh* (1897) 2 Can. Cr. Cas. 114, 28 O.R. 603; *Rex v. Tucker*, 10 O.L.R. 506, 10 Can. Cr. Cas. 217.

*Where special Act permits a further appeal*—See *R. v. Barker*, 47 N.B.R. 248, 12 E.L.R. 535, 21 Can. Cr. Cas. 267.

#### **Costs when appeal not prosecuted.—How recoverable.**

**755.** The court to which an appeal is made, upon proof of notice of the appeal to such court having been given to the person entitled to receive the same, whether such notice has been properly given or not, and though such appeal has not been afterwards prosecuted or entered, may, if such appeal has not been abandoned according to law, at the same sittings for which such notice was given, order to the party or parties receiving the same such costs and charges as are thought reasonable and just by the court, to be paid by the party or parties giving such notice.

2. Such costs shall be recoverable in the manner provided by this Act for the recovery of costs upon an appeal against an order or conviction.

*Origin*—57-58 Vict., Can., ch. 57, sec. 1; sec. 884, Code of 1892; R.S.C. 1886, ch. 178, sec. 81; 32-33 Vict., Can., ch. 31, sec. 69.

*Costs on dismissing an appeal for want of prosecutions*—Costs can be awarded under Code sec. 755 only at the same sittings for which the notice was given. *McShadden v. Lachance*, (1901) 5 Can. Cr. Cas. 43 (B.C.); *Bothwell v. Burnside*, (1900) 4 Can. Cr. Cas. 450, 31 Ont. R. 695. Under a statutory requirement that the notice of appeal shall be served upon the respondent as well as the justice (see sec. 750), it would seem necessary that the respondent should prove that notice of appeal had been received by him before coming to the court for costs. If he denied the receipt of any notice of appeal whether "properly given or not" (sec. 755), he had not been called upon to prepare for an appeal at all. If a notice of appeal had been served, the respondent might still object to its sufficiency in not identifying the conviction sought to be appealed from; *R. v. Ah Yin* (1902) 6 Can. Cr. Cas. 66; or for some other ground of insufficiency. *R. v. Brimacombe* (1905) 2 W.L.R. 53 (Terr.); *Scott v. Dalphin* (1907) 6 W.L.R. 371 (Terr.). If the objection were sustained it would seem that Code sec. 755 would apply to a notice of appeal not properly given.

In *Pahkala v. Hannuksela* (1912) 2 W.W.R. 911 (Sask.), notice had been given and not formally abandoned, and it was held that the court appealed to had the authority under sec. 755 to award costs no matter how defective the notice may have been and whether the appeal was entered or not, or prosecuted or not. Sec. 755 applies on allowing a motion to quash an appeal for want of jurisdiction due to a defect in the notice of appeal. *R. v. Doliver Mountain Mining Co.*, 10 Can. Cr. Cas. 405. Costs were disallowed under sec. 755 in *R. v. Edleston* (1910) 15 W.L.R. 279 (Sask.), because notice of the appeal had been served on only one of two justices; and, per *Maclean*, D.C.J., there was consequently a lack of proof of notice to "the person entitled to receive the same" (Code sec. 755). This interpretation was dissented from in *Pahkala v. Hannuksela*, *supra*. The justice who did receive the notice was a person "entitled" to receive it, and to hold that the fact that another person who was equally entitled to receive the notice did not receive it, prevented the court from awarding costs under sec. 755 to the person who appeared and contested the motion, was held to be putting much too narrow a construction on the section. Per *Farrell*, J.D.C., in *Pahkala v. Hannuksela* (1912) 2 W.W.R. 911, 919 (Sask.).

In *McNeill v. Saskatchewan Hotel Co.* (1911) 17 W.L.R. 7 (Sask.) the objection was to the failure to have the deposit returned into the appellate court, but the objection to the jurisdiction was not taken until the notice of appeal was proved. The office of a notice of appeal is to inform the respondent that some particular conviction is appealed against, and care should be taken not to mislead. *R. v. Ah Yin* (1902) 6 Can. Cr. Cas. 66 (B.C.). A notice will be upheld if it substantially gives the requisite information as to the names of appellants, the intent to appeal, the sessions to which appeal is to be made and the nature of the conviction appealed against; *R. v. Ah Yin*, *supra*; but the notice

will be bad if it describes an entirely different offence from that set out in the conviction. *R. v. Ah Yin*, supra.

*Sub-sec. (2)*—"Costs recoverable in the manner provided," etc.]—See Code secs. 758 and 759.

**Proceedings when appeal fails.**

**756.** If an appeal against a conviction or order is decided in favour of the respondents, the justice who made the conviction or order, or any other justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought.

*Origin*].—Sec. 885, Code of 1892; R.S.C. 1886, ch. 178, sec. 82; Summary Jurisdiction Act, 1848, Imp., sec. 27.

*Distress or commitment under affirmed conviction*].—Sec. 756 enables the process in execution to be issued either by the convicting justice or by any other justice having power to act in the same territorial division, that is, within the convicting justice's territorial jurisdiction. It applies only after the appeal has been decided in favour of the respondent. *Simington v. Colbourne* (1900) 4 Terr. L.R. 372.

**Conviction to be transmitted to appeal court.—Presumption.—Evidence of conviction.—Clerk of court to remit papers in certain cases.**

**757.** Every justice before whom any person is summarily tried, shall transmit the conviction or order to the court to which the appeal is by this Part given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the court.

2. The conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

3. Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence.

4. In any case when a conviction or order is required by this Part after appeal to be enforced by any justice the clerk of the court to which the appeal was had or other proper officer shall remit such conviction or order and all papers therewith sent to

the court of appeal excepting any notice of intention to appeal and recognizance to such justice to be by him proceeded upon as in such case directed by this Part.

*Origin*—Sec. 888, Code of 1892; R.S.C. 1886, ch. 178, sec. 86; 51 Vict., Can., ch. 45, sec. 9.

*Transmitting the conviction appealed from for use on the appeal*—The provision of the first paragraph of sec. 757 is held to be directory only, and failure of the justice to transmit the conviction before the opening of the sittings, will not prevent the court from hearing the appeal, if the conviction is returned by the time the case is begun. *Harwood v. Williamson*, (1908) 1 Sask. L.R. 58, *sub nom.* *R. v. Williamson*, 13 Can. Cr. Cas. 195. The neglect of the magistrate is not to prejudice the rights of the appellant. *Wills v. McSherry*, [1913] 1 K.B. 20, and see *R. v. McKay*, 21 W.L.R. 369, 21 Can. Cr. Cas. 211.

*Duty to return information and depositions*—The justice is also to return the information and depositions. *R. v. Rondeau*, 5 Terr. L.R. 483. These should include notes taken of objections and rulings thereon; *R. v. Dominion Drug Stores* [1919] 1 W.W.R. 285 (Alta.); but whether such notes were taken or not, affidavit evidence on *certiorari* is admissible to show the objections and the justice's rulings during the hearing before him. *Ibid.*; *R. v. Richmond* [1917] 2 W.W.R. 1200; *R. v. Barlow* [1918] 1 W.W.R. 499; *R. v. James* [1918] 2 W.W.R. 994.

*Proof of previous conviction on charge of second offence under a special Act*—Proceedings before a justice of the peace may be certified under the hand or seal of such justice; and, if any such justice has no seal, or so certifies, then a copy purporting to be certified under the signature of such justice is admissible without any proof of the authenticity of such signature or other proof whatsoever. *Canada Evidence Act*, R.S.C. 1906, ch. 145, sec. 23.

Further, by Code sec. 982, a copy of any summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same.

The conviction before a justice may also be proved by the production of the formal conviction itself. *Hartley v. Hindmarch*, L.R. 1 C.P. 553; *R. v. Curran* (1914) 22 Can. Cr. Cas. 388 (Sask.).

Where a statute directs that the magistrate trying a charge of a second or subsequent offence shall first proceed with the enquiry and determination as to the latter and then "and not before" interrogate and take proof as to the alleged prior offence, a breach of such an imperative direction will deprive the magistrate of jurisdiction. *R. v. Edgar*, 15 Ont. R. 142; *R. v. Van Zyl*, 15 Can. Cr. Cas. 212; *R. v. Nurse*,

8 Can. Cr. Cas. 173, 7 O.L.B. 418, disapproving dictum in *R. v. Brown*, 16 Ont. R. 41; *Re Ellis*, 24 Can. Cr. Cas. 345 (P.E.I.); *Faulkner v. Rex* [1905] 2 K.B. 76; nor would jurisdiction be restored on the magistrate striking out the evidence of the prior conviction; *Ibid.* Nor would it be permissible to cross-examine the accused in regard to the prior conviction when called as a witness on the principal charge. *R. v. Van Zyl*, 15 Can. Cr. Cas. 212; *R. v. Dealtry*, 7 Can. Cr. Cas. 443. But where the legislature amends such a statute by leaving out the words "and not before" as was done with the Ontario Liquor License Act, by 9 Edw. VII (Ont.), ch. 82, sec. 209, it would seem that the provision becomes directory only instead of imperative and peremptory, and its contravention would not go to the jurisdiction. *R. v. Graves*, 21 O.L.B. 329, 16 Can. Cr. Cas. 150, 318.

Part XV of the Code contains no provision in itself for dealing first with the later offence, and where the special Act on which the prosecution is based does not require it, the prosecutor must prove the prior conviction as part of his case along with the proof of the subsequent offence. *R. v. Cruikshanks*, (1914) 4 W.W.R. 524, 28 Can. Cr. Cas. 23, 7 Alta. L.R. 98.

In *Ex parte Phillips*, 26 N.B.R. 397, it was held that a certificate of a previous conviction for selling liquor under the Canada Temperance Act is sufficient evidence to prove the fact of such conviction. Usually this is supplemented by testimony to prove identity of the person; but where the issue of identity is not raised by the defence it would appear that an inference of identity may be drawn from the name and address corresponding with the name and address of the defendant. *R. v. Batson* (1906) 12 Can. Cr. Cas. 62 (N.B.). Sec. 982 makes a certificate of a former conviction for an indictable offence proof of same "upon proof of the identity of the person of the offender"; but it has been doubted whether it has any application other than to the trial of indictable offences. *R. v. Leach*, 17 O.L.B. 643, 14 Can. Cr. Cas. 375.

**Yukon Territory.**—In the Yukon Territory every justice of the peace or other magistrate holding a preliminary investigation into any criminal offence which may not be tried under the provisions of Part XV of the Criminal Code shall, immediately after the conclusion of such investigation, transmit to the clerk of the court, or the clerk of the court for the judicial district in which the charge was made, all informations, examinations, depositions, recognizances, inquisitions and papers connected with such charge, and such clerk shall notify the senior judge of the court or the judge for the district of such investigation and the result thereof. The Yukon Act, R.S.C., ch. 63, sec. 82.

#### Order as to costs.

**758.** If upon any appeal the court trying the appeal orders either party to pay costs, the order shall direct the costs to be



paid to the clerk of the peace or other proper officer of the court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid.

*Origin*—Sec. 897, Code of 1892; R.S.C. 1886, ch. 178, sec. 95; Summary Jurisdiction Act, 1848, Imp., sec. 27.

*Judge to fix the costs of the appeal*—Where upon an appeal from a summary conviction the county court judge purports to delegate the taxation of the costs of the appeal to the clerk of the court, instead of himself fixing the costs of the appeal, a superior court, on an application for prohibition from collecting the costs taxed by the clerk, may enlarge the motion to allow of an application to the county judge to fix the costs and amend his judgment accordingly. *R. v. Hamlink*, 2 O.W.N. 186.

*Payment of costs out of cash deposit*—Code sec. 751, sub-sec. (2).

*Recovery of costs on appeal*—The proceedings for enforcement of an order for costs provided by sec. 758 apply only to costs dealt with by the appellate court on affirming or quashing a conviction or order on appeal to that court, and not to costs in *certiorari* proceedings. *R. v. Graham* (1898), 1 Can. Cr. Cas. 405, 29 Ont. R. 192.

The party who originally made the complaint need not always continue to be the party respondent to the appeal taken against the conviction; and some other person may take up the prosecution upon the complainant's death and may be held liable to pay costs if the appeal should be successful. *R. v. Truelove* (1880), 5 Q.B.D. 336, 340.

#### Recovery of costs.—Certificate.—Distress.—Commitment.

**759.** If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the clerk of the peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid.

2. Upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress, and in default of distress may by warrant commit the person against whom the warrant of distress has issued, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and of the

conveying of the party to prison, if the justice thinks fit so to order, are sooner paid.

3. The said certificate shall be in form 52 and the warrants of distress and commitment in forms 53 and 54, respectively.

*Origin*—Sec. 898, Code of 1892; R.S.C. 1886, ch. 178, sec. 96; Summary Jurisdiction Act, 1848, Imp., sec. 27.

*Recovery of costs on appeal*—If a cash deposit has been made by the appellant (sec. 750) and the costs are ordered against him, the costs may be ordered to be paid out of the deposit. Sec. 751, sub-sec. (2). If a recognizance has been given by the appellant who is ordered to pay costs, the recognizance may be enforced; the certificate here provided will apply in cases where costs are ordered against the respondent on an allowance of the appeal. The special means which this section provides for enforcing payment is an alternative to the power conferred by sec. 754, sub-sec. (3) by which any conviction or order made by the court on appeal may also be enforced by process of the court itself.

If an appeal is dismissed without any variance of the conviction or order appealed from, the enforcement of the affirmed conviction should be left to the court below, and the power to issue process from the appellate court should not be used except for recovering the costs of appeal. *Collette v. The King*, (1909) 19 Que. K.B. 124, 16 Can. Cr. Cas. 281.

Code forms 53 and 54 of warrants by justices in default of payment of the costs of appeal from a summary conviction may be varied under Code sec. 1152 so as to apply to warrants issued for the same purpose by the appellate court. *Collette v. The King*, 16 Can. Cr. Cas. 281, 19 Que. K.B. 124.

*Form of certificate of clerk of the peace that the costs of an appeal are not paid*—Code form 52, following sec. 1152.

*Form of warrant of distress for costs of an appeal against a conviction or order*—Code form 53, following sec. 1152.

*Form of warrant of commitment for want of distress for costs of appeal*—Code form 54, following sec. 1152.

#### Abandonment of appeal.

**760.** An appellant may abandon his appeal by giving to the opposite party notice in writing of his intention six clear days before the sitting of the court appealed to, and thereupon the costs of the appeal shall be added to the sum, if any, adjudged against the appellant by the conviction or order, and the justice shall proceed on the conviction or order, as if there had been no appeal.

*Origin*—Sec. 899, Code of 1892; R.S.O. (1887), ch. 74, sec. 8.

"*Six clear days before the sitting*"—In the computation of clear days, the date of giving the notice and the date of the sitting are both excluded, leaving six whole days intervening. See *McQueen v. Jackson* [1903] 2 K.B. 163.

### *Stating a Case.*

**Statement of case by justices for review.—Time limit for application, etc.—Error in law.—Excess of jurisdiction.**

**761.** Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a justice under this Part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the justice declines to state the case, may apply to the court for an order requiring the case to be stated.

2. The application shall be made and the case stated within such time and in such manner as is from time to time directed by rules or orders made under sec. 576 of this Act.

3. If there be no rule or order otherwise providing,—

- (a) the application shall be made in writing to the justice and a copy thereof left with him, and may be made at any time within seven clear days from the date of the proceeding to be questioned;
- (b) the case shall be stated within three calendar months after the date of the application, and after the recognizance hereinafter referred to has been entered into; and
- (c) the applicant shall within three days after receiving the case transmit it to the court, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding which is questioned.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28; Summary Jurisdiction Act, 1879, Imp., 42 and 43 Vict., ch. 49.

*Conviction, order, etc., of a justice under this Part*—As to the application of Part XV, see sec. 706. It includes summary conviction pro-

ceedings before a justice under a special Act of the Canadian Parliament. *R. v. Breckenridge*, 12 Que. K.B. 474, 10 Can. Cr. Cas. 180.

*Stated case by justices*—The statement of the case is called a "stated case," but it differs from the case stated in respect of indictable offences under sec. 1015 on a refusal to grant a reserved case. The stated case by justices under sec. 761 in a summary conviction matter is to be to "the court" as defined by sec. 705, clause (b). See 761 (3), 762, 762A, 764-768.

"*Erroneous in point of law*"—A similar limitation is made in sec. 1014, giving an appeal by way of reserved case after a trial for an indictable offence upon "any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incident thereto, or arising out of the direction of the judge." It has been held under sec. 1014 that a question depending solely upon the weight of evidence is one of fact and not of law; *R. v. McIntyre*, 3 Can. Cr. Cas. 413; *R. v. McCaffery*, 4 Can. Cr. Cas. 193; but a question of the want of legal evidence to support a conviction is one of law. *R. v. Winslow*, 3 Can. Cr. Cas. 215, 12 Man. R. 649; *R. v. Lloyd*, 19 Ont. R. 352.

As to questions of law, this remedy is open as well against the dismissal of a complaint as against a conviction. *Davys v. Douglas*, 28 L.J. Ex. 193, 4 H. & N. 180.

A case cannot be granted to decide a question of jurisdiction of the justices prior to any hearing of the information. *Wakefield L.B. v. W. Riding Rail. Co.*, 30 J.P. 628. But a case may be stated although justices have declined jurisdiction. *Muir v. Hore*, 47 L.J.M.C. 17, 37 L.T. 15.

Justices are not bound to state a case when the application discloses no point on which a case ought to be granted. *R. v. Rutlandshire Justices*, 13 L.T. 722.

The case should be stated so that the opinion of the court will finally dispose of it. *R. v. St. Gile*, 47 J.P. 756.

The court will not consider a question of law not taken before the justices unless the points of law are apparent on the face of the proceedings, though not raised before the justices. *Knight v. Halliwell*, L.R. 9 Q.B. 412; see also *Kavanagh v. Glorney*, Irish Rep. 10 C.L. 220.

The justices have no right to appear in support of their decision. *Smith v. Butler*, 16 Q.B.D. 349.

On a case stated for the superior court on the correctness of the justice's decision upon certain facts submitted the question (of law) for the decision of the court is not whether on the facts presented in the "case," the court would have arrived at the same conclusion as the justices did; but the question is whether the court can reverse the finding of the justices on the ground that there was in law no evidence to support it. *Noch v. Malins* (1918) 87 L.J.K.B. 62; *Kippes v. Lane* (1917) 86 L.J.K.B. 735.

"*The court*"—See definition in Code sec. 705. The appeal by case stated in a summary conviction matter is to the superior court of criminal jurisdiction not to the "court of appeal" by which cases reserved upon indictable offences are heard. *R. v. Henry*, 20 O.L.R. 484, 16 Can. Cr. Cas. 78.

"*Court rules or orders*"—See Code sec. 576.

*Written application for the "case"*—The application is for the purpose of bringing before the justice in a formal manner the request of the appellant to take an appeal by stated case, but the recognizance given and appeal itself relate to the case as stated and not to the application for the case. Yet there is authority for the proposition that a preliminary objection may be raised to a stated case, because the application was not made in due form as required by sec. 761 or by the rules of court. *R. v. Earley*, (1906) 10 Can. Cr. Cas. 336 (Terr.); *R. v. Gaines*, 43 N.S.R. 253.

*The application for the case; Alberta Court Rules*—Alberta Rule 816 is as follows: "An application to a justice of the peace to state and sign a case under said section 761 shall be in writing and be delivered to such justice or left with some person for him at his place of abode within seven days after the making of the conviction, order, determination, or other proceeding questioned. Such application shall state the grounds upon which the proceeding is questioned, and whether the appeal is to be to the appellate division or to a judge."

And Rule 823 provides that "Slight deviation from strict compliance with these rules shall not invalidate any proceeding or thing if the court or judge sees fit to allow the same, either with or without requiring the same to be corrected."

It was held that these rules having been made by virtue of the power conferred by the Code, have themselves the same effect and must be construed as though embodied in the statute. The statutory conditions are obligatory and if not strictly complied with the appellant will lose his right to a case. *R. v. Dean*, [1917] 1 W.W.R. 943 (Alta.). *Foss v. Best*, 75 L.J.K.B. 575; [1906] 2 K.B. 105; 95 L.T. 127. The omission to indicate whether the appeal is to be to the appellate division or a judge is not a slight deviation under rule 823, but a substantial departure from a condition precedent to the applicant's right to a stated case, for the justice would not otherwise know to which office to forward the recognizance. *R. v. Dean*, *supra*.

*No stated case where appeal prohibited*—No case is to be stated under the Code by a justice where an appeal under sec. 749 could not be had, *e.g.*, where a particular statute prohibited an appeal from a conviction thereunder. Sec. 761.

So if an appeal has been taken and tried out under sec. 749, *et seq.*, on which the court appealed to is by sec. 752 the "absolute judge as well of the facts as of the law," the decision is *res judicata* between the

parties and the accused is not entitled thereafter to apply to the justice for a "stated case" to review a point of law decided on the appeal or which he might have raised on the appeal. *R. v. Townshend*, (1902) 35 N.S.R. 401.

Where a seaman's wages are recoverable up to a certain amount by summary proceedings, the general provisions of the summary jurisdiction clauses will be excluded by an enactment in the special Act declaring that the justice's order shall be "final." *Wills v. McSherry*, [1914] 1 K.B. 616, 83 L.J.K.B. 596; Merchant Shipping Act, 1894, Imp., 57-58 Vict., ch. 60, sec. 164; *Westminster Corporation v. Gordon Hotels* [1908] A.C. 142.

A statutory provision in a special statute for a stated case on appeal from the decision of justices thereunder would not of itself take away *certiorari*. *Dierks v. Altermatt*, [1918] 1 W.W.R. 719, 723 (Alta.).

*Refusal to state a case*—See secs. 763, 764.

*Recognizance on stated case by a justice*—See secs. 762, 1097-1101.

The recognizance required by sec. 762 must be entered into by the appellant "before a case is stated and delivered to him by the justice." Sec. 762 (1); *R. v. Geiser*, 8 B.C.R. 169; *R. v. Kettle* [1905] 1 K.B. 212; *Stanhope v. Thorsby*, L.R. 1 C.P. 123; *Walker v. Delacambo*, 63 L.J. 77, 58 J.P. 88. Where an incorporated company are appellants the proper and established practice is for the recognizance to be entered into on behalf of the company by a director duly authorized by a resolution of the company for that purpose. An appeal was dismissed where a managing director entered into a recognizance without previous authority. *Southern Counties Deposit Bank v. Boaler*, 59 J.P. 536, 60 J.P. 34.

"*Stated case*" a mode of appeal—The stating of a case upon a question of law arising in a summary conviction proceeding is a mode of appeal, and is therefore included in the procedure as to "summary convictions and appeals" made applicable to prosecutions under municipal by-laws or a special Act. *Zents v. Johnston*, (1910) 3 Sask. L.R. 364; *R. v. Simpson*, 2 Can. Cr. Cas. 272, 28 Ont. R. 231. The Ontario Statute, 1 Edw. VII, ch. 18, was passed to obviate the difficulty raised in the latter case. *R. v. Harvey*, 1 O.W.N. T002.

*The subject matter of a stated case*—An appeal by way of stated case may properly be taken when the summary conviction is bad on its face. *R. v. Turnbull*, 15 Can. Cr. Cas. 1, 2 Sask. L.R. 186. But it will be for the court to determine whether the defect is curable by any of the various provisions of the Code which forbid the setting aside of convictions for certain informalities or defects.

The justice should state his findings of fact without making the whole evidence a part of the case or transmitting the same to the appellate court. *R. v. Dominion Bowling and Athletic Club* (1909) 15

Can. Cr. Cas. 105, 19 O.L.B. 107, per Riddell, J.; *Jones v. Cotterall*, 46 Sol. J. 396.

The court will rely on the justices and take the case as stated unless there is a patent defect upon the face of it, notwithstanding one of the parties disputes by affidavit the facts as stated, and declares they raise a different question. *Musther v. Musther*, 58 J.P. 53.

*Serving notice of appeal and copy of stated case*—Service should be made on the opposite party himself where that is practicable unless there is a rule of court authorizing service on his solicitor. But under exceptional circumstances, as where the respondent could not be found, service on the solicitor who appeared for him before the justices has been allowed. *Hill v. Wright*, 60 J.P. 312; *Gloucester v. Chauder*, 32 L.J. 66; *Anderson v. Reid*, 66 J.P. 564; *Teddington v. Vile*, 70 J.P. 381. While it has been said that notice of appeal is necessary to found jurisdiction; *Foss v. Best*, [1906] 2 K.B. 105; *Rust v. St. Botolph*, 94 L.T. 575; *Edwards v. Roberts*, [1891] 1 Q.B. 302; that proposition is no longer an absolute one, but is qualified so as to give jurisdiction to hear an appeal where all reasonable efforts to effect service have been unavailing and the respondents were at sea or abroad and without any known place of residence. *Wills v. McSherry*, [1913] 1 K.B. 20, 82 L.J.K.B. 71, 23 Cox C.C. 254. The appeal was finally dismissed as it was brought in respect of a claim for seamen's wages, the decision on which in the court below was made final by the Merchant Shipping Act and consequently the justices had no power to state a special case. *Wills v. McSherry*, [1914] 1 K.B. 616, 83 L.J.K.B. 596; *Westminster v. Gordon Hotels*, [1908] A.C. 142.

In *Teddington Urban Council v. Vile*, 70 J.P. 381, a preliminary objection that no copy of the special case with the notice of appeal had been served under the Summary Jurisdiction Act, 1857, Imp., and the Summary Jurisdiction Act, 1879, Imp., was overruled where notice had been mailed and everything possible had been done but without success to locate and personally serve the respondent, and the court was satisfied that the respondent knew of the appeal. And see *Syred v. Carruthers* (1858) E. B. & E. 469. And service is sufficient where given to and accepted by the respondent's solicitors duly authorized to accept service on the respondent's behalf. *Goodman v. Crofton*, [1914] 3 K.B. 803, 83 L.J.K.B. 1524; *Pennell v. Uxbridge*, 31 L.J.M.C. 92.

In order to displace the Code requirement of serving a written notice of appeal and a copy of the case stated by justices under Code sec. 761, some express provision dealing with that requirement must appear in the court rules; *Re Wood v. Hudson's Bay Co.* [1918] 1 W.W.R. 731, (Alta.); it is not enough that there are court rules dealing with cases stated by justices. It is not to be assumed that court rules were intended to cover the whole practice which make no mention of the service of notice of appeal and of the case stated and which otherwise

would not give the respondent any notice of the appeal until he was served with a notice or appointment of the time and place of hearing. *Re Wood & Hudson's Bay Co.*, *supra*.

The service of a notice of appeal and a copy of the case where sec. 761 is not superseded by any court rule, forms a condition precedent to the right of the applicant to file the case and a good ground of preliminary objection to the hearing of an appeal by stated case. *Re Wood & Hudson's Bay Co.* [1918] 1 W.W.R. 731 (Alta.).

*Conditions precedent in general to the appeal*—The conditions prescribed are conditions precedent to enable the court to hear the appeal only so far as relates to acts to be done by the appellant and are only directory as to the acts of the justices. *Lockhart v. Mayor and Corporation of St. Albans*, 21 Q.B.D. 188; *Hughes v. Wavertree L.B.*, 10 T.L.R. 357, 58 J.P. 654.

The service of the notice of appeal and a copy of the case is a condition precedent to the right of the applicant to file the case. *Re Wood & Hudson's Bay Co.* [1918] 1 W.W.R. 731 (Alta.).

A provision by rule fixing a time limit within which the case must be lodged is so far directory, and not a condition precedent, that where the party has done all in his power to comply with the statutory requirement, and compliance has been impossible from the closing of the offices of the court, the appeal will be heard. *B. v. Turnbull*, 2 Sask. L.R. 186, 15 Can. Cr. Cas. 1; *Mayer v. Harding*, L.R. 2 Q.B. 410, 16 L.T. 429, qualifying *Morgan v. Edwards*, 29 L.J. 108, 5 H. & N. 415, 6 Jur. (N.S.) 378; *Woodhouse v. Wood*, 29 L.J.M.C. 149; *Pennell v. Uxbridge*, 31 L.J.M.C. 92; *Wills v. McSherry*, [1913] 1 K.B. 20, 82 L.J.K.B. 71; *Teddington v. Ville*, 70 J.P. 381. But otherwise the transmission of the case within the time limit is a condition precedent. *Cookesley v. Nakashiba*, 8 B.C.R. 117, 5 Can. Cr. Cas. 111.

"It has been held also that a defect in the application, as where it was not made in writing as required, or although in writing, did not ask the justice to set forth the "facts of the case and the grounds on which the proceeding is questioned," goes to the jurisdiction to hear the stated case. *R. v. Gaines*, 43 N.S.R. 253; *R. v. Earley*, 10 Can. Cr. Cas. 336 (Terr.).

*Signing the stated case*—If the case was tried by two justices sitting together both should sign the stated case. *Barker v. Hodgson*, (1904) 68 J.P. 310; *Westmore v. Pain* [1891] 1 Q.B. 482, 60 L.J.M.C. 89, 17 Cox C.C. 244.

*Amendment of stated case*—See sec. 766.

*No further appeal from decision on stated case*—There is no further appeal from the decision on the stated case, Code secs. 1013, *et seq.*, not applying to give an appeal. *Waller v. The King* (1915) 24 Que. K.R. 127, 24 Can. Cr. Cas. 393.



**Recognizance by applicant for a case.—Fees.—Discharge of applicant from custody.**

**762.** The appellant at the time of making such application, and before a case is stated and delivered to him by the justice, shall, in every instance, enter into a recognizance before such justice or some other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the court and pay such costs as are awarded by the same; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the justice such fees as he is entitled to.

2. The appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice, or such other justice as is then sitting, within ten days after the judgment of the court has been given, to abide such judgment, unless the judgment appealed against is reversed.

*Origin*].—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28.

*Recognizance on stated case by a justice*].—The recognizance of the appellant alone may be accepted as security from an applicant for a stated case under sec. 762. *R. v. Turnbull*, 15 Can. Cr. Cas. 1, 2 Sask. L.R. 186.

*Crown Rules*].—See sec. 761.

*Estreat of recognizance*].—See secs. 1097-1101.

**Proceedings when justice dies or quits office.—Recognizance on stated case.**

**762A.** Where, pending an application for the statement of a case, the justice dies or quits office the applicant may, on notice to the other party or parties, apply to the court to state a case itself, and if a case is thereupon stated it may be dealt with as if it had been duly stated by the said justice.

2. Before any such case is stated by the court the applicant shall enter into recognizances as provided by sec. 762.

*Origin*].—Code Amendment of 1909, 8-9 Edw. VII, Can., ch. 9, sec. 2.

**Refusal to state a case.—Exception.**

**763.** If the justice is of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a

case, and shall on the request of the applicant sign and deliver to him a certificate of such refusal: Provided that the justice shall not refuse to state a case where the application for that purpose is made to him by or under the direction of the Attorney General of Canada, or of any province.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28.

*Refusal if application frivolous*—A case is to be stated on application unless the latter is merely frivolous. It is to be granted on a point going to the justice's jurisdiction although not previously raised before him. *Ex parte Markham*, 21 L.T.R. 748; 34 J.P. 150.

*Crown Rules*—See sec. 761.

**Application to compel case.—Rule therefor.—Case to be stated.**

**764.** Where the justice refuses to state a case, it shall be lawful for the applicant to apply to the court, upon an affidavit of the facts, for a rule calling upon the justice, and also upon the respondent, to show cause why such case should not be stated; and such court may make such rule absolute, or discharge the application, with or without payment of costs, as to the court seems meet.

2. The justice upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28.

*To "the court"*—See secs. 705 (b).

**Hearing of case stated.—Order final.—No costs against justice.**

**765.** The court to which a case is transmitted shall hear and determine the question or questions of law arising thereon and shall thereupon affirm, reverse or modify the conviction, order, or determination, in respect of which the case has been stated, or remit the matter to the justice with the opinion of the court thereon, and may make such other order in relation to the matter, and such orders as to costs, as to the court seems fit; and all such orders shall be final and conclusive upon all parties.

2. No justice who states and delivers a case shall be liable

to any costs in respect or by reason of such appeal against his determination.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28.

*Conditions precedent*—Code sec. 761.

*Question of law on the sufficiency of the evidence*—On a case stated by a magistrate as to the sufficiency of the evidence to warrant the conviction, the appellate court will not deal with the question of the weight of evidence further than to satisfy itself that the case could not have been withdrawn from the jury if a jury trial had been possible. *Zeate v. Johnston*, (1910) 3 Sask. R. 364.

If no evidence by the defence, the conviction may be sustained on the relevant testimony although irrelevant testimony was improperly admitted. *B. v. Nugent*, (1904) 9 Can. Cr. Cas. 1.

*Question as to illegal excess of penalty*—If the penalty is held to be above the legal limit it may be reduced on the hearing of a stated case under the powers conferred by sec. 765. See *B. v. Power*, (1908) 14 Can. Cr. Cas. 264 (N.S.).

*Question of law not raised below*—Unless a question of law raised for the first time on the hearing of the appeal is one which no evidence could alter, it will not be entertained. *Kates v. Jeffery* [1914] 3 K.B. 160, 83 L.J.K.B. 1760, explaining *Giebler v. Manning*, [1906] 1 K.B. 709, 75 L.J.K.B. 463; *Knight v. Halliwell*, (1874) L.R. 9 Q.B. 412; *Simpson v. Lock*, 7 Can. Cr. Cas. 294.

*"Shall be final and conclusive"*—Any right of appeal under sec. 749 is to be taken as abandoned. Code sec. 769.

*Order as to costs*—The respondent may be ordered to pay costs of an appeal rendered necessary by the objection he had raised before the justice although he does not appear on the hearing of the stated case. *Robinson v. Gregory*, [1905] 1 K.B. 534.

*"The court"*—See secs. 705 (b) and 766 (b).

*No certiorari required to give court jurisdiction to hear appeal*—Code sec. 768.

*Justice protected on enforcing conviction after affirmance or amendment*—Code sec. 1151.

**Remitting case for amendment.—Practice as to hearing in Chambers.**

**766.** The court for the opinion of which a case is stated shall have power, if it thinks fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.

2. The authority and jurisdiction of the court for the opinion

of which a case is stated may, subject to any rules and orders of court in relation thereto, be exercised by a judge of such court sitting in chambers, and as well in vacation as in term time.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28.

*Judge of such court sitting in Chambers*—See sec. 705 (b).

*Crown Rules*—See secs. 576, 761.

**Enforcement of conviction by justice.—By process of court.**

**767.** After the decision of the court in relation to any case stated for their opinion, the justice in relation to whose determination the case has been stated, or any other justice exercising the same jurisdiction, shall have the same authority to enforce any conviction, order or determination which has been affirmed, amended or made by such court as the justice who originally decided the case would have had to enforce his determination if a case had not been stated.

2. If the court deems it necessary or expedient any order of the court may be enforced by its own process.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28.

*"The court"*—See secs. 705 (b) and 766 (2).

*Estreat of recognisance*—See secs. 1097-1101.

**No certiorari required on case stated.**

**768.** No writ of *certiorari* or other writ shall be required for the removal of any conviction, order or other determination in relation to which a case is stated as aforesaid for obtaining the judgment or determination of a superior court on such case.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 8.

**Statement of case precludes appeal.—No case to be stated when no appeal permitted.**

**769.** Every person for whom a case is stated as aforesaid in respect of any determination of a justice from which he is entitled to an appeal under sec. 749, shall be taken to have abandoned his said right of appeal finally and conclusively and to all intents and purposes.

2. Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall

be taken to have a case stated or signed as aforesaid in any case to which such provision as to appeal in such special Act applies.

*Origin*—Sec. 900, Code of 1892.

"For whom a case is stated"—It is not open to the party who has given a recognizance and obtained the justice to sign a stated case to so abandon it as to qualify him for thereafter appealing on both facts and law to the tribunal constituted under sec. 749.

But *certiorari* may still be available if the stated case was dismissed for some irregularity and not upon the merits. *R. v. Gairnor* [1919] 1 W.W.R. 801 (Alta.).

#### *Fees.*

#### **Fees under Part XV.**

**770.** The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part:—

#### *Fees to be taken by Justices of the Peace or other Clerks.*

1. Information or complaint and warrant or summons. \$0 50
2. Warrant where summons issued in first instance.. 0 10
3. Each necessary copy of summons or warrant..... 0 10
4. Each summons or warrant to or for a witness or witnesses. (Only one summons on each side to be charged for in each case, which may contain any number of names. If the justice of the case requires it, additional summonses shall be issued without charge) ..... 0 10
5. Information for warrant for witness and warrant.. 0 50
6. Each necessary copy of summons or warrant for witness ..... 0 10
7. For every recognizance..... 0 25
8. For hearing and determining case..... 0 50
9. If case lasts over two hours..... 1 00
10. Where one justice alone cannot lawfully hear and determine the case the same fee for hearing and determining to be allowed to the associate justice.
11. For each warrant of distress or commitment..... 0 25
12. For making up record of conviction or order where the same is ordered to be returned to sessions or on *certiorari* ..... 1 00

## SUMMARY CONVICTIONS

[§ 770]

But in all cases which admit of a summary proceeding before a single justice and wherein no higher penalty than twenty dollars can be imposed, there shall be charged for the record of conviction not more than..... 0 50

13. For copy of any other paper connected with any case, and the minutes of the same if demanded, per folio of one hundred words..... 0 05

14. For every bill of costs when demanded to be made out in detail..... 0 10  
(Items 13 and 14 to be chargeable only when there has been an adjudication.)

### *Constables' Fees.*

1. Arrest of each individual upon a warrant, or arresting without a warrant an individual who is subsequently convicted or committed for trial..... \$1 50

2. Serving summons or subpoena..... 0 50

3. Mileage to serve summons, subpoena or to make an arrest, one way, per mile, thirteen cents (if no public conveyance is available reasonable livery charges to be allowed).

4. Mileage when service cannot be effected, upon proof of due diligence, one way..... 0 13

5. Returning with prisoner after arrest to bring same before a magistrate or justice for preliminary hearing or trial where the magistrate or justice is not at place where warrant was handed constable, and where the journey is of necessity over a different route than that travelled to make the arrest, per mile, one way..... 0 13

6. Taking prisoner to gaol on remand or committal, one way, per mile..... 0 13  
(Not payable if this is return journey from taking prisoner before the justice, double mileage not being chargeable).

7. Attending magistrate or justices on summary trials, or on examination of prisoners charged with crime, for each day necessarily employed, only one day's fees on any number of cases..... 2 00
8. Serving distress warrant, and returning same..... 1 50
9. Advertising under distress warrant..... 1 50
10. Travelling to make distress, or to search for goods to make distress, when no goods are found, one way, per mile..... 0 13
11. Appraisements, whether by one appraiser or more—two cents in the dollar on the value of the goods.
12. Catalogue sale and commission, and delivery of goods—five cents in the dollar on the net produce of the goods.

*Witnesses' Fees.*

1. Each day attending trial..... \$0 75
2. Mileage travelled to attend trial (one way) per mile. 0 10

*Interpreters' Fees.*

1. Each day attending trial..... \$2 00
2. Mileage travelled to attend trial (one way) per mile. 0 10

*Origin*—1917 Can., ch. 14, sec. 5; 8-9 Edw. VII., Can., ch. 9, sec. 2; 57-58 Vict., ch. 57, sec. 1; Code of 1892, sec. 871; 52 Vict., Can., ch. 45, sec. 2.

*Effect of awarding unauthorized or excessive costs*—Where a warrant of commitment includes unauthorized costs to be paid as a condition of release, the court will not discharge the prisoner on that ground alone, but will remand him for a sufficient time to have the erroneous judgment corrected. *R. v. Smith*, 16 Can. Cr. Cas. 425 (N.S.); nor will a conviction be quashed on the ground of excessive costs. *Ex parte Rayworth*, 24 N.B.R. 74, 2 Can. Cr. Cas. 230. The magistrate is liable in a civil action to refund that part of the costs imposed by him which is unauthorized. *Ex parte Howard*, 32 N.B.R. 237.

Where unauthorized costs are included in a "summary conviction," the court on *certiorari* has power, under Code sec. 112d, to amend the conviction by reducing the costs to the proper items. *R. v. Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.R. 295; *R. v. Harris*, 13 Can. Cr. Cas. 398; *R. v. Turnbull*, 15 Can. Cr. Cas. 5; *R. v. Mah Sam*, 19 Can. Cr. Cas. 5. But it would seem that an order for costs against the informant is not

a conviction or order within the scope of sec. 1124; *R. v. Laird*, 1 Terr. L.B. 179. Sec. 1124 relates to convictions or orders which evidence the commission of an "offence" and impose a "punishment" therefor.

The amount of the costs and charges of conveying the accused to gaol in default of payment of the fine (Code sec. 739), need not be fixed in the summary conviction; *R. v. Code*, 13 Can. Cr. Cas. 372, 1 Sask. L.B. 295.

Item 6 of the constable's fees was amended in 1917 so as to omit all reference to "disbursements" as an addition to the mileage. See, under the former item 6, the case of *Re Hoskins*, 21 Can. Cr. Cas. 435, 13 E.L.R. 143.

*Application of tariffs*—The tariffs of costs here are primarily for proceedings under Part XV; but the amendment made to the Constable's tariff in 1917 makes it include certain costs and charges, applicable only to preliminary enquiries and summary trials under Part XVI. Costs ordered to be paid by the defendant on a summary conviction are to be reasonable and "not inconsistent with the fees established by law to be taken on proceedings had by and before justices." Code sec. 735. Tariffs, for similar services in regard to provincial offences and for services payable out of public funds of the province in the administration of the criminal law may be found in the statutes of the provinces.

*Ontario provincial laws*—By the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 4, the tariff provided in Part XV of the Crim. Code is made applicable to summary convictions under Ontario laws and fees of constables in such matters are governed by the Code tariff and not by the tariff in schedule A to the Administration of Justice Expenses Act, R.S.O. 1914, ch. 96.

*Quebec provincial laws*—In *Zimmerman v. Burwash*, 29 Que. S.C. 250, a conviction under a provincial game law was held invalid because the costs were in excess of the authorized tariff. The proceeding was, however, by action to declare void the summary conviction, a procedure permitted in Quebec under article 50 C.P. Que., notwithstanding that an appeal against the conviction might have been taken to another tribunal. See also *Ex parte Meadaquis*, 16 Que. P.R. 26 (in which a commitment was held indivisible as to excess costs), and *Ex parte Martin*, 22 L.C.J. 88.





## PART XVI.

### SUMMARY TRIAL OF INDICTABLE OFFENCES.

#### *Interpretation.*

#### **Definitions.**

**771.** In this Part, unless the context otherwise requires,—

(a) 'magistrate' means and includes,

(i) in the provinces of Ontario, Quebec, and Manitoba, any recorder, judge of a county court if a justice of the peace, commissioner of police, judge of the sessions of the peace, and police magistrate, district magistrate, or other functionary or tribunal, invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices, and acting within the local limits of his or of its jurisdiction,

(ii) in the provinces of Nova Scotia and New Brunswick, any recorder, judge of a county court, stipendiary magistrate or police magistrate, acting within the local limits of his jurisdiction, and any commissioner of police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices of the peace,

(iii) in the provinces of British Columbia and Prince Edward Island, any two justices sitting together, and any functionary or tribunal having the powers of two justices,

- (iv) in the provinces of Saskatchewan and Alberta, a judge of any district court, or any two justices, or any police magistrate, or other functionary or tribunal having the powers of two justices and acting within the local limits of his or its jurisdiction;
- (v) in the Northwest Territories, any stipendiary magistrate, any two justices sitting together and any functionary or tribunal having the powers of two justices,
- (vi) in the Yukon Territory, any judge of the Territorial Court, any two justices sitting together and any functionary or tribunal having the powers of two justices,
- (vii) in all the provinces, where the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of sec. 773, any two justices sitting together;
- (b) 'the common gaol or other place of confinement,' in the case of any offender whose age at the time of his conviction does not, in the opinion of the magistrate, exceed sixteen years, includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which by the law of that province the offender may be sent; and,
- (c) 'property' includes everything within the meaning of 'valuable security,' as defined by this Act.

2. In any case where the value of any valuable security is necessary to be determined it shall be reckoned in the manner prescribed by sec. 4.

*Origin*—6-7 Edw. VII, Can., ch. 45, sec. 6; 58-59 Vict., Can., ch. 40, sec. 1; Code of 1892, sec. 782; R.S.C. 1886, ch. 176, sec. 2; 32-33 Vict., Can. (1869), ch. 32.

*Summary trial*—The procedure under Part XVI is commonly given the technical designation of "summary trial" (*procès sommaire*) while that under Part XV is a summary proceeding, or more accurately, a summary conviction proceeding.

*Within the local limits of his jurisdiction*—Even where not expressed it is to be implied that courts of summary jurisdiction are to act only in the locality for which they are constituted. *Re Peerless*, 1 Q.B. 143; *Johnson v. Colam*, L.R. 10 Q.B. 544, 44 L.J.M.C. 185.

The jurisdiction of the first magistrate having possession of the case may be made exclusive by the provincial law governing the appointment of magistrates. *R. v. Bloom* (1913) 5 W.W.R. 897, 7 Alta. L.R. 1; Alta. 1907, ch. 5, sec. 7.

*Police magistrates in Ontario*—Police magistrates in Ontario are appointed by the Lieutenant-Governor in Council, and hold office during pleasure. Every city must have one, and so must towns having a population of 5,000 or over. Special provision is made for the city of Toronto, which may have three police magistrates. R.S.O. 1914, ch. 88. A second police magistrate may be appointed for any other city, on a resolution passed on a two-thirds' vote of its municipal council, and the duties of the office may be divided by order-in-council. R.S.O. 1914, ch. 88, sec. 5. The salary is payable by the municipality and is subject to a statutory minimum. The Lieutenant-Governor in Council may appoint a police magistrate without salary for any incorporated town which has no salaried magistrate. In cities of not less than 40,000, a deputy police magistrate may be appointed by the like authority authorized to perform the duties of the office in case of the death, illness, or absence of the police magistrate. R.S.O. 1914, ch. 88, sec. 9. The Lieutenant-Governor in Council may also appoint a police magistrate for a county or district, but his jurisdiction shall not extend to any city, town or village for which there is a police magistrate, "nor to any case in which the initiatory proceedings were taken by or before such last mentioned police magistrate." R.S.O. 1914, ch. 88, sec. 15. Every police magistrate is *ex officio* a justice of the peace for the whole county or district in which the city or town for which he is police magistrate is situate. Ibid., sec. 24. Where one justice of the peace has jurisdiction, as in summary conviction matters, where the enabling statute does not require two justices or a police magistrate with the powers of two justices, and the case is pending before a police magistrate, a single justice of the peace may act in his place in case of his absence or illness, or at his request; and in other cases two or more justices may in such event act in the place of the police magistrate. R.S.O. 1914, ch. 88, secs. 26 and 27. And in case of the illness or "absence from the county or district" of a police magistrate, any other police magistrate whether appointed for the county or district or for a city, town, village or other place therein, shall have all the powers and may perform all the duties of the police magistrate during such illness or absence from the county. R.S.O. 1914, ch. 88, sec. 34.

*North-West Territories*—Separate provisions for summary trial of

certain offences, including theft up to \$200, are contained in the N.W.T. Act, R.S.C., ch. 62, sec. 38.

*Yukon Territory*].—For additional powers of summary trial in the Yukon, see the Yukon Act, R.S.C. 1906, ch. 63 and amendments; the Yukon Act controls in that territory under Code sec. 9. Every judge of the Territorial Court of the Yukon and every commissioned officer of the R.N.W. Mounted Police has by sec. 105 of the Yukon Act, R.S.C. 1906, ch. 63, all the powers of two justices of the peace. Sections 89-94 of the Yukon Act makes special provision in reference to the jurisdiction of police magistrates at Dawson, at Whitehorse, in the Yukon.

*Dominion Elections Act*].—Provisions of Part XVI apply to all proceedings under the Dominion Elections Act, R.S.C., ch. 6, under secs. 294-300 of that Act in charges of personation.

#### *Application of Part.*

**Part XVII not affected.**

**772.** Nothing in this Part shall affect the provisions of Part XVII, and this Part shall not extend to persons punishable under that Part so far as regards offences for which such persons may be punished thereunder.

*Origin*].—Sec. 808, Code of 1892; R.S.C. 1886, ch. 176, sec. 35.

*When accused is a juvenile of sixteen or under*].—Code sec. 805 and other provisions of Part XVII apply where the juvenile is charged before a justice with having committed or having attempted to commit any offence which is theft or punishable as theft (sec. 802). Part XVII does not apply in British Columbia or Prince Edward Island if the theft is of a class which is punishable by imprisonment for two years or upwards. Code sec. 801. See also the Juvenile Delinquents Act, 1908, Can., ch. 40 (and amendments) in districts in which the latter Act has been proclaimed to be in force.

#### *Jurisdiction.*

**Summary trial.—Theft not exceeding ten dollars.—Attempt.—Aggravated assault.—Indecent assault.—Assault on peace officer.—Inmate of house of ill-fame.—Keeping disorderly house.—Betting offences.**

**773.** Whenever any person is charged before a magistrate,—

- (a) with theft, or obtaining money or property by false pretences, or unlawfully receiving stolen property, where the value of the property does not, in the judgment of the magistrate, exceed ten dollars; or,

- (b) with attempt to commit theft; or,
- (c) with unlawfully wounding or inflicting grievous bodily harm upon any other person, either with or without a weapon or instrument; or,
- (d) with indecent assault upon a male person whose age does not, in the opinion of the magistrate, exceed fourteen years, when such assault is of a nature which cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other Part; or with indecent assault upon a female, not amounting, in the magistrate's opinion, to an assault with intent to commit a rape; or,
- (e) with assaulting or obstructing any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or,
- (f) with keeping a disorderly house under sec. 228 or with being an inmate of a common bawdy-house under sec. 229A; or,
- (g) with any offence under sec. 235;

the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way.

*Origin*—5 Geo. V, Can., ch. 12, sec. 8; 8-9 Edw. VII, Can., ch. 9; B.S.C. 1906, ch. 146, sec. 773; sec. 783, Code of 1892; B.S.C. 1886, ch. 176, sec. 3.

*Jurisdiction generally*—The maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction to an inferior court; on the contrary, nothing is to be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged. *Falkingham v. Victorian Railway Company* [1900] A.C. 452; *R. v. Taylor*, 5 W.W.R. 1105, 22 Can. Cr. Cas. 234, 26 W.L.R. 652.

Where a magistrate has jurisdiction over the particular offence either as one for which a summary conviction may be made or as one for which he has power of summary trial as for an indictable offence without the consent of the accused, it is essential to the exercise of the latter jurisdiction that the magistrate should expressly declare on commencing the trial that he will proceed under the "summary trials" clauses of the Code. *R. v. Belmont*, 23 Can. Cr. Cas. 89; *R. v. Romer*, 23 Can. Cr. Cas. 235.

The jurisdiction under Part XVI being purely statutory, it is open to collateral attack by evidence *dehors* the proceedings, whether or not

the record of proceedings purports to show jurisdiction. *R. v. Taylor*, 5 W.W.R. 1105, 22 Can. Cr. Cas. 234, 26 W.L.R. 652.

"*Subject to the subsequent provisions of this Part*" ]—Sec. 778 makes it a condition precedent to trial that the accused shall have elected summary trial under the formalities of sec. 778 in all cases in which there is no provision making the jurisdiction absolute without the consent of the accused. *R. v. Crossen*, 12 Man. R. 571; *R. v. Helliwell*, (1914) 30 O.L.R. 504, 23 Can. Cr. Cas. 146. The conditions as to offences and locality which make the jurisdiction absolute are contained in secs. 774-776 inclusive, and in sec. 777, sub-sec. (5). And see *R. v. Merton* (1914) 7 W.W.R. 95, 23 Can. Cr. Cas. 172.

*Assault occasioning bodily harm* ]—It is doubted whether this offence is within sec. 773. See notes to secs. 274, 295; *R. v. Law* (1916), 9 W.W.R. 1075, 25 Can. Cr. Cas. 251 (Alta.); *R. v. Sharpe*, 20 Man. R. 555; and see note to sec. 951.

*Summary trials for theft* ]—See notes to secs. 386, 777, 782, 783.

*Summary trials for receiving stolen property* ]—See notes to sec. 399. 777.

*Summary trials for unlawful wounding* ]—See note to sec. 274.

*Summary trials for inflicting grievous bodily harm* ]—See note to sec. 274.

*Summary trials for indecent assault on male* ]—See note to sec. 293.

*Summary trials for indecent assault on female* ]—See note to sec. 292.

*Summary trials for assaulting officer in execution of his duty* ]—See note to sec. 296.

*Summary trials for obstructing officer in execution of his duty* ]—See note to sec. 169.

*Summary trials for keeping disorderly house* ]—See note to sec. 228.

*Summary trials for being inmate of bawdy-house* ]—See note to sec. 229A.

*Summary trials for betting and "bookmaking" offences* ]—See note to sec. 235.

*Jurisdiction of two justices in any province for offences under paragraphs (a) and (f)* ]—See paragraph (VII) of sec. 771 and sec. 797, as to appeals. Sec. 771, paragraph (VII) is not intended to exclude the jurisdiction of officials qualified under any of the other paragraphs to try offences under 773 (a) and 773 (f).

*Theft by person not over sixteen* ]—See secs. 802-821, under which a special jurisdiction is conferred on two justices and certain other functionaries. Neither sec. 773 nor 777 apply to juveniles punishable under secs. 802-821. Sec. 772. And, as to localities in which the Juvenile Delinquents Act is in force, see that Act, 7-8 Edw. VII, Can., ch. 40; 2 Geo. V, ch. 30; 4-5 Geo. V, ch. 39.

*Extended jurisdiction of certain police magistrates* ]—Code sec. 777.

*Restitution of property* ]—See Code secs. 795 and 1050.

*Compensation of bona fide purchasers of stolen property* ]—Code sec. 1049.

*When magistrate may send case for trial in higher court*—Special circumstances may weigh with the magistrate in declining jurisdiction to summarily try the accused and proceeding with a preliminary enquiry and committal for trial by indictment, in which case the accused may elect "speedy trial" under Part XVIII of the Code before the tribunal specified in Code sec. 823; but the magistrate must decide before the defendant has "made his defence" (Code sec. 784), which probably means before the evidence for the defence is entered upon. *Ex parte Cook*, 3 Can. Cr. Cas. 72, B.C.R. 18; Code sec. 832.

An information for theft of property of less value than \$10 may be laid and preliminary enquiry held before a justice of the peace in New Brunswick in his capacity as such, although he was also a county stipendiary magistrate with power of summary trial under Part XVI (Code sec. 773), without any obligation to give the accused an opportunity to elect for a summary trial before such county stipendiary magistrate. *R. v. Howe*, 24 Can. Cr. Cas. 215, 42 N.B.R. 378.

*As to appeal*—No appeal lies from the decision of a judge of the sessions, police magistrate, district magistrate or other single functionary mentioned in sec. 771, holding a "summary trial" under this section. *R. v. Racine*, 3 Can. Cr. Cas. 446, 9 Que. Q.B. 134; *R. v. Nixon*, 5 Can. Cr. Cas. 33 (Ont.). But where two justices of the peace exercise jurisdiction under this Part a special right of appeal in like manner as under Part XV is conferred by sub-sec. 797 as to offences under paragraphs (a) and (f) of sec. 773.

The same offences as are triable under paragraph (a) may be tried before the police magistrate of a city having a population of over 25,000, under sec. 777, sub-sec. (5) without the consent of the accused and in that event a reserved case may be obtained under sec. 1013 *et seq.* But if the same class of offence is tried by a police magistrate of a city with a lesser population or by a police magistrate for a county or district, under sec. 773, there can be no reserved case, for sec. 1013 provides an appeal of that class from police magistrates in cases only in which their jurisdiction is under sec. 777, and there is no appeal under sec. 797. *R. v. Berenstein* (1917) 24 B.C.R. 361; *R. v. Robertson*, (1915) 22 B.C.R. 13, 26 Can. Cr. Cas. 239; *R. v. Dubuc*, (1914) 22 Can. Cr. Cas. 426; *R. v. Brown*, (1916) 10 W.W.R. 695, 9 Alta. L.R. 494, 26 Can. Cr. Cas. 97, 34 W.L.R. 575.

Although the police magistrate tries the case without defendant's election in a district where his jurisdiction is absolute without the consent of the party charged, there is no appeal either under sec. 797 or 1013. *R. v. Berenstein*, (1917) 27 B.C.R. 361.

A stipendiary magistrate summarily trying a charge of theft of goods of the value of less than \$10 under Code sec. 773, and not under sec. 777, is not a "court or judge having jurisdiction in criminal cases" within Code sec. 1013 allowing an appeal by way of case reserved. *R. v. Hawes*, 4 Can. Cr. Cas. 529, 33 N.S.R. 389.



On a question of jurisdiction a proceeding under Part XVI under which the accused is imprisoned may be attacked on habeas corpus. *R. v. St. Clair*, (1900) 27 A.R. 308 (Ont.), 3 Can. Cr. Cas. 551; *R. v. Morgan*, 25 Can. Cr. Cas. 192, 20 E.L. 277 (Que.); *R. v. Miller*, 25 W.L.R. 296, 25 Can. Cr. Cas. 151 (Alta.); *R. v. Wallace*, 32 W.L.R. 264, 24 Can. Cr. Cas. 370 (Alta.); *R. v. Davis* (1912), 3 W.W.R. 1, 5 Alta. L.R. 443, 22 W.L.R. 837; *Re Baptiste Paul* (No. 2) (1912), 2 W.W.R. 927, 20 Can. Cr. Cas. 161, 5 Alta. L.R. 442; *R. v. Young Kee*, [1917] 2 W.W.R. 442; *R. v. Pollard*, [1917] 3 W.W.R. 754, 29 Can. Cr. Cas. 35 (Alta.).

Sec. 791 declares that a conviction under Part XVI shall have the "same effect" as a conviction upon indictment for the same offence; but this does not make a conviction by a "magistrate" under Part XVI a conviction by a court of record. *R. v. St. Clair*, (1900) 27 A.R. 308, 3 Can. Cr. Cas. 551 (Ont.).

*Attempts*—Under sec. 773 attempts to commit theft are included without limitation as to the value of the property which the accused attempted to steal. Jurisdiction attaches under sec. 773, where the charge preferred is for one of the offences designated; there is no authority under it for a magistrate to entertain as a substantive charge any other attempt but an attempt to commit theft. But on a trial for the completed offence, which in practice is charged in the terms of a sworn information, the magistrate on finding against the completed offence may, if the evidence warrants it, find the accused guilty of an attempt to commit it. Code sec. 949; *R. v. Morgan* (No. 1), 2 O.L.R. 413, 5 Can. Cr. Cas. 272, 3 O.L.R. 356.

*Fine in lieu of or in addition to other punishment*—See sec. 1035.

*Constables' fees under Part XVI*—The amended constables' tariff under sec. 770 of Part XV as substituted by 7-8 Geo. V, Can., ch. 14, sec. 5, contains many items expressly applicable to proceedings under Part XVI.

*What defects not to invalidate*—No conviction, sentence or proceeding under Part XVI shall be quashed for want of form, sec. 1130. No warrant of commitment upon a conviction under the Part XVI is to be held void by reason of any defect therein "if it is therein alleged that the offender has been convicted and there is a good and valid conviction to sustain the same." Sec. 1130, and the curative provisions of sec. 1124 also apply to convictions or orders made under Part XVI. Code sec. 797 (2).

*Suspended sentence on summary trial*—Code sec. 1081.

#### **Proceedings when corporation is charged.**

**773A.** When the person to be so charged is a corporation, the summons may be served on the mayor or chief officer of such corporation, or upon the clerk or secretary or the like officer

thereof, and may be in the same form as if the defendant were a natural person.

2. The corporation in such case shall appear by attorney, who may on its behalf elect, and confess or deny the charge, and thereupon the case shall proceed as if the defendant were a natural person.

3. If the corporation does not appear and confess or deny the charge, the magistrate may proceed in the absence of the defendant, as upon a preliminary investigation.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2.

*Company defendant*—This procedure for the summary trial of a corporation for an indictable offence is similar to that provided upon a trial by jury under sec. 916 *et seq.* Compare sec. 720A in Part XV.

**Absolute jurisdiction in respect to disorderly houses.—Inmates of bawdy-houses.**

774. The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked if he consents to be so tried.

2. The provisions of this Part do not affect any absolute summary jurisdiction given to justices by any other Part of this Act.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; sec. 784, Code of 1892; R.S.C. 1886, ch. 176, secs. 4, 5.

*When jurisdiction "absolute"*—The word "absolute" is used in the sense of "unconditional," that is to say, not dependent upon the conditions precedent to the right to exercise the jurisdiction which are prescribed by the Act as ordinarily applicable, and the words referring to the consent of the accused were added *ex abundantī cautēd.* *R. v. Helliwell* (1914) 30 O.L.R. 504, 23 Can. Cr. Cas. 146.

*"Disorderly house" defined*—The term disorderly house includes any common bawdy-house (sec. 225), common gaming-house (sec. 226), common betting-house (sec. 227), or opium joint (sec. 227A). See Code sec. 228; *R. v. Jung Lee*, 22 Can. Cr. Cas. 63, 25 O.W.R. 63.

*Absolute jurisdiction in disorderly house cases*—See secs. 228, 229A, 773 (f).

*Habitual frequenter of bawdy-house*—This phrase formerly applied to the offence designated in sub-sec. (k) of sec. 238 (vagrancy), which

has been repealed. Concurrently with the repeal, sec. 229 was amended so as to make it a summary conviction offence to be found in any disorderly house without lawful excuse.

The fact that sec. 774, relating to procedure, still, evidently by an oversight, contains the words, "or habitual frequenter," while sub-clause (f) of sec. 238, substantively constituting the offence ("(f) Is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself,") has been repealed by sec. 7 of the Criminal Code Amendment Act 1915, cannot affect the application of sec. 774 to such substantive offences mentioned in it as still exist. *R. v. James*, (1915) 9 W.W.R. 235, 25 Can. Cr. Cas. 23, at 24, 9 Alta. L.R. 66.

*Jurisdiction as affected by illegality of arrest*—There are conflicting judicial opinions as to the right of a magistrate to try against his protest a man who, having been illegally arrested without a warrant, is brought before him for trial. The opinions negating the right to try are based upon the theory that the magistrate is without jurisdiction to try him in such case without his consent, which might be evidenced by his failure to take exception. *R. v. Pollard*, [1917] 3 W.W.R. 754, 29 Can. Cr. Cas. 35 (Alta.), decided under a liquor law; *R. v. Wallace*, 32 W.L.R. 264, per Stuart, J. (Alta.); *Re Baptiste Paul* (No. 2) 2 W.W.R. 927, 5 Alta. L.R. 442, 20 Can. Cr. Cas. 161 (Beck, J.); *R. v. Miller*, 25 Can. Cr. Cas. 151, 25 W.L.R. 296 (Beck, J.); *R. v. Young Kee*, [1917] 2 W.W.R. 442, 28 Can. Cr. Cas. 161 (Hyndman, J.); *R. v. Young Kee* (No. 2), [1917] 2 W.W.R. 654, 28 Can. Cr. Cas. 236 (Alta.); *R. v. Davis*, (1912) 3 W.W.R. 1, 22 W.L.R. 837, 5 Alta. L.R. 443, 20 Can. Cr. Cas. 293 (Walsh, J.).

The other view that the magistrate has jurisdiction notwithstanding the illegal arrest is based upon the theory that once the accused is actually before a magistrate having general jurisdiction over the subject matter, the jurisdiction over the particular charge and over the person accused has attached by reason of the presence of the latter before him, at least if no exception is taken. *Re Baptiste Paul* (No. 1), 2 W.W.R. 892, 5 Alta. L.R. 440, 20 Can. Cr. Cas. 159 (Simmons, J.); *R. v. Hurst* (1915) 7 W.W.R. 994, 23 Can. Cr. Cas. 389, 30 W.L.R. 176 (Simmons, J.); *R. v. Pudwell*, 26 Can. Cr. Cas. 47 (Alta.). As to justification of arrest by a peace officer under secs. 30, 33, 648-652, see *Altman v. Majury*, 37 O.L.R. 608, 11 O.W.N. 21, 27 Can. Cr. Cas. 398. It is said that if the accused is brought before the justice on a warrant which could legally have been issued only upon a sworn information, and there is no such information, the accused may protest against the justice's jurisdiction and if convicted notwithstanding his protest of the jurisdiction the conviction will be set aside. *R. v. Davis* (1912) 3 W.W.R. 1, 120 Can. Cr. Cas. 293 (Alta.), citing *R. v. McNutt*, 3 Can. Cr. Cas. 186.

A person whose conviction was removed by *certiorari* and set aside for want of jurisdiction on a pure technicality, *e. g.*, that the accused having been improperly arrested on a warrant under circumstances in which arrest without a warrant was not justified, was illegally brought before the court, may be again tried and convicted upon the same charge on being arrested under a proper warrant. *R. v. Young Kee* (No. 2), [1917] 2 W.W.R. 654 (Alta.). *R. v. Weiss & Williams*, 5 W.W.R. 48, 25 W.L.R. 351, 22 Can. Cr. Cas. 42 (Alta.).

*Jurisdiction in Ontario as to sentence of females to reformatory*—Whenever any female is convicted either under sec. 239 for vagrancy, or is convicted for an offence tried under Part XVI of the Code, she may be sentenced to the Reformatory for an indefinite term less than two years, and if any term exceeding six months is inflicted, no fine shall be imposed in addition. The Prisons Act, R.S.C. 1906, ch. 148, sec. 57, as amended, 3-4 Geo. V, 1913, ch. 39, sec. 3. The amended sec. 57, being in Part II of the Prisons Act, applies only to the province of Ontario. R.S.C. 1906, ch. 148, sec. 42.

*Where two justices act, both to sign commitment*—

Where the trial under Code sec. 773 takes place before two justices the warrant of commitment following a conviction made, should be signed by both justices, but if there be a valid conviction a commitment irregularly signed by only one justice is cured by Code sec. 1180. *R. v. James* (1915) 9 W.W.R. 235, 239, 9 Alta. L.R. 66, 32 W.L.R. 528.

*Sentence dates from conviction*—A woman was convicted before a police magistrate of being an inmate of a disorderly house, and was sentenced to three months' imprisonment. The warrant was held over for 48 hours to give her an opportunity, if she felt disposed to take advantage of it, to leave the city. No definite time was fixed as to how long she was to remain away. She left the city, and remained away for three months. Upon her return she was re-arrested upon a warrant based upon the above conviction, but was discharged on the ground that her re-arrest was illegal. *R. v. Fitzpatrick*, (1915) 9 W.W.R. 191 (Man.).

It was held that at the expiration of the three months the effect of the conviction was spent, and no power existed to re-arrest the applicant on a warrant based on the old conviction. *Ibid.*

**Absolute jurisdiction as to seafaring person.—No consent necessary.**

**775.** The jurisdiction of the magistrate is absolute in the case of any person who, being a seafaring person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of the police ordinance, or within the city of Montreal as so limited, or in any other seaport city or town in Canada

where there is such magistrate, with the commission therein of any of the offences in this Part previously mentioned, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence.

2. Such jurisdiction does not depend on the consent of any such person to be tried by the magistrate, nor shall such person be asked whether he consents to be so tried.

*Original*.—Sec. 784, Code of 1892; R.S.C. 1886, ch. 176, secs. 4, 5.

*Restitution of property*.—See Code sec. 795 and 1050.

**Jurisdiction absolute in certain provinces.—Exception.**

**776.** The jurisdiction of the magistrate in the provinces of British Columbia, Prince Edward Island, Saskatchewan and Alberta, and in the Northwest Territories and Yukon Territory, under this Part, is absolute without the consent of the party charged, except in cases coming within the provisions of sec. 777, and except in cases under secs. 782 and 783, where the person charged is not a person who under sec. 775, can be tried summarily without his consent.

*Original*.—63-64 Vict., Can., ch. 46, sec. 3; sec. 784, Code of 1892; R.S.C. 1886, ch. 176, secs. 4 and 5.

*Absolute jurisdiction in certain provinces*.—This absolute jurisdiction was originally limited to Prince Edward Island and Keewatin; Cr. Code, 1892, sec. 784 (2); but was extended in 1895: *Re Worrell*, 8 W.W.R. 230; affirmed, 8 W.W.R. 478. The exception referred to as contained in secs. 782 and 783, is the special power to summarily try only in case the plea is one of guilty for theft, false pretences or receiving if the property exceeds \$10 in value.

*Summary trial by judge under the N.W. Territories Act*.—Under the operation of the Alberta Act (1905, Can., ch. 3), the Supreme Court of Alberta which had been constituted a superior court of criminal jurisdiction, was to be governed by the procedure in criminal matters of the former Supreme Court of the N.W. Territories, until otherwise provided by competent authority. 1905, Can. Stat., ch. 3, sec. 16, sub-sec. 2. But the Governor-in-Council may, from time to time, declare all or any part of such procedure to be inapplicable to the Supreme Court of Alberta.

Similar provisions were contained in the Saskatchewan Act as regards the Supreme Court of Saskatchewan. The Saskatchewan Act, 1905, 4-5 Edw. VII, Can., ch. 42. The power of summary trial in

Alberta and Saskatchewan under the N.W.T. Act gave a judge of the Supreme Court the powers of a justice of the peace or of any two justices, and also power to try summarily without a jury charges of theft, embezzlement or obtaining money or property by false pretenses, or receiving stolen property in any case in which the value of the whole property alleged to have been stolen, embezzled, obtained or received, did not, in the opinion of the judge, exceed \$200. N.W.T. Act, R.S.C. 1886, ch. 50, sec. 66; 60-61 Vict., Can., ch. 28, sec. 14.

A Supreme Court judge might also try summarily without a jury a person charged with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person either with or without a weapon or instrument any grievous bodily harm or by unlawfully and maliciously wounding any other person. N.W.T. Act, R.S.C. 1886, ch. 50, sec. 66; 60-61 Vict., Can., ch. 28, sec. 14.

An assault upon any female when not amounting, in the opinion of the judge, to an assault with intent to commit rape might be tried by a Supreme Court judge summarily without a jury; N.W.T. Act, R.S.C. 1886, ch. 50, sec. 66; 60-61 Vict., Can., ch. 28, sec. 14; and likewise an assault upon any male not over fourteen years of age; escape from lawful custody; prison breach; assaulting or obstructing a peace officer in the lawful performance of his duty or with intent to prevent the performance thereof. N.W.T. Act, R.S.C. 1886, ch. 50, sec. 66; 60-61 Vict., Can., ch. 28, sec. 14.

**Summary trial in other cases before police magistrates of certain places.**

**777.** If any person is charged in the province of Ontario before a police magistrate or before a stipendiary magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a court of general sessions of the peace, or if any person is committed to a gaol in the county, district or provisional county, under the warrant of any justice, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the court of general sessions of the peace.

2. This section shall apply also to district magistrates and judges of the sessions in the province of Quebec, and to police and stipendiary magistrates of cities and incorporated towns having a population of not less than two thousand five hundred

according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada, and to the recorder of any such city or town if he exercises judicial functions, and to judges of the Territorial Court and police magistrates in the Yukon Territory.

3. Secs. 780 and 781 do not extend or apply to cases tried under this section.

4. Where an offence charged is punishable with imprisonment for a period not exceeding five years the Attorney General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by a magistrate under this section, and thereupon the magistrate shall have no jurisdiction to try or sentence such person under this section.

5. The jurisdiction of the magistrate under this section in cities having a population of not less than twenty-five thousand, according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada, is absolute, and does not depend upon the consent of the accused, in the case of any person charged with theft, or with obtaining property by false pretenses, or with unlawfully receiving stolen property, where the value of the property alleged to have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; 63-64 Vict., Can., ch. 46, sec. 3; Code of 1892, sec. 785.

*Judicial notice of census for purposes of jurisdiction*—Judicial notice will be taken of a Dominion census. *R. v. Rahamat Ali* (No. 2), 15 B.C.R. 175, 16 Can. Cr. Cas. 193. As to official notices in the *Canada Gazette*, see Canada Evidence Act, sec. 30.

*If any person is "charged before a police magistrate," etc.*—A person brought up on a preliminary inquiry before a magistrate qualified under sec. 777 stands "charged" before such magistrate upon the information or the charge sheet being read to him, as the case may be. See *ex parte Seeley*, 41 S.C.R. 5, 14 Can. Cr. Cas. 270. Sec. 777 must be read along with Code secs. 653-666 in this regard. *Ex parte Seeley*, *supra*.

The "charge" is contained in the information sworn to and lodged with the magistrate and upon which he issues his warrant, as well as in the depositions taken at the preliminary inquiry, if an inquiry is held;

but if the prisoner waives the inquiry and consents to be tried summarily, then the magistrate makes the charge for the purpose of that proceeding on the sworn complaint and information then before him and, when read to the prisoner for the purpose of enabling him to make his option, he is "charged" within the meaning of sec. 777 and the magistrate has jurisdiction to deal with him. *Re Seeley* (1908), 41 S.C.R. 5.

*General sessions of the peace*—Sub-sec. 2 applies although in the particular provinces there may be no court of general sessions of the peace if the offences be one which, if committed in Ontario, would be triable by an Ontario court of general sessions. *Re Vancini*, 34 S.C.R. 621, 8 Can. Cr. Cas. 164; *R. v. Spates*, (1914) 5 W.W.R. 1136, 22 Can. Cr. Cas. 69 (Alta.). Offences under pre-confederation statutes of other provinces although indictable there will not be within sec. 777 unless the like offence exists in Ontario and is within the jurisdiction of the sessions. *Ex parte Belyea*, 30 D.L.R. 24 (N.B.).

For the offences triable at general sessions, see Code secs. 582 and 583.

*When magistrate may send case for trial in higher court*—See sec. 784.

*Extended jurisdiction of police magistrates in certain cases*—Sec. 777 confers a jurisdiction on a certain limited class of persons occupying judicial positions in certain limited areas to try summarily all cases which may be tried at a court of general sessions of the peace and to impose the penalty which could be imposed by such court in Ontario. *R. v. Crawford* (1912) 2 W.W.R. 952, 955, 22 W.L.R. 107, 20 Can. Cr. Cas. 49 (Alta.); *R. v. Alexander* (1913) 5 W.W.R. 17, 6 Alta. L.R. 227; *R. v. McEwan*, 17 Man. R. 477.

Sec. 777 is not to be construed as conferring upon the magistrate the jurisdiction he already has under sec. 773. *Re Worrell*, (1915) 8 W.W.R. 478; affirming *re Worrell* (1915) 8 W.W.R. 230 (Sask.). It confers upon the magistrates therein mentioned such additional jurisdiction within the limits of the general sessions as was not conferred by sec. 773. *Re Worrell*, (1915) 8 W.W.R. 478, affirming 8 W.W.R. 230 (Sask.); *R. v. Hayward*, 5 O.L.R. 65, 6 Can. Cr. Cas. 399.

Consequently a person accused in B.C., Sask. or Alberta, or in the Territories, before a magistrate qualified both under secs. 773 and 777 in respect of an offence within sec. 773, for which otherwise he might elect, is not entitled to say that he should have been permitted to elect for or against summary trial, as the magistrate in those provinces is given absolute jurisdiction by sec. 776. *Re Worrell* (1915) 8 W.W.R. 478 affirming 8 W.W.R. 230. The punishment under sec. 773 is limited by secs. 780 and 781. *R. v. Randolph*, 4 Can. Cr. Cas. 165.

Sec. 777 was, in its origin, special legislation applicable only to the province of Ontario and it conferred a general authority to police and stipendiary magistrates in that province to try offences which would be



triable before an Ontario court of general sessions, provided the accused elected in favour of such summary trial and renounced his claim to a jury trial. That legislation was sought to reduce the expense of the jury trials at the general sessions and to facilitate the disposal of disputed cases in which the accused might not be able to furnish the usual bail. The scope of such legislation was afterwards extended so as to apply to the other provinces to a limited extent, so that police and stipendiary magistrates of cities and incorporated towns with an official census of 2,500 population or over in the other provinces of Canada have jurisdiction to try by consent any case which in Ontario would be triable at the general sessions:

While the consent of the accused is a feature of the exercise of the extended jurisdiction of summary trial, Parliament has seen fit to incorporate one exception (sub-sec. (5) ) and to make the jurisdiction absolute, that is to say, it shall exist without the consent of accused, if (1) the charge is theft, obtaining property by false pretences, or unlawfully receiving stolen property, (2) the value of the money or property involved does not exceed \$10, and (3) the case is one in a city of over 25,000 population. This amendment was effected by the Code amendment, 8-9 Edw. VII, Can., ch. 9, sec. 2. The magistrate is to decide the question whether the value is or is not in excess of \$10. *Ibid.*

It will be noticed that the offences designated in sub-sec. (5) are identical with those in sec. 773, sub-sec. (a). Its effect may be said to be to supersede the operation of sec. 773, sub-sec. (a), in the events which sub-sec. (5) of sec. 777 contemplate so that a defendant who comes before the magistrate of a city of over 25,000 population and is convicted under sec. 777 instead of sec. 773, becomes liable to the heavier punishment for which sec. 777 provides. But if the same magistrate already has jurisdiction without consent for the offence because of the theft charge being against a "seafaring person" within the terms of sec. 775, it may be doubted whether sub-sec. (5) of sec. 777 would apply. As to the otherwise absolute jurisdiction in parts of Western Canada and in Prince Edward Island under sec. 776, it would appear that sub-sec. (5) of sec. 777 will control because sec. 776 in terms limits the absolute jurisdiction under Part XVI to cases with the exception, *inter alia*, of those "coming within the provisions of sec. 777."

*Bringing up for election after committal*—Where a committal for trial for an offence alleged to have been committed in a city to which sub-sec. 2 of sec. 777 applies has been made by a county stipendiary not authorized to hold a summary trial in Nova Scotia under sec. 777, sub-sec. 2, the Superior Court may, for the purpose of enabling the prisoner to elect trial before the city stipendiary magistrate having the extended jurisdiction of sec. 777, grant his application for writs of habeas corpus and *recipias corpus* to transfer him from the gaol to the city magistrate's court. *B. v. Foley* (1914) 24 Can. Cr. Cas. 150 (N.S.).

*What magistrates included*].—Even though a stipendiary magistrate for a county or province may have conferred upon him by a provincial statute the powers of a police or stipendiary magistrate for a city or incorporated town, nevertheless he is not a police or stipendiary magistrate for the purpose of trying offences summarily under sec. 777 of the Criminal Code. *R. v. Nar Singh*, 14 B.C.R. 192, 14 Can. Cr. Cas. 454; and see *R. v. Kolamber*, 22 Can. Cr. Cas. 341 (Y.T.).

But the one man may be appointed both a city and provincial magistrate. *R. v. McEwan*, 17 Man. R. 477.

*Offence committed in another county*].—If a person is brought before a justice of the peace charged with an offence committed within the province, but out of the limits of the jurisdiction of such justice, the latter, in his discretion, may either order the accused to be taken before some justice having jurisdiction in the place where the offence was committed; sec. 665; or may proceed as if it had been committed within his own jurisdiction. The accused was brought before the stipendiary magistrate of the city of Halifax charged with having committed burglary in Sydney, N.S. It was held that the stipendiary magistrate could, with the consent of the accused, try him summarily under sec. 777. *Re Charles Seeley*, 41 S.C.R. 5, 14 Can. Cr. Cas. 270.

Sections 653, 665, 666 and 777 taken together, mean that when an offence is committed *within the limits of a province* any presence, however transitory, of the accused in any part of that province will justify the exercise of as full and complete jurisdiction as if the offence was committed where the offender is apprehended, leaving to the magistrate a discretionary power to send the prisoner for further inquiry or for trial before the justice having jurisdiction over the locus where the offence was committed. *Re Seeley*, (1908) 41 S.C.R. 5; and see *R. v. McEwan*, 17 Man. R. 477.

*Power to order further particulars of charge*].—It has been doubted whether any further particularity as to the place of the offence is required in an information or charge on a summary trial than to indicate that the offence was committed within the territory over which the justice had jurisdiction, but under some circumstances it would be proper for the magistrate to insist upon the prosecution giving particulars. *R. v. James* (1915) 9 W.W.R. 235, 9 Alta. L.R. 66, 32 W.L.R. 528; *R. v. C.P.R.*, 1 Alta. L.R. 34; *R. v. Crawford*, (1912) 2 W.W.R. 952, 20 Can. Cr. Cas. 49, 23 W.L.R. 107.

*Right to make full answer and defence*].—Sec. 786.

*Fine in lieu of or in addition to other punishment*].—See sec. 1035.

*Punishment of whipping*].—See secs. 80, 204, 216, 276, 292, 293, 301, 302, 446, 457, 1060.

*Power as to costs*].—Sec. 1044 is applicable both to the magistrate having the ordinary jurisdiction and to the city or town magistrate having the extended jurisdiction of summary trial. It confers power to order costs in addition to the sentence. The magistrate may con-

damn the person convicted to payment of the whole or any part of the "costs or expenses" incurred in and about the prosecution and conviction if he sees fit so to do, including such moderate allowance to the prosecutor for loss of time as the magistrate, on affidavits or other inquiry, ascertains to be reasonable. Sec. 1044; R. v. Emery [1917] 1 W.W.R. 337, 351.

*Where there is an additional punishment for a second offence*—On a summary trial before a city police magistrate for theft (sec. 386) the maximum penalty is seven years' imprisonment unless a previous conviction has been charged in the information, by analogy to the procedure under Code sec. 851 for charging previous convictions in indictments in cases in which a greater punishment may be imposed by reason thereof. A sentence for more than seven years for theft where no previous conviction had been charged in the proceedings will be reduced on a case reserved to the sentence which it deems appropriate, notwithstanding the admission of the accused made to the magistrate after conviction that he had been previously convicted of theft. R. v. Edwards, 13 Can. Cr. Cas. 202, 17 Man. R. 288.

*Restitution of property*—See Code secs. 795 and 1050.

*Defects of form*—No conviction, sentence or proceeding under Part XVI shall be quashed for want of form; and no warrant of commitment upon a conviction under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same. Code sec. 1130.

By the Code Amendment of 1913 the provisions of sec. 1124 (*certiorari*) were made applicable to convictions or orders made under Part XVI which relates to summary trials for indictable offences. Code sec. 797 (2).

*Theft by juvenile offenders*—See also the special provisions of Part XVII for trial by two or more justices of juveniles of the age of 16 or under, charged with theft. Code secs. 800-821.

*Appeal by reserved case where trial jurisdiction depends on sec. 777*—There is an appeal by reserved case, or by leave of the Court of Appeal under sec. 1015, from the judgment of a magistrate proceeding under Code sec. 777 on the trial of any person for an indictable offence, upon the application of such person if convicted. Code sec. 1013.

The fact that the police magistrate on a summary trial is one of the class of magistrates having extended powers under Code sec. 777 does not give a right of appeal by reserved case or by stated case on his refusal to reserve, if he had absolute jurisdiction without consent to summarily try the particular case under secs. 773 and 776. If the trial is without consent under sec. 777 (5) an appeal lies by reserved case; and presumably this absolute jurisdiction where available must be utilized and a magistrate empowered under sec. 777 (5) should not ask the election of the accused under sec. 778 nor assume to try a case

under sec. 773 (a) with consent which he was competent to try under sec. 777 (5) without consent.

Sub-sections 1 to 4 inclusive of sec. 777 referring to cases which would be triable at a court of general sessions in Ontario relate only to cases *other than those listed in sec. 773*. *R. v. Davidson*, [1917] 2 W.W.R. 718, 720 (Alta.).

A summary trial before a police magistrate under sec. 777 for an indictable offence stands in much the same position as a trial before a judge of the Provincial Supreme Court; *R. v. Emery*, [1917] 1 W.W.R. 337, 349 (Alta.); and in case an appeal is taken by reserved case upon a question of law the evidence, or such parts of it as the magistrate thinks necessary, or as the Court of Appeal desires, must be sent up for the hearing of the appeal. Code sec. 1017.

*Sentence of female to reformatory in Ontario*—Whenever any female is convicted under sec. 239 (vagrancy), or is convicted under Part XVI of the Criminal Code, of an offence triable under that Part, she may be sentenced to the reformatory for an indefinite term less than two years, and if any term exceeding six months is inflicted, no fine shall be imposed in addition. R.S.C. 1906, ch. 148, sec. 57, as amended, 3-4 Geo. V, 1913, ch. 39, sec. 3, and applying only to the province of Ontario. R.S.C. 1906, ch. 148, sec. 42; and see Code sec. 1057.

*Jurisdiction in Yukon Territory*—By sec. 777, jurisdiction is given in the Yukon Territory only to judges of the Territorial Court and police magistrates. In *Rex v. Alexander*, 21 Can. Cr. Cas. 473, a charge of theft of an amount in excess of \$10, it was held that the extended jurisdiction given by Criminal Code, sec. 777, sub-sec. (2), to "police and stipendiary magistrates of cities and incorporated towns" to try with the consent of the accused, is intended to apply only to a special kind of police or stipendiary magistrate whose official capacity is designated in terms conforming to the statute, and not to magistrates for a whole province or judicial district with merely consequent jurisdiction for a city or incorporated town within the territorial limits. A commissioned officer of the B.N.W. Mounted Police, although vested with the powers of two justices under the Yukon Act, has no jurisdiction under sec. 777. *R. v. Kolember*, 22 Can. Cr. Cas. 341, 16 D.L.R. 146. The consent of the accused could not confer such jurisdiction. *R. v. Breckenridge*, 7 Can. Cr. Cas. 116.

### *Procedure.*

**Proceedings on arraignment.**—Accused put to election.—Charge reduced to writing.—Proceedings on confession.—If accused pleads not guilty.

**778.** Whenever the magistrate, before whom any person is charged as aforesaid, proposes to dispose of the case summarily under the provisions of this Part, such magistrate, after ascer-

taining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him.

2. If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused—

(a) that he is charged with the offence, describing it:

(b) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

3. If the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of such charge.

4. If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily.

*Origin*—Sec. 786, Code of 1892; R.S.C. 1886, ch. 176, secs. 8, 9.

*No option to elect if jurisdiction absolute*—Code secs. 774, 775, 776, 777 (5); *Re Worrell* (No. 2) (1915) 8 W.W.R. 478, 24 Can. Cr. Cas. 92, 8 Sask. L.R. 140; *Re Worrell* (No. 1), 8 W.W.R. 230, 30 W.L.R. 915, 24 Can. Cr. Cas. 88; *R. v. Hayward*, 5 O.L.R. 65, 6 Can. Cr. Cas. 399.

*Stating option that accused may remain in custody or under bail as the court decides*—The accused is to have called to his attention the possibility of his release on bail, while retaining and exercising his right to a jury trial; and where the prisoner's consent to summary trial

has been irregularly obtained without the statutory information being given him, he may repudiate it after conviction. The right thus given him to be informed by the magistrate that he has the option to remain in custody or under bail as the court decides, before he may be tried summarily by a police magistrate, was considered of sufficient importance by Parliament to justify an amendment to the Criminal Code. The accused may not be deprived of the benefit thereof, and its omission vitiates the conviction. *R. v. Davis*, 22 Can. Cr. Cas. 34 (Que.); *R. v. Howell* (1910) 19 Man. R. 326, 16 Can. Cr. Cas. 178.

The consent given by the prisoner that the charge be tried summarily, and his plea of guilty, does not confer upon the police magistrate a jurisdiction to try the case, unless the conditions imposed by law for that purpose upon the magistrate have been fulfilled. *Ibid.*; *R. v. Walsh and Lamont*, 8 Can. Cr. Cas. 101, 7 O.L.R. 149; *R. v. Harris*, 18 Can. Cr. Cas. 392, 4 S.L.R. 31, and *R. v. Crooks*, 19 Can. Cr. Cas. 150, 4 S.L.R. 335.

*Option may be stated by magistrate's clerk in open court*—The statutory question giving the option of mode of trial may legally be put by the magistrate's clerk acting in the magistrate's presence. *R. v. Eldehough*, (1903) 14 Man. R. 434, 7 Can. Cr. Cas. 340.

*Changing the election*—If when unrepresented by counsel the accused elects summary trial by the magistrate, he has no right, upon a postponed hearing when represented by counsel, to recall such election and to re-elect for a jury trial without the leave of the magistrate. *R. v. Macdonald*, 16 Can. Cr. Cas. 121, 21 O.L.R. 38.

*Election against summary trial*—An election under Code sec. 778 to be tried "in the ordinary way by the court having criminal jurisdiction" is not decisive in favour of a trial by a jury. The court having criminal jurisdiction has not to be selected until arraignment at the county or district court judge's criminal court which is a court having criminal jurisdiction as well as the assizes, although with the former there is no jury. *R. v. Price and Burnett* (1914) 7 W.W.R. 621, 25 Man. R. 26, 30 W.L.R. 1, 23 Can. Cr. Cas. 285. After electing against a summary trial by a magistrate, upon a charge in which the accused is called upon to elect, he has still an election for trial at a county judge's criminal court without a jury. Code sec. 825; *R. v. Price and Burnett*, (1914) 7 W.W.R. 621, 25 Man. R. 26, 30 W.L.R. 1; *R. v. Thompson*, 17 Man. R. 608, 14 Can. Cr. Cas. 27. A prisoner has a right to elect under Code sec. 825, even after the grand jury has found a true bill. *R. v. Thompson*, *supra*, (approved in *R. v. County Judge's Criminal Court*, 23 Can. Cr. Cas. 7 (Nova Scotia)).

*Recording the consent to summary trial*—A statement of the consent to summary trial appearing in a conviction is sufficient if it follows the statutory form (form 55) if there is nothing to impeach the record in that respect. *R. v. Mali* (1912) 1 W.W.R. 1047; and see *R. v. Mali* (1912) 1 W.W.R. 766 (Man.); *R. v. Howell*, 19 Man. R. 317. But a

recital that the accused consented "to jurisdiction" is not an equivalent of the statutory form. *R. v. Crooks*, 17 W.L.R. 560 (Sask.). Specific consent to summary trial is quite different from a consent to some undefined jurisdiction. *R. v. Mali* (1912) 1 W.W.R. 1047, 1048 (Man.).

In the absence of anything to impeach the record there would be a necessary implication that conditions precedent had been observed. *R. v. Mali*, (1912) 1 W.W.R. 1047, 1048, and see *R. v. Mali* (1912) 1 W.W.R. 766; and see *R. v. Howell*, 19 Man. R. 317; *R. v. Crooks*, 17 W.L.R. 560; *R. v. Burtress*, (1900) 3 Can. Cr. Cas. 536 (N.S.).

If the consent were actually given, the defect might be remedied under sec. 1130 on the fact being shown. *R. v. Burtress*, *supra*.

*No waiver effective where jurisdiction depends on compliance*—The statutory notice to be given to the accused on taking his election is required for the protection of accused persons and the magistrate's jurisdiction is dependent upon compliance with these statutory directions; jurisdiction will not accrue upon a consent given without compliance with the formalities even where there was knowledge by the accused of his right to a jury trial. *R. v. Cockshutt*, [1898] 1 Q.B. 582, 67 L.J.Q.B. 467.

*Magistrate to reduce the charge to writing and read it to the accused*—The information is superseded for the purposes of the trial by a separate "charge in writing" prepared by the magistrate as required by Code sec. 778 (3). *R. v. Gill*, 14 Can. Cr. Cas. 294, 18 O.L.R. 284. This "charge" may be written out before asking the accused to exercise his option. *R. v. Shepherd*, 6 Can. Cr. Cas. 463; *R. v. Graf*, 19 O.L.R. 238, 15 Can. Cr. Cas. 193.

In police court proceedings the charge is commonly contained in a charge sheet made out by the clerk of the court containing the names of the different persons to be tried with the nature of the charge on which each is to be tried. The "information" is for the purpose of authorizing a summons or warrant, and having answered that purpose it ceases to have any signification as such, but may thereafter be treated (with any trivial unsworn amendments) as the "charge in writing." *R. v. Crawford*, (1912) 2 W.W.R. 952 (Alta.); *R. v. James*, (1915) 9 W.W.R. 235, 25 Can. Cr. Cas. 23, 9 Alta. L.R. 66, 32 W.L.R. 528. No particular formality is required in the "charge in writing," but natural justice requires that any person being tried should know what he is being tried for, and should have the fullest opportunity for meeting the charge. *R. v. Crawford* (1912) 2 W.W.R. 952, 954, 20 Can. Cr. Cas. 49, 22 W.L.R. 107 (Alta.). The magistrate may adopt the information as a reduction of the charge to writing under sub-sec. (3) and so constitute the reading of such adopted charge a compliance with the Code provision. *R. v. James*, (1915) 9 W.W.R. 235, 237, 9 Alta. L.R. 66, 32 W.L.R. 528; *R. v. Graf*, 19 O.L.R. 238, 15 Can. Cr. Cas. 193.

If the charge has been read to defendant in the terms of the written

information, and defendant has pleaded guilty, it is not competent for him thereafter to say that he was not aware of the nature and particulars of the charge. *R. v. McLeod*, 39 N.S.R. 108, 12 Can. Cr. Cas. 73. If the accused has been legally arrested without warrant and is brought before the magistrate and consents to summary trial, the magistrate may proceed on the written charge then made, although there is no sworn information. *R. v. McLean*, 5 Can. Cr. Cas. 67.

*Provisions as to count of an indictment apply to a "charge"*—

Sec. 854 is as follows: "A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious."

Clause 16 of sec. 2 of the Code, as amended by sec. 2 in ch. 8 of 1907, gives the following definition: "'Indictment' and 'count' respectively include information and presentment as well as indictment and also any plea, replication or other pleading, any formal charge under sec. 873a and any record." It has been held in Saskatchewan that the word "count" of sec. 854 includes a charge reduced to writing and to which the party is called upon to plead, as provided by sub-sec. 3 of sec. 778 of the Code, that sec. 854 is applicable to proceedings under part XVI. The charge which is made out by the police magistrate, and to which the party is required to plead, is a pleading within the meaning of clause 16 of sec. 2. *R. v. Mah Sam*, 19 Can. Cr. Cas. 1, at 6 (Sask.).

*Accused must be personally present*—The accused must be personally present; it is not competent for a magistrate to proceed with a summary trial in the absence of the accused, although his counsel is present on his behalf prepared to make option under Code sec. 778 as to mode of trial and although the latter produces a written authority in that behalf signed and sworn to by the absent defendant. *R. v. Bomer*, 23 Can. Cr. Cas. 235.

*Proceedings under plea of not guilty*—There is no specific direction as to the taking of depositions by the magistrate on a summary trial of an indictable offence; *R. v. Emery*, [1917] 1 W.W.R. 387, 348 (Alta.); but the situation is the same in effect as to their authentication, because sec. 797 directs the magistrate to transmit the conviction or certificate of dismissal along with "the depositions of witnesses," etc., to the district officer to be kept among the records of the district criminal court. *R. v. Emery*, supra. Furthermore, by Code sec. 797 (2) the provisions of Code sec. 1124 are to apply to convictions or orders made under Part XVI (summary trials) and sec. 1124 so incorporated makes special reference to the depositions taken before the magistrate being examined on *certiorari* for the purpose of validating an informal or irregular conviction. The depositions on a summary trial are by necessary intendment a part of the record. *R. v. Emery* [1917] 1 W.W.R.



337, 349. If the trial be under Code sec. 777 (extended jurisdiction where defendant elects) the depositions may be needed on a case reserved or stated, Code sec. 1017. The omission to take down the depositions or notes of evidence is fatal to a conviction, and where no depositions are returned to a *certiorari* and there was a plea of not guilty, the conviction will be quashed in *certiorari* proceedings; *R. v. Perron* (1915) 26 Can. Cr. Cas. 442; and see *R. v. Harris* (1911) 18 Can. Cr. Cas. 392; *Re Lacroix* (1907) 12 Can. Cr. Cas. 297; *R. v. Jung Lee* (1913) 22 Can. Cr. Cas. 63, 5 O.W.N. 80.

*Adjournment of summary trial*—An adjournment of a summary trial must be, to a day, certain and fixed, and must be stated in the presence of the parties or their solicitors. *R. v. Wilson* (1914) 9 W.W.R. 160, 23 Can. Cr. Cas. 256, 29 W.L.R. 515 (Alta.). A conviction was quashed where the adjournment was made *sine die* on a reservation of judgment by the magistrate, although the accused, who was held in custody, was brought up within a few days for sentence. *R. v. Wilson* (1914) 7 W.W.R. 160, 23 Can. Cr. Cas. 256, 29 W.L.R. 515 (Alta.).

*Right of magistrate to take a view on summary trial doubtful*—The right of the magistrate to take a view of the *locus in quo*, except probably by consent, has been denied in respect of a summary trial under Part XVI of the Code. *R. v. Crawford*, (1913) 3 W.W.R. 731, 18 B.C.R. 20, 21 Can. Cr. Cas. 70, 22 W.L.R. 969, citing *R. v. Petrie* (1890) 20 Ont. R. 317.

*Remedial powers apply as upon indictment*—The same remedial powers given to the courts on a trial by indictment may be exercised by a magistrate's trying the same class of offence under the summary trials procedure. *R. v. Crawford* (1912) 2 W.W.R. 952; and see Cr. Code secs. 797, 1124.

*Where there is an alternative mode of trial under Part XV or Part XVI under special Act*—Where a prosecution before a police magistrate for an offence under the Secret Commissions Act, 8-9 Edw. VII (Can.), ch. 33, is brought as for an indictable offence and is tried on the defendant's election under Part XVI, there is no right of appeal by the prosecutor from the dismissal of the charge, as there would have been had the proceedings been taken without consent under Part XV. *Re Buchanan*, 22 Can. Cr. Cas. 200, 26 W.L.R. 447. But as to appeal by case reserved, see secs. 1013 and 1014 (3).

**Proceedings when accused is a minor.—Notice to parents or guardian.**

**779.** Whenever the person charged appears to be of, or about, or under the age of sixteen years, and is not represented by counsel present at the time, the magistrate shall not proceed under the last preceding section without first asking the person charged what his age is.

2. If such person then states his age as being sixteen years or less, the magistrate shall defer any further action, and shall at once cause notice to be given to the parent or parents of such person, living in the province, if any, or if he has no such parents, or if his parents are unknown, then to the guardian or householder, if any, with whom he ordinarily resides, of such person having been so charged, and of the time and place when such person will be called on to make his election as to whether he will be tried by the said magistrate.

3. Such notice shall allow reasonable time for the said parents, guardian or householder to be present and advise the said person charged before he is called on to so elect.

4. At the time fixed by such notice, or if it appears to the satisfaction of the magistrate that there is no person for whom notice is provided as aforesaid, or that all reasonable means to give such notice have been taken without success, then, at the earliest convenient time, the magistrate shall proceed as in the last preceding section provided.

5. If any person notified as aforesaid is present at the time so fixed, the magistrate shall afford him an opportunity to advise the person charged before he is called upon to elect.

6. The notice provided for by this section may be given by registered letter, if the person to be notified does not reside in the city, town or municipality where the proceedings are had.

*Origin*].—4 Edw. VII, Can., ch. 8, sec. 1.

*Juvenile courts*].—Where juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30, and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age. And see Code secs. 772 and 802 as to theft charges where there is no Juvenile Court.

**Theft not over \$10.—Attempt.—Penalty under (a) or (b) of s. 773.**

**780.** In the case of an offence charged under paragraph (a) or (b) of sec. 773, the magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months.

*Origin*—Compare sec. 787, Code of 1892; B.S.C. 1886, ch. 176, sec. 10.

*Non-application to trials with consent before a police magistrate acting under sec. 777*—This section does not apply to cases tried under sec. 777. Sec. 777 (3).

*Right to make full answer and defence*—Sec. 786.

*If the magistrate "finds the charge proved"*—Code sec. 780 limits the imprisonment on a plea of guilty as well as where a conviction has followed on a plea of not guilty. *R. v. Alexander*, (1913) 5 W.W.R. 17, 6 Alta. L.R. 227, 21 Can. Cr. Cas. 473, 25 W.L.R. 290.

*Adding costs to punishment otherwise authorized*—A magistrate acting under Part XVI may add to such sentence as may otherwise be passed an order for payment of costs and expenses "incurred in and about the prosecution." Code sec. 1044. Payment of such costs may be ordered out of money belonging to the accused taken from him on his apprehension; Code sec. 1044; but otherwise payment of the costs is to be enforced, in like manner as in a civil action, at the instance of any person liable to pay or who has paid the same. A direction as to punishment is divisible so that that part of the sentence on a summary trial which is absolute may stand although there is an illegal order for commitment in default of paying same. *R. v. Miller*, 25 W.L.R. 296 (Alta.). Sections 735 and 736 do not apply as their operation is excluded by sec. 798.

*Restitution of property*—See Code secs. 795 and 1050.

*Fine in lieu of or in addition to other punishment*—See sec. 1035.

*Female reformatory sentences in Ontario*—See the Prisons Act, R.S.C. 1906, ch. 148, sec. 57, as amended 3-4 Geo. V, ch. 39, sec. 3.

#### **Penalty on summary trial under s. 773.—Enforcing conviction.**

**781.** In any case summarily tried under paragraphs (c), (d), (e), (f), or (g) of sec. 773, if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, two hundred dollars, or to both fine and imprisonment not exceeding the said sum and term.

2. Such fine may be levied by warrant of distress under the hand and seal of the magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same

conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid.

*Origin*—3-4 Geo. V, Can., ch. 13, sec. 27; sec. 788, Code of 1892; R.S.C. 1886, ch. 176, sec. 11.

*Case "summarily tried"*—This section is not applicable to summary convictions under Part XV (secs. 705 to 770 of the Code). *R. v. Frizell*, 22 Can. Cr. Cas. 214, 15 D.L.R. 674, 5 O.W.N. 801, 25 O.W.B. 607.

*Non-application to trials with consent before a police magistrate acting under sec. 777*—This section does not apply to cases tried under sec. 777. Sec. 777 (3).

*Conviction with fine added*—Code sec. 709 refers to forms 55-57 which are silent as to costs but that section enables the magistrate in case of a fine to add the requisite words.

*Further term unless fine paid*—By sub-sec. (2) it is provided that the person convicted may be committed to the common gaol or other place of confinement for a further term not exceeding six months unless such fine is sooner paid. Sec. 1057 gives power to impose hard labour, and, where a fine is imposed, it may be ordered that the alternative of imprisonment in default of its payment shall be with hard labour. *R. v. Nelson* (1914) 22 Can. Cr. Cas. 301.

*Inclusion of costs and expenses*—See sec. 1044.

*Costs*—Costs ordered under Cr. Code, sec. 781, on a conviction made under the summary trials clauses are to be awarded to the prosecutor and not to the clerk of the police court where he is not the prosecutor. *R. v. Miller*, 25 Can. Cr. Cas. 151, 25 W.L.R. 296.

*Limitation as to costs*—Where the extended jurisdiction of Code sec. 777 is exercised, the punishment may be the same as in Ontario might have been imposed by the general sessions for the like offence. Sec. 778. But if the jurisdiction is being exercised under sec. 773; the punishment is limited by the provisions of secs. 780 and 781 read along with sec. 1044 dealing with the subject of costs generally. It is for the magistrate to fix the costs at a reasonable sum; there is no capiff. *R. v. Emery*, [1917] 1 W.W.R. 337, 351, 10 Alta. L.R. 139, 27 Can. Cr. Cas. 116 (Alta.). But the power to order costs, under sec. 1044, is necessarily subject as to the offences of unlawful wounding, etc., under sub-secs. (c) to (g) inclusive of Code sec. 773 to the restriction imposed by Code sec. 781 that the fine shall not exceed "with the costs in the case" \$200.

*Further term for non-payment of fine*—It has been said that the use of the words "in addition to" and "a further term" in Code sec. 781 (2), which apply *inter alia*, to convictions on summary trial for keeping a disorderly house, was probably intended to make it clear that even where imprisonment in the first instance, as well as a fine, is

imposed, then further imprisonment in default of payment may also be imposed; but that it was not intended to provide that there must be imprisonment in the first instance (however short the term) before imprisonment in default of payment of the fine can be given. *R. v. Davidson*, [1917] 2 W.W.R. 160, 164. As was said by Stuart, J., in that case: "There does not seem to be anything in sec. 781 (2) which makes it necessary to impose imprisonment in the first instance, as well as a fine, before imprisonment in default of payment of the fine can be imposed."

*Reducing excessive fine*—Sec. 1013 does not apply to give a right of appeal by reserved case if the magistrate acts under sec. 773, such appeals being limited to trials under sec. 777. It is therefore not competent for the Court of Appeal to entertain a motion under sec. 1016 to reduce an excessive fine under sec. 773 to the legal limit. *R. v. Booth*, (1914) 31 O.L.R. 539, 23 Can. Cr. Cas. 224. The remedy is by *certiorari*. Code secs. 797 (2), 1124; *R. v. Booth*, *supra*.

*Fine "not exceeding, with the costs in the case, \$200"*—If the conviction read that the accused should forfeit and pay \$200 to be paid and applied according to law, the court may assume that the costs are included in the \$200 and uphold the conviction; *R. v. Stark* (1911) 19 Can. Cr. Cas. 67, 18 W.L.R. 419 (Man.). But if the \$200 were designated a "fine," this would contravene sec. 781 unless the conviction showed on its face that there were no costs. *R. v. Cyr*, 12 P.R. 24 (Ont.). But see as to amendment secs. 1124, 797 (2).

*Hard labour*—Hard labour may be imposed whether the punishment is imprisonment with or without a fine. *R. v. Morton* (1913) 7 W.W.R. 95, 23 Can. Cr. Cas. 172.

*Sentence of females to Reformatory in Ontario*—See the Prisons Act, R.S.C., ch. 148, sec. 57, as amended, 3-4 Geo. V, ch. 39, sec. 3, and Code sec. 1057.

*What defects curable*—See secs. 797 (2), 1124, 1130; *R. v. Miller*, 25 Can. Cr. Cas. 151, 25 W.L.R. 296; *R. v. James*, (1915) 9 W.W.R. 235, 9 Alta. L.R. 66, 25 Can. Cr. Cas. 23.

### **Theft, false pretenses and receiving stolen property exceeding ten dollars.**

**782.** When any person is charged before a magistrate with theft or with having obtained property by false pretenses, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary

way, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who, under sec. 775, can be tried summarily without his consent, shall then put to him the question mentioned in sec. 778, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3; sec. 789, Code of 1892.

*Application of secs. 782, 783*—In cities of over 25,000 the city police or stipendiary magistrate has an added power of trial without consent under sub-sec. (5) of sec. 777, for these offences, where the value does not exceed \$10. Other magistrates under sec. 773, sub-sec. (a) may try such cases subject to Code secs. 774, 775, 776 and 778, the consent of the accused being essential unless one of these sections excludes it under special circumstances as to locality or class of offences. If the value is over \$10 in a theft case, sec. 773 does not apply, but a magistrate authorized under sub-secs. (1) to (4) of sec. 777 could try the charge on defendant's consent given in pursuance of sec. 778. It has been held that secs. 782 and 783 do not restrict the right of a police magistrate to deal with the case under sec. 777, sub-secs. (1) to (4). *R. v. Macdonald*, 16 Can. Cr. Cas. 121, 21 O.L.R. 38; *R. v. McLeod*, 39 N.S.R. 108, 12 Can. Cr. Cas. 73; *R. v. Bowers*, 34 N.S.R. 550, 6 Can. Cr. Cas. 264. The magistrate acting under sec. 777 has not to enter upon a preliminary investigation to decide whether or not the case is one which can be disposed of in a summary way; *R. v. McLeod*, 39 N.S.R. 108; *R. v. Macdonald*, 21 O.L.R. 38; but if the magistrate has no authority under sec. 777, such an investigation is essential. *R. v. Williams*, 11 B.C.R. 351, 10 Can. Cr. Cas. 330.

*Exception from absolute jurisdiction in certain provinces*—See sec. 776.

*Seafaring persons in seaport towns*—Sec. 775, referred to in sec. 782, confers absolute jurisdiction in the cities of Montreal and Quebec and other seaport towns and cities to summarily try without consent transient seafaring persons charged with the offences specified in sec. 773, or cases in which the sailor is both a complainant and a necessary witness.

#### Consent and trial.

**783.** If the person charged as mentioned in the last preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the pro-

ceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, he shall be remanded to gaol to await his trial in the usual course.

*Origin*—7-8 Edw. VII, Can., ch. 18, sec. 11; 63-64 Vict., Can., ch. 46, sec. 3; Code of 1892, sec. 790.

*Trial on plea of guilty only by magistrate under sec. 773 for theft over \$10*—Secs. 782 and 783 only enable the magistrate not authorized under sec. 777, but who otherwise could try the charge if the amount were not over \$10, to try the case where the defendant pleads guilty. See *R. v. McLeod*, 39 N.S.R. 108, 12 Can. Cr. Cas. 73, and note to sec. 782.

*Restitution of property*—See Code secs. 795 and 1050.

*Sentence of female to Reformatory in Ontario*—In Ontario whenever any female is convicted under sec. 239 for vagrancy or is convicted under Part XVI of the Code, of an offence triable under that Part, she may be sentenced to the Reformatory for an indefinite term less than two years, and if any term exceeding six months is inflicted, no fine shall be imposed in addition. R.S.C. 1906, ch. 148, sec. 57, as amended, 3-4 Geo. V, 1913, ch. 39, sec. 3.

**Magistrate may decide not to proceed summarily.**

**784.** If, in any proceeding under this Part, it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case; but a previous conviction shall not prevent the magistrate from trying the offender summarily, if he thinks fit so to do.

*Origin*—Sec. 791, Code of 1892; R.S.C. 1886, ch. 176, sec. 14.

*When magistrate may decide to send case to higher court*—Under certain circumstances the magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case. Code sec. 784. The right under this section can be exercised only in the terms of same. *R. v. Hicks* (1912) 2 W.W.R. 1100 (Alta.). It is not competent for a magistrate who is holding a summary trial after hearing all of the evidence on both sides to decide to commit for trial instead of disposing of the case himself. After the accused has made his defence, the magistrate is the only tribunal clothed with power to

try the charge and he must dispose of it. *R. v. Hicks* (1912) 2 W.W.R. 1100, 22 W.L.R. 236, 30 Can. Cr. Cas. 192 (Alta.).

So also where a person accused of perjury had, with his own consent, been summarily tried before a police magistrate under sec. 777, pleading "not guilty," and the magistrate, upon hearing the evidence, adjudicated summarily and dismissed the charge; it was held that the magistrate was right in refusing thereafter to bind the prosecutor over to prefer and prosecute an indictment against the defendant, as provided for in sec. 688, for the magistrate has, under sec. 784, to determine, before the defence has been made, whether he will try the case summarily or not. *Re Rex v. Burns*, 1 O.L.R. 341, 4 Can. Cr. Cas. 330.

*Electing trial by county judge*—If the magistrate or justices decide under sec. 784 not to proceed with the summary trial, and commit the accused for trial, the accused may afterwards with his own consent be tried under the provisions of Part XVIII. Code sec. 832.

**Election of trial by jury to be stated on warrant of committal.**

**785.** If, when his consent is necessary, the person charged elects to be tried before a jury, the magistrate shall proceed to hold a preliminary inquiry as provided in Parts XIII and XIV, and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made.

*Origin*—Sec. 792, Code of 1892; R.S.C. 1886, ch. 176, sec. 15.

**Full answer and defence.—Counsel allowed.**

**786.** In every case of summary proceedings under this Part the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor.

*Origin*—Sec. 793, Code of 1892; R.S.C. 1886, ch. 176, sec. 16.

*"Full answer and defence"*—This phrase appears also in Code secs. 715, 786, and 942, dealing respectively with summary conviction matters, summary trials and trials on indictment.

The French version of the Code translates the words "a full answer and defence" by the words equivalent to "a full and entire defence."

The word "answer" as used in sec. 786 has no special reference to the question to be put by the magistrate to the accused in certain cases on taking an election for or against summary trial, but applies alike to summary trial cases in which there is no right of election by the accused. *R. v. Romer*, 23 Can. Cr. Cas. 235.

The principle of English law is, that an accused person is presumed to be innocent until proved to be guilty, and, although there are cases



where the prosecution may, by proving certain facts, raise a presumption of guilt which the accused must rebut, yet, generally speaking, the burden of proof lies on the prosecution, and any doubt as to the sufficiency of proof must be decided in favour of the accused. The right now enjoyed by the accused of giving evidence himself (Can. Evidence Act, see Appendix) has not shifted the burden of proof.

If by inadvertence a magistrate erroneously assumes that there is no evidence to be adduced in answer, and sentences a prisoner before hearing the defence, this may be corrected by forthwith withdrawing the sentence and offering to hear testimony; so where the offer was made but was declined by defendant's counsel on the excuse that it was too late as the conviction had been pronounced, the conviction was affirmed on *certiorari*. *R. v. Cyr*, [1917] 3 W.W.R. 849, affirming [1917] 2 W.W.R. 1185, 29 Can. Cr. Cas. 77 (Alta.).

#### Open court.

**787.** Every court held by a magistrate for the purposes of this Part shall be an open public court.

*Origin*—Sec. 794, Code of 1892.

*Exclusion of public from trial*—See sec. 645 as to specific offences there mentioned, sec. 644 as to juveniles.

#### Procuring attendance of witnesses.

**788.** The magistrate before whom any person is charged under the provisions of this Part may, by summons or, by writing under his hand, require the attendance of any person as a witness upon the hearing of the case, at a time and place to be named in such summons, and such magistrate may bind, by recognizance, all persons whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge.

2. If any person so summoned, or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is made of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the magistrate before whom such person should have attended may issue a warrant to compel his appearance as a witness.

*Origin*—Sec. 795, Code of 1892; R.S.C. 1886; ch. 176, sec. 18.

*Payment by county of magistrate's travelling expenses in Ontario*—Where the justice or police magistrate without salary, for the convenience of witnesses and others attends at a distance from his residence to hear the evidence on a criminal charge, he shall be entitled to a mileage allowance of 15 cents a mile one way for the distance necessarily travelled, to be paid by the county, or, in the case of a district, by the province. R.S.O. 1914, ch. 87, sec. 35.

#### **Service of summons.**

**789.** Every summons issued under the provisions of this Part may be served by delivering a copy of the summons to the person summoned, or by delivering a copy of the summons to some inmate of such person's usual place of abode apparently over sixteen years of age.

2. Every person required by any writing under the hand of the magistrate to attend and give evidence as aforesaid shall be deemed to have been duly summoned.

*Origin*—Sec. 796, Code of 1892; R.S.C. 1886, ch. 176, sec. 19.

*Summons to witness*—Sub-sec. (2) validates an informal summons not under seal.

#### **Dismissal of charge.**

**790.** Whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal.

*Origin*—Sec. 797, Code of 1892; R.S.C. 1886, ch. 176, sec. 20.

*Finds the offence not proved*—Only after a hearing; on the merits is there jurisdiction to grant the certificate. *R. v. Mann* [1919] 1 W.W.R. 917 (Sask.).

*Illegal remand "until called on"*—After hearing both sides, the magistrate is not to adjourn the trial and remand the accused "until called on," where the evidence does not satisfy the magistrate either of the guilt or innocence of the accused; the prisoner is in such case entitled to the benefit of the doubt and to an acquittal, and prohibition will be granted to restrain the magistrate from proceeding to hear further evidence alleged to have been discovered by the crown, and in respect whereof the accused was again summoned to receive judgment upon the original charge. *R. v. White* (1915) 24 Can. Cr. Cas. 277, 34 O.L.R. 370.

A magistrate holding a summary trial has power under Code sec. 1081, to suspend sentence in certain cases, but sentence cannot be suspended until there has been an adjudication of guilt. *Ibid.*

**Effect of conviction on summary trial.**

**791.** Every conviction under this Part shall have the same effect as a conviction upon indictment for the same offence.

*Origin*—Sec. 798, Code of 1892; R.S.C. 1886, ch. 176, sec. 20.

*Inclusion of costs and expenses*—See sec. 1044.

*Power to amend*—A conviction made under Part XVI of the Code, is not in the same position as a conviction made by the sessions, and may be amended to accord with the sentence pronounced before the return to a *certiorari*. *R. v. Graf*, 19 O.L.R. 238, 15 Can. Cr. Cas. 193; and see secs. 797 (2), 1124.

Where the sentence is in excess of the magistrate's jurisdiction, sec. 1124 provides that this shall not affect the conviction but only the punishment, and places on the court the duty of imposing a sentence which is authorized. *Rex v. Crawford* (1912) 2 W.W.R. 952, 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 6 D.L.R. 380; *R. v. Boardman* (1914) 23 Can. Cr. Cas. 191, 6 W.W.R. 1304, 29 W.L.R. 176.

No conviction, sentence or proceeding under Part XVI shall be quashed for want of form; and no warrant of commitment upon a conviction under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same. Code sec. 1130; *R. v. McLeod*, 39 N.S.R. 108, 12 Can. Cr. Cas. 73.

The warrant of commitment following a summary trial is for the information of the gaoler and of a court hearing a habeas corpus application; and a reference therein to the section of the Code under which the charge was laid will be regarded in aid of the description of the offence. *R. v. Gill*, 14 Can. Cr. Cas. 294, 18 O.L.R. 234.

*Section 791 does not prevent certiorari and habeas corpus applications in respect of summary trial convictions*—Notwithstanding sec. 791 a conviction and commitment upon a summary trial for an indictable offence may be reviewed on habeas corpus. The prisoner will be discharged if the conviction on a plea of guilty is upon a charge which does not disclose a criminal offence. *R. v. St. Clair*, 27 A.B. 308, 3 Can. Cr. Cas. 551; *R. v. Leschinski*, (1908) 17 Can. Cr. Cas. 199. The decision in *R. v. Marquis*, 8 Can. Cr. Cas. 346 (Que.) denying the right of *certiorari* in summary trials for indictable offences was disapproved in *R. v. Leschinski*.

In *The Queen v. Racine*, 9 Que. Q.B. 134, 3 Can. Crim. Cas. 446, (Que.) there was an attempt to bring a conviction under the Summary Trials Part of the Code before the court or a judge by way of appeal on both facts and law.

That right of appeal is confined entirely to summary convictions by justices of the peace under the part relating to summary convictions, and it was not extended to convictions under the Summary Trials Part, except in certain cases specially provided for in sec. 797. In giving judgment in *The Queen v. Racine*, Wurtels, J., refers to the then existing

section of the Code of 1892, which corresponds with sec. 791 of the present Code, but, as is pointed out in *R. v. Leschinski*, 17 Can. Cr. Cas. 199 (Sask.), he only does so incidentally; he does not decide whether or not there could be a review by way of *certiorari*.

He refers to it for the purpose of accentuating his conclusion that the appeal which is provided for under the Summary Convictions Part of the Code did not apply to convictions under the Summary Trials Part of the Code. *R. v. Leschinski*, 17 Can. Cr. Cas. 199, 9 W.L.R. 602 (Sask.).

A recent Ontario decision favours the view that if the trial were under sec. 777 and a reserved case could therefore have been had to test the question of jurisdiction, *certiorari* proceedings will not lie, even on that ground. *R. v. Sinclair*, 38 O.L.R. 149, 11 O.W.N. 131, 28 Can. Cr. Cas. 350. The decision in *R. v. Racine*, *supra* is cited in the *Sinclair* case as one in which the same conclusion was reached. It is submitted, however, that the Quebec decision in *R. v. Morgan* (*Morgan v. Malepart*), 25 Can. Cr. Cas. 192, 20 Rev. Leg. 277 (Que.), is to be preferred to that of *R. v. Sinclair*; 38 O.L.R. 149, and that *R. v. Racine* (Que.) is correctly explained in the *Leschinski* case, *supra* (Sask.). In *R. v. Morgan*, 25 Can. Cr. Cas. 192 (Que.), it was definitely affirmed that the right of appeal by reserved case on a summary trial under sec. 777 does not bar the remedy of habeas corpus on a question of jurisdiction of the magistrate, the summary trial court not being a court of record even where the presiding magistrate is a judge of a court of record. Where the question is not one of jurisdiction as to which *certiorari* or habeas corpus are uniformly considered appropriate remedies; *R. v. Bissette*, [1917] 3 W.W.R. 501 (Alta.); it may well be that the court's discretion to grant or refuse a *certiorari* may be exercised by refusing *certiorari* if a remedy of equal efficiency is available by any method of appeal. See *R. v. Therrien*, 25 Can. Cr. Cas. 275, 17 Que. P.R. 285 (Que.); *R. v. Amyot*, 11 Can. Cr. Cas. 232, 15 Que. K.B. 22; *R. v. McLatchy*, 44 N.B.R. 402, 28 Can. Cr. Cas. 277; *R. v. Fuerst*, (1913) 22 Can. Cr. Cas. 183, 26 W.L.R. 445 (Y.T.). On habeas corpus if it be found that the necessary formalities had not been complied with to give the magistrate jurisdiction, the court instead of discharging the accused, may remand him under sec. 1120 to be brought again before the magistrate to make his election. *R. v. Fuerst*, *supra*.

#### Certificate of dismissal or conviction.

**792.** Every person who obtains a certificate of dismissal or is convicted under the provisions of this Part, shall be released from all further or other criminal proceedings for the same cause.

*Origin*—Sec. 799, Code of 1892; R.S.C. 1886, ch. 176, sec. 23; 32-33 Vict., Can., ch. 20, sec. 45.

*After a hearing on the merits*—The certificate is to be granted only

if the justices "find the offence not proved," thus implying a hearing on the merits. *R. v. Mann* [1919] 1 W.W.R. 917 (Sask.).

*Certificate as bar to further criminal proceedings*—Compare with secs. 730 and 734 in Part XV.

In *Baxter v. Gordon Ironsides & Fares Co.*, 13 O.L.R. 598, it was held that in an action for malicious prosecution, although the prosecution may have in fact been terminated *prima facie* in favour of the plaintiff, it is competent to show that it did not in fact terminate in his favour, and that the termination of it was the result of a compromise or agreement to withdraw the prosecution. The production of the record of the dismissal of the complaint would be *prima facie* evidence only. *Cockburn v. Kettle*, (1913) 28 O.L.R. 417.

Under sec. 773, two justices of the peace have power to try an accused person of attempting to steal property of any value, no matter how large, if the charge is only for the attempt. *R. v. Pope* (1914) 5 W.W.R. 1070 at 1076, 7 Alta. L.R. 169, 22 Can. Cr. Cas. 327, 26 W.L.R. 659 (Alta.). So if a conviction is made for the attempt, it seems that the accused cannot afterwards be charged with the completed offence, although the justices would have had no jurisdiction to convict of the completed offence. *R. v. Pope* (1914) 5 W.W.R. 1070, 1076 (Stuart, J.). If the accused had been convicted at a jury court of an attempt, he could not afterwards be charged with the completed offence. Cr. Code sec. 950.

**Result of hearing to be filed in court of sessions.**

**793.** The magistrate adjudicating under the provisions of this Part shall transmit the conviction, or a duplicate of the certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the accused, to the clerk of the peace or other proper officer for the district, city, county or place wherein the offence was committed, there to be kept by the proper officer among the records of the general or quarter sessions of the peace or of any court discharging the functions of a court of general or quarter sessions of the peace.

*Origin*—1 Edw. VII, Can., ch. 42, sec. 2; 63-64 Vict., Can., ch. 46, sec. 3; Code of 1892, sec. 801.

*Returning amended conviction to correct error*—It is the duty of the magistrates if they discovered that an irregular conviction—a conviction improperly drawn—had been returned, to return and file a proper one in the place of it, and they are at liberty to do this at any time as long as the first conviction had not been attacked: *Sellwood v. Mount*, 9 C. & P. 75. The fact that the second conviction was filed only some few minutes before it was tendered in evidence cannot affect the question in any way. *R. v. Taylor*, 12 Can. Cr. Cas. 244 at 249. (Alta.).

**Evidence of conviction or dismissal.**

**794.** A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceedings.

*Origin*—Sec. 802, Code of 1892; R.S.C. 1886, ch. 176, sec. 26.

*How conviction on summary trial to be proved*—Where the conviction was by two justices, but only one had signed the formal conviction, it is defective as evidence. *R. v. Taylor*, 12 Can. Cr. Cas. 244 (Alta.); and the defect is not cured by producing the memorandum of adjudication which both had signed because the memorandum is not proof of the conviction itself. *Ibid.* No provision is made in Part XVI for a memorandum of adjudication such as is contained in the summary convictions clauses, Part XV, by Code sec. 727. Nothing less than the formal conviction or a duly certified or proved copy thereof is sufficient; *R. v. Bourdon*, 2 C. & K. 336; *R. v. Taylor*, 12 Can. Cr. Cas. 244 (Alta.); even where the trial on which it is to be proved is before the same magistrate as made the conviction. *R. v. Legros*, 17 O.L.R. 425, 14 Can. Cr. Cas. 161.

**Restitution of property.**

**795.** The magistrate by whom any person has been convicted under the provisions of this Part may order restitution of the property stolen, or taken or obtained by false pretenses, in any case in which the court, before whom the person convicted would have been tried but for the provisions of this Part, might by law order restitution.

*Origin*—Sec. 803, Code of 1892; R.S.C. 1886, ch. 176, sec. 27.

**Remand by justice to magistrate.**

**796.** Whenever any person is charged before any justice or justices, with any offence mentioned in sec. 773, and in the opinion of such justice or justices the case is proper to be disposed of summarily by a magistrate, as in this Part provided, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for trial before the nearest magistrate in like manner in all respects as a justice or justices are authorized to commit an accused person for trial at any court: Provided that no justice or justices, in any

province, shall so remand any person for trial before any magistrate in any other province.

2. Any person so remanded for trial before a magistrate in any city, may be examined and dealt with by the said magistrate or any other magistrate in the same city.

*Origin*—Sec. 804, Code of 1892; R.S.C. 1886, ch. 176, secs. 28, 29, 30.

*Proper to be disposed of summarily by a magistrate*—The word "magistrate" is here to be interpreted by sec. 771 and not by the Interpretation Act, R.S.C., ch. 1, as the context of Part XVI shows that the definition of the Interpretation Act, declaring that a justice of the peace is a magistrate should not apply.

Where the trial was before two justices for an offence under sec. 773, an exception taken to the proceedings because of the information having been taken before one only of the justices was held to be answered by sec. 796, as the one justice would have jurisdiction to remand for hearing before the both constituting a statutory "magistrate" for the purposes of Part XVI. *R. v. James* (1915) 9 W.W.R. 235, 239, 9 Alta. L.R. 66, 25 Can. Cr. Cas. 23, 32 W.L.R. 528.

**Provision of Part XV as to appeals applies.—Theft under § 10.—Keeping disorderly house.—Being inmate of bawdy-house.—Appeal if tried by two justices.—Application of sec. 1124 to convictions under Part XVI.**

**797.** When any of the offences mentioned in paragraphs (a) or (f) of sec. 773 is tried in any of the provinces under this Part before two justices of the peace sitting together, an appeal shall lie from a conviction for the offence in the same manner as from summary convictions under Part XV, and all provisions of that Part relating to appeals shall apply to every such appeal.

2. The provisions of sec. 1124 shall apply to convictions or orders made under the provisions of this Part.

*Origin*—3-4 Geo. V, Can., ch. 13, sec. 23; 58-59 Vict., Can., ch. 40, sec. 1.

*When any of the offences in 773 (a) or (f) is tried*—The offence tried is that set forth in the written charge or in the information used as a written charge. It should make no difference that the conviction was for the lesser offence of an attempt, and it is submitted that there would still be the appeal from that verdict; but see contra, *R. v. Lyons* (No. 2), 16 Can. Cr. Cas. 352 (Que.).

*Appeal from two justices on theft charges under \$10 or disorderly house charge*—Although Code sec. 771 interprets the word "magistrate" in Part XVI as including in certain provinces, "two justices," it does not follow that the words "two justices" in sec. 797 (relating to appeals from certain summary trials before two justices) shall be interpreted as including a police magistrate having the power of two justices. *R. v. Berenstein*, (1917) 24 B.C.R. 361; *R. v. Brown* (1916) 10 W.W.R. 695, 9 Alta. L.R. 494, 26 Can. Cr. Cas. 97 (Alta.); *R. v. Merker and Daniels*, 37 O.L.R. 582, 27 Can. Cr. Cas. 113. The legislative intention in the amendment of sec. 797 was to withdraw the right of appeal for offences specified in sub-secs. (e) and (f) of sec. 773 where the conviction had been made by a district judge or a police magistrate and to retain it only where the conviction had been made by two justices of the peace. *R. v. Brown*, supra; *R. v. Berenstein*, supra; and see *R. v. Robertson* (1915) 22 B.C.R. 13, 26 Can. Cr. Cas. 286; *R. v. Dubuc*, (1914) 22 Can. Cr. Cas. 436.

Cases under prior law; *R. v. McLennan* (No. 2), 10 Can. Cr. Cas. 14; *R. v. Pisoni*, 6 Terr. L.R. 238.

Oral testimony is admissible to prove that the conviction appealed against is erroneously dated, and that an appeal taken therefrom under sec. 797 was not, in fact, too late, as it would appear to be because of the error. *R. v. Martinuk* (1914) 6 W.W.R. 405, 22 Can. Cr. Cas. 275 (Sask.).

*Bail pending appeal*—Code sec. 750 (c) provides for bail if given within the time limited for filing a notice to appeal. Presumably after the expiration of that time bail might still be granted on a habeas corpus by a superior court judge if he saw fit to grant it. *R. v. Sands*, 9 W.W.R. 129, 131.

An irregularity in accepting cash bail instead of a recognizance where a recognizance is required, has been held not to be fatal to the appeal where the course adopted was assented to by the prosecution. *Robinson v. Saanich*, 20 W.L.R. 235, 20 Can. Cr. Cas. 241 (B.C.).

*Submission to jurisdiction*—Where an appeal is permitted under Code sec. 797, from a conviction for keeping a common bawdy-house and the accused takes the appeal to the district court, the latter court acquires jurisdiction over the person of the appellant and may proceed to a re-hearing "upon the merits," notwithstanding defendant's objection that the magistrate had no jurisdiction because the arrest was illegally made without a warrant. *R. v. Miller*, 25 Can. Cr. Cas. 151, 25 W.L.R. 296.

*Procedure on appeal*—See Code sec. 749 et seq.

*Conviction removed by certiorari not to be held invalid for irregularity and may be amended as on appeal*—Code sec. 1124.

**Part XV or provisions as to preliminary inquiries not to apply.**

**798.** Except as specially provided for in the two last preceding sections, neither the provisions of this Act relating to



preliminary inquiries before justices, nor of Part XV, shall apply to any proceedings under this Part.

*Origin*—Sec. 808, Code of 1892; R.S.O. 1886, ch. 176, sec. 34.

*"Any proceedings" under Part XVI*—A proceeding to enforce a penalty imposed by the magistrate, that is the imposition of imprisonment in default of payment, is a "proceeding" within the meaning of this section. *R. v. Davidson* (No. 1), [1917] 2 W.W.R. 160, 162, 11 Alta. L.R. 9, 28 Can. Cr. Cas. 44.

*Depositions need not be read over before defence*—Sec. 798 of the Code relieves the magistrate holding a summary trial under Part XVI from the duty of reading the depositions to the witnesses before the accused enters on his defence. *R. v. Klein*, 15 B.C.R. 165, 16 Can. Cr. Cas. 501.

*Constables' tariff*—The constables' tariff under Part XV, see sec. 770, was amended by the 1917 Can. Stat., ch. 14, sec. 5, so as to include various items specially concerning summary trial proceedings under Part XVI, and sec. 798 must be read subject to the later enactment.

#### Forms.

**799.** A conviction or certificate of dismissal under this Part may be in the form 55, 56, or 57 applicable to the case or to the like effect; and whenever the nature of the case requires it, such forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected, if the fine is not sooner paid.

*Origin*—Sec. 807, Code of 1892.

*Form of conviction*—Code form 55, following sec. 1152.

*Form of conviction upon a plea of guilty*—Code form 56, following sec. 1152.

*Form of certificate of dismissal*—Code form 57, following sec. 1152.

## PART XVII.

### TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

#### *Interpretation.*

#### **Definitions.**

**800.** In this Part, unless the context otherwise requires,—

- (a) 'two or more justices,' or 'the justices,' includes,
  - (i) in the provinces of Ontario and Manitoba, any judge of the county court being a justice, police magistrate or stipendiary magistrate, or any two justices, acting within the limits of their respective jurisdictions,
  - (ii) in the province of Quebec, any two or more justices, the sheriff of any district, except Montreal and Quebec, the deputy sheriff of Gaspé, and any recorder, judge of the sessions of the peace, police magistrate, district magistrate or stipendiary magistrate, acting within the limits of their respective jurisdictions,
  - (iii) in the provinces of Nova Scotia, New Brunswick, Prince Edward Island and British Columbia, any functionary or tribunal invested by the proper legislative authority with power to do acts usually required to be done by two or more justices.
  - (iv) in the provinces of Saskatchewan and Alberta, a judge of any district court, or any two justices, or any police magistrate or other functionary or tribunal having the powers of two justices and acting within the local limits of his or its jurisdiction;

- (v) in the Northwest Territories, any stipendiary magistrate, any two justices sitting together, and any functionary or tribunal having the powers of two justices, and
- (vi) in the Yukon Territory, any judge of the Territorial Court, any two justices sitting together, and any functionary or tribunal having the powers of two justices;
- (b) 'the common gaol or other place of confinement' includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which, by the law of that province, the offender may be sent.

*Origin*—6-7 Edw. VII, Can., ch. 45, sec. 6; sec. 809, Code of 1892; R.S.C. 1886, ch. 177, sec. 2.

#### *Application of Part.*

**Not to apply to certain offences in B.C. or P.E.I.**

**801.** The provisions of this Part shall not apply to any offence committed in the province of British Columbia or Prince Edward Island, punishable by imprisonment for two years and upwards; and in such provinces it shall not be necessary to transmit any recognizance to the clerk of the peace or other proper officer.

*Origin*—Sec. 829, Code of 1892; R.S.C. 1886, ch. 177, sec. 30.

#### *Jurisdiction.*

**Theft by person not over sixteen.**

**802.** Every person charged with having committed, or having attempted to commit any offence which is theft, or punishable as theft, and whose age, at the period of the commission or attempted commission of such offence, does not, in the opinion of the justice before whom he is brought or appears, exceed the age of sixteen years, shall, upon conviction thereof in open court, upon his own confession or upon proof, before any two or more justices, be committed to the common gaol or other place of confinement within the jurisdiction of such justices, there to be

imprisoned, with or without hard labour, for any term not exceeding three months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding twenty dollars, as such justices adjudge.

*Origin*—Sec. 810, Code of 1892; R.S.C. 1886, ch. 177, sec. 3.

*Theft*—The term "theft" as used in the Code has an enlarged statutory meaning more extensive than the common law term of "larceny"; see secs. 344-357.

"Two or more justices"—See definition in sec. 800.

*Place of imprisonment*—See the exception in 803 applicable to Ontario.

*Juveniles to be tried without publicity*—See sec. 644, and where a juvenile court has been established see sec. 10 of the Juvenile Delinquents Act, 1908.

*Children's Aid Societies in Ontario*—Notice of the charge is to be given in Ontario to the Children's Aid Society, if there be one in the county, wherever an information is laid against a boy under 12 or a girl under 13, and an opportunity is to be given the Society for investigation. The Prisons Act, R.S.C. 1906, ch. 148.

#### **No imprisonment in reformatory in Ontario.**

**803.** The provisions of this Part shall not authorize two or more justices to sentence offenders to imprisonment in a reformatory in the province of Ontario.

*Origin*—Sec. 880, Code of 1892; R.S.C. 1886, ch. 177, sec. 80.

#### **Not to prevent summary conviction.**

**804.** Nothing in this Part shall prevent the summary conviction of any person who may be tried thereunder before one or more justices, for any offence for which he is liable to be so convicted under any other Part of this Act or under any other Act.

*Origin*—Sec. 831, Code of 1892; R.S.C. 1886, ch. 177, sec. 8.

*What offences are theft or punishable as theft and triable under Part XV*—Code secs. 374, 375, 376, 377, 401.

*Under any other Act*—See the Juvenile Delinquents Act, 7-8 Edw. VII, ch. 40, as amended, 2 Geo. V, ch. 30 and 4-5 Geo. V, ch. 39.

*Procedure.***Procuring appearance of accused.**

**805.** Whenever any person, whose age is alleged not to exceed sixteen years, is charged with any offence mentioned in sec. 802, on the oath of a credible witness, before any justice, such justice may issue his summons or warrant, to summon or to apprehend the person so charged, to appear before any two justices, at a time and place to be named in such summons or warrant.

*Origin*—Sec. 811, Code of 1892; B.S.C. 1886, ch. 177, sec. 4.

*Offence which is theft or punishable as theft*—Sec. 802.

*Mode of service of summons*—Code sec. 812.

*Notice to parent or guardian*—In Ontario the magistrate may give notice of the charge to the parents or either of them or other person apparently interested in the welfare of the child; The Prisons Act, R.S.C. 1906, ch. 148, sec. 68; and must give notice to the Children's Aid Society for the county if the information is against a boy under 12 or a girl under 13.

**Remand of accused.—Bail.**

**806.** Any justice, if he thinks fit, may remand for further examination or for trial, or suffer to go at large, upon his finding sufficient sureties, any such person charged before him with any offence aforesaid.

2. Every such surety shall be bound by recognizance conditioned for the appearance of such person before the same or some other justice or justices for further examination, or for trial before two or more justices as aforesaid, or for trial by indictment at the proper court of criminal jurisdiction, as the case may be.

3. Every such recognizance may be enlarged, from time to time, by any such justice or justices to such further time as he or they appoint; and every such recognizance not so enlarged shall be discharged without fee or reward, when the person has appeared according to the condition thereof.

*Origin*—Sec. 812, Code of 1892; B.S.C. 1886, ch. 177, secs. 5, 6, 7.

**Election.—Objection of accused or parent or guardian.**

**807.** The justices before whom any person is charged and proceeded against under the provisions of this Part, before such

person is asked whether he has any cause to show why he should not be convicted, shall address the person so charged in these words, or words to the like effect:—

‘We shall have to hear what you wish to say in answer to the charge against you; but if you wish to be tried by a jury, you must object now to our deciding upon it at once.’

2. And if such person, or a parent or guardian of such person, then objects, no further proceedings shall be had under the provisions of this Part; but the justices may deal with the case according to the provisions set out in Parts XIII and XIV, as if the accused were before them thereunder.

*Origin*—Sec. 813, Code of 1892; B.S.C. 1886, ch. 177, sec. 8.

*Re-election of speedy trial after electing jury trial*—Code secs. 828, 830 (Part XVIII).

**When accused shall not be tried summarily.—Election to be stated in warrant.**

**808.** If the justices are of opinion, before the person charged has made his defence, that the charge is, from any circumstance, a fit subject for prosecution by indictment, or if the person charged, upon being called upon to answer the charge, objects to the case being summarily disposed of under the provisions of this Part, the justices shall not deal with it summarily, but may proceed to hold a preliminary inquiry as provided for in Parts XIII and XIV.

2. In case the accused has elected to be tried by a jury, the justices shall state in the warrant of commitment the fact of such election having been made.

*Origin*—Code of 1892, sec. 814; B.S.C. 1886, ch. 177, sec. 8.

*Before accused has made his defence*—A similar restriction is stated in sec. 784 as to summary trials under Part XVI.

*Charge a fit subject for prosecution by indictment*—Compare sec. 784 (Part XVI).

*Re-election of speedy trial under Part XVIII*—Code secs. 828, 830, 832.

**Summons to witness.**

**809.** Any justice may, by summons or by writing under his hand, require the attendance of any person as a witness upon

the hearing of any case before two justices, under the authority of this Part, at a time and place to be named in such summons.

*Origin*—Sec. 815, Code of 1892; R.S.C. 1886, ch. 177, sec. 10.

*Summoning witnesses*—Compare sec. 671.

#### **Binding over witness.**

**810.** Any such justice may require and bind by recognizance every person whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge.

*Origin*—Sec. 816, Code of 1892; R.S.C. 1886, ch. 177, sec. 11.

#### **Warrant when witness disobeys summons.**

**811.** If any person summoned or required or bound, as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is given of such person having been duly summoned, as hereinafter mentioned, or bound by recognizance, as aforesaid, either of the justices before whom any such person should have attended, may issue a warrant to compel his appearance as a witness.

*Origin*—Sec. 817, Code of 1892; R.S.C. 1886, ch. 177, sec. 12.

*Warrant for defaulting witness*—Compare secs. 673 and 674.

#### **Service of summons.**

**812.** Every summons issued under the authority of this Part may be served by delivering a copy thereof to the person, or to some inmate, apparently over sixteen years of age, at such person's usual place of abode, and every person so required by any writing under the hand or hands of any justice or justices to attend and give evidence as aforesaid, shall be deemed to have been duly summoned.

*Origin*—Sec. 818, Code of 1892; R.S.C. 1886, ch. 177, sec. 13.

"Every summons"—See sec. 805 (summons to defendant) and sec. 809 (summons to witness).

*Service of summons*—Compare sec. 656.

**Discharge of accused.—Sureties for good behaviour.**

**813.** If the justices upon the hearing of the case deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the person charged, and make out and deliver to him a certificate in the form 58, or to the like effect, under the hands of such justices, stating the fact of such dismissal: Provided that if the dismissal shall be on account only of it being deemed inexpedient to inflict any punishment the accused shall be discharged only on his finding sureties for his good behaviour.

*Origin*—Compare sec. 819, Code of 1892; R.S.C. 1886, ch. 177, sec. 14.

*Sureties for good behaviour*—Compare secs. 748, 1058, 1059.

*Where punishment not expedient*—Compare secs. 1081, 1082.

*Form of certificate of dismissal*—Code form 58, following sec. 1152.

**Form of conviction.**

**814.** The justices before whom any person is summarily convicted of any offence in this Part previously mentioned, may cause the conviction to be drawn up in form 59, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.

*Origin*—Sec. 820, Code of 1892; R.S.C. 1886, ch. 177, secs. 16, 17.

*Form of conviction*—Code form 59, following sec. 1152.

*What defects cured*—No conviction under Part XVII shall be quashed for want of form or be removed by *certiorari* or otherwise into any court of record; and no warrant of commitment under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted and there is a good and valid conviction to sustain the same. Code sec. 1123.

*Sentence to reformatory*—The court or person before whom any offender whose age at the time of his trial does not, in the opinion of the court, exceed sixteen years, is convicted, whether summarily or otherwise, of any offence punishable by imprisonment, may sentence such offender to imprisonment in any reformatory prison in the province in which such conviction takes place, subject to the provisions of any Act respecting imprisonment in such reformatory. R.S.C. 1906, ch. 148, sec. 29.

In no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison. *Ibid.*, sec. 29 (2).



Such imprisonment shall be substituted, in such case, for the imprisonment in the penitentiary or other place of confinement by which the offender would otherwise be punishable under any Act or law relating thereto; provided, that in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment shall be in the penitentiary. *Ibid.*, sec. 29 (3).

Every person imprisoned in a reformatory shall be liable to perform such labour as is required of such person. *Ibid.*, sec. 29 (4).

See also the Juvenile Delinquents Act, 1908, 7-8 Edw. VII, ch. 40, as amended, 2 Geo. V, ch. 30, and 4-5 Geo. V, ch. 39. For Ontario, see also the Prisons Act, secs. 67-70; for Manitoba, the Prisons Act, secs. 139-142, 9-10 Edw. VII, ch. 48; for Quebec, the Prisons Act, secs. 79-86; for New Brunswick, the Prisons Act, secs. 116-130; for Nova Scotia, the Prisons Act, secs. 90-97 and 105-108, 7-8 Edw. VII, ch. 55; for Prince Edward Island, the Prisons Act, secs. 132-137, 3-4 Geo. V, ch. 39, sec. 4.

#### Further proceeding barred.

**815.** Every person who obtains such certificate of dismissal, or is so convicted, shall be released from all further or other criminal proceedings for the same cause.

*Origin*—Sec. 821, Code of 1892; R.S.C. 1886, ch. 177, sec. 15.

*Release from further prosecution*—Sec. 815 is similar to sec. 792 as to summary trials; compare sec. 734 as to proceedings under the summary convictions procedure of Part XV.

#### Conviction and recognizances to be filed.

**816.** The justice before whom any person is convicted under the provisions of this Part shall forthwith transmit the conviction and recognizances to the clerk of the peace or other proper officer, for the district, city, county or union of counties wherein the offence was committed, there to be kept by the proper officer among the records of the court of general or quarter sessions of the peace, or of any other court discharging the functions of a court of general or quarter sessions of the peace.

*Origin*—Sec. 822, Code of 1892; R.S.C. 1886, ch. 177, sec. 18.

*Quarterly return by clerk of the peace*—By Code sec. 1139 it is provided that every clerk of the peace or other proper officer shall transmit to the Minister of Agriculture a quarterly return of the names of offenders, the offences and punishments mentioned in convictions transmitted to him under Part XVII of the Code.

**Restitution of property.—Value of property ordered to be paid.**

**§17.** No conviction under the authority of this Part shall be attended with any forfeiture, except such penalty as is imposed by the sentence; but whenever any person is adjudged guilty under the provisions of this Part, the presiding justice may order restitution of property in respect of which the offence was committed, to the owner thereof or his representatives.

2. If such property is not then forthcoming, the justices, whether they award punishment or not, may inquire into and ascertain the value thereof in money; and, if they think proper, order payment of such sum of money to the true owner, by the person convicted, either at one time or by instalments, at such periods as the justices deem reasonable.

3. The person ordered to pay such sum may be sued for the same as a debt in any court in which debts of the like amount are, by law, recoverable, with costs of suit, according to the practice of such court.

*Origin*—Sec. 824, Code of 1892; R.S.C. 1886, ch. 177, secs. 20, 21 and 22.

*Restitution of stolen property*—Compare with secs. 795 and 1050.

**Proceedings where penalty is not paid.**

**§18.** Whenever the justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this Part, and such penalty is not forthwith paid, they may, if they deem it expedient, appoint some future day for the payment thereof, and order the offender to be detained in safe custody until the day so appointed, unless such offender gives security to the satisfaction of the justices, for his appearance on such day; and the justices may take such security by way of recognizance or otherwise in their discretion.

2. If at any time so appointed such penalty has not been paid, the same or any other justices may, by warrant under their hands and seals, commit the offender to the common gaol or other place of confinement within their jurisdiction, there to remain for any time not exceeding three months, reckoned from the day of such adjudication.

*Origin*—Sec. 825, Code of 1892; R.S.C. 1886, ch. 177, secs. 23, 24.

**Costs.—Order for payment.—Costs when no conviction.**

**819.** The justices before whom any person is prosecuted or tried for any offence cognizable under this Part may, in their discretion, at the request of the prosecutor or of any other person who appears on recognizance or summons to prosecute or give evidence against such person, order payment to the prosecutor and witnesses for the prosecution, of such sums as to them seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they have severally incurred in attending before them, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein, and to the constables and other peace officers payment for the apprehension and detention of any persons so charged.

2. The justices may, although no conviction takes place, order all or any of the payments aforesaid to be made, when they are of opinion that the persons, or any of them, have acted in good faith.

*Origin*—Sec. 826, Code of 1892.

*Limit of costs out of public money*—See secs. 820 and 821.

**Costs to be certified by justices.—Limit.**

**820.** The amount of expenses of attending before the justices and the compensation for trouble and loss of time therein, and the allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such justices.

2. The amount of the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of eight dollars.

*Origin*—Sec. 828, Code of 1892; R.S.C. 1886, ch. 177, secs. 28, 29.

**Order for payment.—On officer receiving fines in district.—Officer must pay on sight of order.**

**821.** Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper

justices as aforesaid, shall be forthwith made out and delivered by the said justices or one of them, or by the clerk of the peace or other proper officer, as the case may be, to such prosecutor or other person, upon such clerk or officer being paid his lawful fee for the same, and shall be made upon the officer to whom fines imposed under the authority of this Part are required to be paid over in the district, city, county or union of counties in which the offence was committed, or was supposed to have been committed.

2. Such officer shall upon sight of every such order, forthwith pay to the person named therein, or to any other person duly authorized to receive the same on his behalf, out of any moneys received by him under this Part, the money in such order mentioned, and he shall be allowed the same in his accounts of such moneys.

*Origin*—Sec. 828, Code of 1892; R.S.C. 1886, ch. 177, secs. 28, 29.

*Moneys received by municipal officer*—See sec. 1036 (3), 1037.



## PART XVIII.

### SPEEDY TRIALS OF INDICTABLE OFFENCES.

#### *Application of Part.*

##### **Part only of Canada.**

**822.** The provisions of this Part do not apply to the North-west Territories or the Yukon Territory.

*Origin*—6-7 Edw. VII, Can., ch. 45, sec. 6; R.S.C. 1906, ch. 146, sec. 822; Code of 1892, sec. 762; 52 Vict., Can., ch. 47, sec. 3.

*References to Speedy Trials Act*—A reference in any Act of the Parliament of Canada to the "Speedy Trials Act" is to be construed as a reference to Part XVIII of the Code, Interpretation Act, R.S.C. ch. 1, sec. 29.

*North-West Territories*—Whenever any person charged with a criminal offence is committed to gaol in the North-West Territories for trial, the person in charge of such gaol shall, within 24 hours, notify the nearest stipendiary in writing, and the stipendiary shall cause the prisoner to be brought before him for trial either with or without a jury as the case requires. N.W.T. Act, R.S.C., ch. 62, sec. 53. Any police guardhouse or guardroom in the Territories is to be considered a gaol (sec. 55), and by sec. 56 the power is conferred on the Governor-in-Council to declare any building or any part thereof or any enclosure to be a gaol or lock-up.

*Yukon Territory*—Special provisions are made by the Yukon Act, R.S.C., ch. 63, for summary trial without a jury as to certain offences specified in sec. 65 thereof without the consent of the accused, and as to other criminal offences with such consent (sec. 66); and by sec. 83 of that Act whenever any person charged is committed to gaol for trial, the sheriff or other person in charge of such gaol shall, within twenty-four hours, notify a judge of the court, in writing, that such prisoner is so confined, stating his name and the nature of the charge preferred against him; whereupon, with as little delay as possible, one of the judges of the court shall cause the prisoner to be brought before him for trial, either with or without a jury, as the case requires.

*Interpretation.***Definitions.**

**823.** In this Part, unless the context otherwise requires,—

- (a) 'judge' means and includes,
  - (i) in the province of Ontario, any judge of a county or district court, junior judge or deputy judge authorized to act as chairman of the general sessions of the peace,
  - (ii) in the province of Quebec, in any district wherein there is a judge of the sessions of the peace such judge of the sessions, and in any district wherein there is no judge of the sessions of the peace, but wherein there is a district magistrate, such district magistrate, or any judge of sessions of the peace; and in any district wherein there is no judge of the sessions of the peace and no district magistrate, any judge of the sessions of the peace or the sheriff of such district.
  - (iii) in each of the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any judge of a county court,
  - (iv) in the province of Manitoba, the Chief Justice or a puisne judge of the Court of King's Bench, or any judge of a county court,
  - (v) in the province of British Columbia, the Chief Justice or a puisne judge of the Supreme Court, or any judge of a county court;
  - (vi) in the provinces of Saskatchewan and Alberta, a judge of the Supreme Court of the province, or of any district court;
- (b) 'prosecuting officer' includes in the province of Ontario, the County Crown Attorney, in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the province of Manitoba, any Crown Attorney, the prothonotary of the Court of King's Bench, and any deputy prothonotary thereof, any deputy clerk

of the peace, and the deputy clerk of the Crown and pleas for any district in the said province, and in the provinces of Saskatchewan and Alberta, any local registrar, clerk, or deputy clerk of the Supreme Court of the province, or any clerk or acting clerk of a district court, or any person conducting under proper authority the Crown business of the court.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; 6-7 Edw. VII, ch. 45, sec. 6; 6-7 Edw. VII, ch. 8, sec. 2; 63-64 Vict., ch. 46, sec. 3; 58-59 Vict., ch. 40, sec. 1; R.S.C. 1906, ch. 146, sec. 823; sec. 763, Code of 1892; 52 Vict., ch. 47, sec. 2.

*Sub-sec. (b)*—The “prosecuting officer”—The word “includes” in sub-sec. (b) is not a term of restriction but of extension, as showing that in addition to something already existing there is a further inclusion; and the difference is well brought out and marked by the prior definition of “Judge” which “means and includes” etc., etc., and which therefore is primarily restricted to the “meaning” as defined: *R. v. Jun Goon* (1916), 10 W.W.R. 24, 25 Can. Cr. Cas. 415, 33 W.L.R. 761 (B.C.). *R. v. Kershaw* (1858), 6 E. & B. 999 at 1007; *R. v. Hermann* (1879), 4 Q.B.D. 284 at 288, wherein Lord Chief Justice Coleridge said:—

“The words ‘shall include’ are not identical with, or put for ‘shall mean.’ The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation which the sections of the Act would otherwise have, it merely provides that certain specified cases shall be included.” And see *Dilworth v. New Zealand Com. of Stamps* (1898) 68 L.J.P.C. 1, at 4.

Sub-sec. (b) of sec. 823 does not limit but rather extends the words “prosecuting officer” so as to include under that designation persons who otherwise would not be regarded as coming within the term. *R. v. Jun Goon*, (1916) 10 W.W.R. 24, 22 B.C.R. 381, 25 Can. Cr. Cas. 415, 33 W.L.R. 761. On the other hand the term “judge” under Code sec. 823 (a) is declared to “mean and include” the functionaries named therein. So, in a province as to which there is no applicable Code definition as to who is to be “included” in the term “prosecuting officer,” the clerk of the peace or other officer appointed for the purpose under provincial law is the prosecuting officer, or an appointment may be made *ad hoc* by the provincial authorities authorizing a barrister to conduct the prosecution. *R. v. Jun Goon*, (1916) 10 W.W.R. 24, 22 B.C.R. 381, 25 Can. Cr. Cas. 415. *Semble* the clerk of the peace, where there is such an officer, has a common law jurisdiction to arraign prisoners in local courts. *Ibid.*, per Martin, J.A.

*Ontario tariff to Crown Attorney*—In all criminal cases tried at the Court of General Sessions of the Peace or the County Judge’s Criminal



Courts, in which no costs have been ordered to be paid, or, if ordered to be paid, cannot be made of the defendant, the Crown Attorney shall be entitled to receive for the services rendered by him in such case, fees (to be paid upon the certificate of the chairman) as set out in Schedule "A" of the Administration of Justice Expenses Act, R.S.O. 1914, ch. 95.

*Jurisdiction.*

**Judge a court of record.—Record to be filed.**

**824.** The judge sitting on any trial under this Part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and in every province of Canada, except in the province of Quebec, and except as hereinafter provided, such court shall be called the county court judge's criminal court of the county or union of counties, or judicial district, in which the same is held:

(a) In the provinces of Saskatchewan and Alberta, and in the provisional judicial districts of the province of Ontario, such courts shall be called the district court judge's criminal court of the district in which the same is held.

2. In the province of Saskatchewan such court shall be called the district court judge's criminal court, and, in the province of Alberta, the district judge's criminal court of the district in which the same is held. [6-7 Edw. VII, ch. 45, sec. 6.]

3. The record in any such case shall be filed among the records of the court over which the judge presides, and as part of such records.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; 6-7 Edw. VII, Can., ch. 45, sec. 6; R.S.C. 1906, ch. 146, sec. 824; Code of 1892, sec. 764; 52 Vict., Can., ch. 47, sec. 4.

*A court of record*—Although the criminal court constituted for the purposes of Part XVIII is a court of record, it is to be doubted whether the verity of a statement in the record in regard to a mixed matter of law and fact essential to the jurisdiction should be conclusively presumed on an appeal by reserved case under sec. 1013 *et seq.*; if the material filed in the court below and transmitted with the stated case discloses an absence of jurisdiction, it may be proper for the appellate court to determine the point adversely to a formal entry in the trial book. See *Brunet v. The King*, (1918) 30 Can. Cr. Cas. 16, 23, 57

S.C.R. 83; *Mayor of London v. Cox*, L.R. 2 H.L. 239, 262; *Falkingham v. Victorian Railway Commissioner* [1900] A.C. 452.

But it has been held that on a habeas corpus motion, the recital in the record of facts necessary to confer jurisdiction is conclusive and cannot be contradicted by extrinsic evidence. *R. v. Guay*, (1914) 23 Can. Cr. Cas. 243, 21 Rev. de Juris. 253 (Que.).

In Ontario, the statutory writ of habeas corpus will not be issued to review a conviction made by a court of record. *R. v. Murray*, 28 Ont. R. 549, 1 Can. Cr. Cas. 452; *R. v. St. Denis*, 8 P.R. 16 (Ont.); 29-30 Vict. (1866), ch. 45 (former province of Canada).

*Territorial limits*—The Federal Parliament may impose upon existing provincial courts or judges the duty of administering the criminal law without further provincial legislation to specifically include the criminal jurisdiction. *Re Vancini*, 34 S.C.R. 61, 8 Can. Cr. Cas. 228; *re Seeley*, 41 S.C.R. 5, 14 Can. Cr. Cas. 270. Where the jurisdiction is to be exercised by "any judge of a county court," it means any judge having, by force of the provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he may hold a "speedy trial" under Part XVIII. *Re County Courts of British Columbia*, 21 S.C.R. 446. His jurisdiction may be extended beyond his own county in certain contingencies by provincial legislation, but sec. 823, taken alone, does not mean that the judge of any county may preside anywhere in the province for the purposes of Part XVIII. *Re County Courts of British Columbia*, supra.

The Judges Act, R.S.C. 1906, ch. 138, sec. 30, deals with the jurisdiction of the judge of one county to sit *pro tempore* for the judge of another county by request or under special governmental authority.

It has also been held that it is competent for the provincial legislature to narrow or enlarge the territorial jurisdiction of any county court judge; and that, therefore, it may provide that the county judge of another county may preside *pro tempore* in the event of a vacancy occurring by death in the county in which the proceedings are pending. *R. v. Brown*, 13 Can. Cr. Cas. 133 (N.S.).

An allegation of the place of the offence is a material one to be proved so as to confer jurisdiction where the accused was not found or apprehended in the same county or district in which the trial is to take place, and there was consequently no jurisdiction upon that ground. *R. v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113; Code secs. 577, 580, 582.

An election of speedy trial without a jury in the County Court Judge's Criminal Court does not confer jurisdiction in a case in which there would be no jurisdiction over the accused if the trial were upon indictment before a jury in the same territorial district. *R. v. O'Gorman*, 15 Can. Cr. Cas. 173, 18 O.L.R. 427; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 113. Compare *R. v. Nevison* [1919]

1 W.W.R. 793 (B.C.); R. v. Thornton (1915) 9 W.W.R. 825, 968, 9 Alta. L.R. 163; R. v. McKeown (1912) 20 Can. Cr. Cas. 492; R. v. Harrison [1918] 1 W.W.R. 12, 10 Sask. L.R. 434.

*Punishment of whipping*—See secs. 80, 204, 216, 276, 292, 293, 301, 302, 446, 457, 1060.

*Alberta and Saskatchewan district courts*—The confusion in reference to the names of the courts in these provinces was probably due to the fact that by the statutes of 1907 certain amendments to the Code as regards these two provinces were made by a statute having the general title, "An Act to amend the statute law in its application to the provinces of Saskatchewan and Alberta," 6-7 Edw. VII, ch. 45. Sec. 824 was re-enacted in an amended form, the former sub-sec. (2) becoming sub-sec. (3) as above and a new sub-sec. (2) being introduced. This was probably overlooked on the Code Amendment Act, 8-9 Edw. VII, ch. 9, being passed, for a somewhat similar provision in that Act became paragraph (a) without any amendment of sub-sec. (2). Paragraph (a) being the later enactment will control and practically supersede sub-sec. (2), although the official text of the statute (in 1919) includes both.

*Ontario*—By the County Court Judges' Criminal Courts Act, R.S.O. 1914, ch. 61, the judge of every county and district court in Ontario, or the junior or deputy judge thereof, authorized to preside at the sittings of the court of general sessions of the peace (see Code sec. 582), is constituted a court of record for the trial out of sessions and without a jury, of any person committed to gaol on a charge of being guilty of an offence for which such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions and without a jury; the court so constituted "shall have the powers and perform the duties mentioned in Part 18 of the Criminal Code." R.S.O. 1914, ch. 61, sec. 2. The court so constituted shall be called the county (or district) court judges' criminal court of the county (or district) in which the same is held. R.S.O., 1914, ch. 61, sec. 2.

*Ontario tariff to Clerks of the Peace*—For services in County, or District Court Judge's Criminal Court:—

- |  |        |
|--|--------|
| (86.) Attending and service in court, and making all necessary entries; for each prisoner brought before the judge, and not consenting to be tried. In all .....                           | \$0.50 |
| (87.) For attendance in court, and services rendered at trial, making necessary record of proceedings and all necessary entries, including calendar of conviction. For each prisoner ..... | 2.00   |
| (88.) Preparing judge's warrant to bring up the body of prisoner, and delivering same to sheriff. For each prisoner .....  | .50    |
| (89.) Issuing writ of summons to witness when necessary....  | .40    |

(90.) Copy of summons. Each .....	.20
(91.) Warrant of remand, when issued and delivered to Sheriff .....	.50
(92.) For warrant to arrest, taking and estreating recognizances and proceedings to enforce same . . . . (the same fees as allowed for like services at the Grand Sessions of the Peace.)	

**Offences triable under this part by consent.—Entry of consent.—Trial out of sessions and term.—Committed for trial.**

**825.** Every person committed to gaol for trial on a charge of being guilty of any of the offences which are mentioned in sec. 582 as being within the jurisdiction of the general or quarter sessions of the peace, may, with his own consent, be tried in any province of Canada, and, if convicted, sentenced by the judge.

2. An entry shall be made of such consent at the time the same is given.

3. Such trial shall be had under and according to the provisions of this Part out of sessions and out of the regular term or sittings of the court, and whether the court before which, but for such consent, the said person would be triable for the offence charged or the grand jury thereof is or is not then in session.

4. A person who has been bound over by a justice or justices under the provisions of sec. 696, and has been surrendered by his sureties, and is in custody on the charge, or who is otherwise in custody awaiting trial on the charge, shall be deemed to be committed for trial within the meaning of this section.

5. Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by the judge under this Part, and thereupon the judge shall have no jurisdiction to try or sentence the accused under this Part.

6. A person accused of any offence within subsection 1 of this section, who has been bound over by a justice or justices under the provisions of sec. 696 and is at large under bail, may notify the sheriff that he desires to make his election under this Part, and thereupon the sheriff shall notify the judge, or the prosecuting officer, as provided in sec. 826.

7. In such case, the judge having fixed the time when, and the place where the accused shall make his election, the sheriff shall notify the accused thereof, and the accused shall attend at the time and place so fixed, and the subsequent proceedings shall be the same as in other cases under this Part.

8. The recognizance taken when the accused was bound over as aforesaid shall in such case be obligatory upon each of the persons bound thereby, as to all things therein mentioned, with reference to the appearance of the accused at the time and place so fixed and to the trial and proceedings thereupon, in like manner as if such recognizance had been originally entered into with reference thereto: Provided that notice in writing shall be given either personally or by leaving the same at the place of residence, as described in the recognizance, of the persons bound as sureties by such recognizance, that the accused is to appear at such time and place to make his election as aforesaid.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; 6-7 Edw. VII, Can., ch. 45, sec. 6; R.S.C. 1906, ch. 146, sec. 825; 63-64 Vict., Can., ch. 46, sec. 3; Code of 1892, sec. 765; 32-33 Vict., Can. (1869), ch. 35.

*Who may elect a speedy trial*—A person committed for trial, but released on bail and thereupon appearing before a county court judge's criminal court and electing a speedy trial without a jury is then in custody for the purposes of the jurisdiction of that court to hold the trial, although he was not placed under arrest by the sheriff or other officer attending the court. *B. v. Jun Goon*, (1916) 10 W.W.R. 24, 22 B.C.R. 381, 25 Can. Cr. Cas. 415, 33 W.L.R. 761.

Under sec. 825, every person committed for trial for an offence within the jurisdiction of the General or Quarter Sessions of the Peace may, with his consent, be tried under Part XVIII. A person in custody awaiting trial, however he may so find himself, is under s.s. 4 to "be deemed to be committed for trial within the meaning of the section." The accused is "in custody awaiting trial on the charge," when he surrenders himself for trial on the appointed date on making his election. *Giroux v. The King*, (1917) 56 S.C.R. 63, 29 Can. Cr. Cas. 258, 267. *Re Walsh*, 23 Can. Cr. Cas. 7 at p. 9; *R. v. Thompson*, 14 Can. Cr. Cas. 27, at 30. The "charge" means the charge mentioned in sub-sec. (1), i.e., a charge cognizable by the Court of Sessions. The interests of justice are protected, as far as parliament considered such protection necessary, by the provision of sub-sec. 5 that, where the offence charged is punishable with imprisonment exceeding a period of five years, the Attorney-General may require a trial by jury. *Giroux v. The King*, *supra*.

Nothing precludes an election for trial under Part XVIII by an accused under indictment, no matter how or when presented, if he comes within the comprehensive terms of sec. 825. The difficulty which formerly existed owing to the supposed impossibility of complying with sec. 827 in the absence of depositions taken upon a magistrate's preliminary investigation in cases where such investigation had been waived and the accused had consented to be committed for trial without it, was overcome by the insertion of the words "if any" in sec. 827 by 8 and 9 Edw. VII, c. 9, s. 2. Any similar difficulty in cases of indictment, preferred under the section now numbered 873, was thus likewise removed. *Giroux v. The King*, supra. The special provision made by sec. 828 for re-election after indictment by a person who had already elected for trial by jury does not import an intention to preclude the right of election in other cases after indictment. The *raison d'être* of this provision was not to provide for the case of an indictment having been found, but to confer or make clear the right to a second election. Its terms, however, pointedly indicate that the presentment of an indictment was not regarded by parliament as a bar to the right of election. No good reason can be suggested why, if the man who has already elected for a jury trial should be allowed to re-elect after indictment and up to the moment when his actual trial begins, the man who has never elected should be debarred from doing so by the presentment of an indictment. *Giroux v. The King*, supra, (per Anglin, J.); *re Walsh*, 23 Can. Cr. Cas. 7, 16 D.L.R. 500; *R. v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. R. 608.

Parliament has, in explicit terms provided for an election even after plea, since plea precedes the commencement of the trial. *Giroux v. The King*, supra; *re Walsh*, 23 Can. Cr. Cas. 7 (N.S.).

The fact that bail has been granted after the committal has been ordered does not alter the situation as regards the procedure to obtain the election. It is said in *Hawkins' Pleas of the Crown* (8th ed.) 138, Bk. 2, ch. 15, s. 3, that "A man's bail are looked upon as his gaolers of his own choosing, and that the person bailed is, in the eye of the law, for many purposes, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler." And see *Regina v. Lawrence* (1896), 1 Can. Cr. Cas. 295, 5 B.C.B. 160, at 164, applying *R. v. Burke* (1893), 24 Ont. 64, affirming the right to election "although the accused has never been received into custody at all except in the way of surrender merely for the purpose of appearing before the judge for election." It is not necessary that the "prisoners" when brought before the judge for election should be surrendered by their bail; so long as they are before the judge and still under bail that is sufficient to satisfy the statute and their election in such case is a valid one for they are both "prisoners" and "otherwise in custody" at that time within the true intent and meaning of secs. 825 (4) and 827. In the case of *R. v. Day*,

20 Can. Cr. Cas. 325, 16 B.C.R. 323, the accused, having been bailed after committal, came voluntarily before the judge (not being brought up by the sheriff), and elected, and the court of appeal unanimously rejected as "altogether too technical" the submission that the election was thereby invalidated. *R. v. Jun Goon*, 10 W.W.R. 24, 22 B.C.R. 381, 25 Can. Cr. Cas. 415, 429; *R. v. Cameron*, 1 Can. Cr. Cas. 169 (Que.). It has been held that a person being conveyed in custody from one district to another and temporarily detained at a place *en route* is not entitled to make his election at that place. *R. v. Tetreault*, (1909) 17 Can. Cr. Cas. 259 (Sask.).

In the case of re-election, whatever the offence and however punishable, by the proviso to s. 828 after indictment the consent in writing of the prosecuting officer acting under sec. 826 (2), is required, and in any case either the judge or the prosecuting officer may prevent effect being given to a second election (sub-sec. 3). The fact that the indictment under which the accused was awaiting trial had been preferred under sec. 873 (1) of the Code, by leave of the jury court and without a preliminary enquiry having been held will not prevent his exercising the right of election either under sec. 825 or sec. 828. *Giroux v. The King*, 56 S.C.R. 63, 29 Can. Cr. Cas. 258, affirming *R. v. Giroux*, 26 Que. K.B. 323.

Parliament, by one amendment after another, has overcome the several restrictions that judges have from time to time sought to place upon the right to elect for trial before a judge of the Court of Sessions, thus evincing its policy and determination that this mode of trial shall, as far as possible, be available within the limits and subject to the safeguards which it has prescribed, and its desire that the sections of the Code providing for it should receive a liberal rather than a narrow construction. *Giroux v. The King*, 56 S.C.R. 63, (per Anglin, J.).

See also *R. v. McKeown* (1912) 20 Can. Cr. Cas. 492 (Que.); *R. v. Harrison*, [1918] 1 W.W.R. 12, 10 Sask. L.R. 434; *R. v. Nevison* [1919] 1 W.W.R. 793 (B.C.).

"*May*" with his own consent be tried]—The word "may" in the first sub-section of section 825, read in the light of the other provisions, seems to create a duty on the part of the official to afford a prisoner the opportunity to exercise this option. *R. v. County Court, re Walsh*, 23 Can. Cr. Cas. 7 at p. 14, 48 N.S.R. 1.

Where the accused, after a preliminary investigation, was bound over by a justice under section 696 to appear for trial, and not being surrendered by his sureties, an indictment was preferred against him before the grand jury and a bench warrant was issued by a judge for his arrest as he had not appeared on his recognizance, he is in custody awaiting trial on the charge laid against him, and within the terms of sub-section 4 of sec. 825, so as to be entitled to elect summary trial. There is no difference in effect between the case of sureties rendering a defendant under a warrant (sec. 703) and the case of an arrest under

a bench warrant.. One is kindred to the other, and the words "or otherwise" ought to be held to cover such a case. *R. v. County Judge's Criminal Court, re Walsh*, 23 Can. Cr. Cas. 7, at p. 11, 48 N.S.R. 1. The accused does not get the privilege of electing for a speedy trial as a general right under all circumstances without effort on his part. If he is brought up on a bench warrant to answer an indictment preferred by leave of a jury court, and the latter is presided over by a judge not empowered under Part XVIII, it may be necessary for him to make formal application to the court under whose control he happens to be for an order that he should be taken by the sheriff before the County Court Judge's Criminal Court that he may elect trial there. If the accused is not in close custody, he must put himself in a position to claim the right. *R. v. Sovereign*, 20 Can. Cr. Cas. 103 (Ont.); *R. v. Burke*, 24 Ont. R. 64.

*Electing for or against speedy trial*—When the accused is first brought before the judge of the county court judge's criminal court (or under certain circumstances before the prosecuting officer) he is to be given the privilege of electing for or against a speedy trial without a jury. Sec. 827.

*Election for trial by the court not by any particular judge of same*—The election of speedy trial is to be one for trial before the particular County Court Judge's Criminal Court, and is not to be limited to the judge before whom the election is made. *R. v. McDougall*, 8 Can. Cr. Cas. 234 (Ont.); *R. v. Stewart*, 43 N.S.R. 353, 15 Can. Cr. Cas. 331; *R. v. Guay*, (1914) 23 Can. Cr. Cas. 243, 21 Rev. de Juris, 253 (Que.).

*Speedy trial under Part XXIII bars proceedings on pending indictment for same offence*—It may be that by pleading to the indictment when arraigned on an indictment preferred by leave of the court the accused chose his forum and acquired the privilege to be tried by a jury. But if he applies for and obtains leave to be tried by the judge of the sessions he waived this privilege and selected another forum which he had a right to do with the consent of the prosecuting officer. If the accused not only appeared voluntarily before the judge of the sessions to answer the charge, but at the trial he, with the assistance of counsel, cross-examined the Crown witnesses and examined witnesses on his own behalf, he cannot, after conviction there, raise objection to the proceedings before the sessions court on the ground that a bill of indictment had been already found against him at the Assizes for the same offence as that for which he was tried in the Court of Sessions nor object on the ground that such indictment remains undisposed of. *Giroux v. The King*, 56 S.C.R. 63, 29 Can. Cr. Cas. 258, affirming *R. v. Giroux*, 26 Que. K.B. 323.

His conviction before the judge of the Session and the sentence would be a complete bar to any further proceedings on the indictment. *Re Walsh* (*R. v. County Judge's Criminal Court*) 16 D.L.R. 500, at 510,



23 Can. Cr. Cas. 7, at 19; *R. v. Burke*, 24 O.R. 64. The proper course would be to move to have it quashed. *Giroux v. The King*, *supra*.

*Procedure.*

**Sheriff to notify judge after committal of accused.—Notice to prosecuting officer when judge does not reside in county.**

**826.** Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him.

2. Where the judge does not reside in the county in which the prisoner was committed, the judge having received the notification and having obtained the depositions on which the prisoner was committed, if any, may forward them to the prosecuting officer with instructions to cause the prisoner to be brought before him instead of the judge, naming as early a day as possible for the trial in case the prisoner shall elect to be tried by the judge, without a jury, and the prosecuting officer shall, in such case, with as little delay as possible cause the prisoner to be brought before him.

*Origin*—Sec. 766, Code of 1892.

*Sheriff's notice to judge*—Sec. 826 provides that "every sheriff shall, within 24 hours after any person charged as aforesaid is committed to gaol for trial, notify the judge," etc. That means 24 hours, not after the justice has made the order committing, but 24 hours after the party is actually committed to prison and is taken in custody there. The language of a statute of this character is to be strictly construed. *R. v. Tetreault (Sask.)* 17 Can. Cr. Cas. 259.

*Duties of the prosecuting officer*—Under sec. 826 (2) and the first part of secs. 827-8, the duty which now may be discharged by the prosecuting officer in taking the election and re-election is one which was formerly discharged by the judge alone, and is of a judicial nature; then under sub-secs. 3 and 4 of 827 and 833 the duties are primarily those of a ministerial officer of the court; then under sec. 828 in the granting or withholding the consent for re-election after indictment, required by the proviso, there is the discharge of a duty quite distinct from either of the foregoing and pertaining more to the powers of the Attorney-General as representing the Crown. *R. v. Jun Goon*, (1916) 10 W.W.R. 24, 25 Can. Cr. Cas. 415, 425, 22 B.C.R. 381, 33 W.L.R. 761.

*Ontario tariff of sheriff's fees*—

(34.) Notification to judge, for each prisoner .....	\$1.00
(35.) Bringing up each prisoner before judge, to elect as to mode of trial, including attendance at court .....	2.00
(36.) Bringing up each prisoner for arraignment on trial, and for sentence, including attendance-at court, whether convicted or acquitted .....	2.00

*Persons jointly accused*—See sec. 829.

**Arraignment.—The charge.—The option.—Procedure where accused consents to trial without jury.—Prosecuting officer prefers charge.**

**827.** The judge, having first obtained the depositions on which the prisoner was so committed, if any, or the prosecuting officer, as the case may be, shall state to the prisoner,—

- (a) that he is charged with the offence, describing it;
- (b) that he has the option to be tried forthwith before a judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner has been brought before the prosecuting officer, and consents to be tried by the judge, without a jury, the trial shall proceed on the day named by the judge in the manner provided by the next following subsection.

3. In such case or if the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in form 60.

4. Such plea shall be entered on the record, and the judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by a court having jurisdiction to try the offence in the ordinary way.

*Origin*—Sec. 767, Code of 1892.

*Manner of taking option on arraignment*—The judge is to “state” to the accused what offence he is charged with, and the offence is to be “described.” Sec. 827. There is no essential difference in the stating of the offence at this stage and the preferring of the charge on his

arraignment for trial. *R. v. Jun Goon*, 10 W.W.R. 24 at 29, per Martin, J.A.; 22 B.C.R. 381, 33 W.L.R. 761, 25 Can. Cr. Cas. 415.

*Recording the consent*—An entry shall be made "of the consent at the time the same is given" (sec. 825).

In sec. 1152, it is declared that "the several forms in this Part, varied to suit the case or forms to the like effect, shall be deemed good, valid and sufficient in the cases thereby respectively provided for." Code form 60 is headed "sec. 827" and the recital is as follows: "and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried." There is nothing about information of the chance of being admitted to bail. In view of these provisions it has been held that parliament did not contemplate that there should be any recital in the conviction of the fact that the prisoner had been given the information about the chance of bail, though it was the duty of the judge to give it, but that, on the contrary, it was intended that the recital in the statutory form would suffice to show the jurisdiction. *R. v. Therrien* (No. 1), 25 Can. Cr. Cas. 275 (Que.); *R. v. Mali* (No. 1) (1912) 1 W.W.R. 766, 22 Man. R. 29, 19 Can. Cr. Cas. 184, 1 D.L.R. 256, and *R. v. Mali* (No. 2), (1912) 1 W.W.R. 1047; 19 Can. Cr. Cas. 188, 1 D.L.R. 484, 20 W.L.R. 601, 22 Man. R. 29.

*Fixing day for trial is directory only and does not affect jurisdiction*—The County Court Judge's Criminal Court is a Court of Record, for the trial of certain criminal offences, and the judge thereof for all purposes and proceedings connected therewith and relating thereto, has all the powers of a Court of Record, and a prisoner who elects to be tried before such court submits himself not to the particular judge but to the County Court Judge's Criminal Court, which court does not lose jurisdiction over him until he is tried for the offence for which he is committed. *R. v. Stewart*, 43 N.S.R. 353, 15 Can. Cr. Cas. 331. The mere fact that the judge of the court is not present on the day fixed for the trial cannot possibly affect the jurisdiction of the court, which arises and continues by reason of the prisoner's election to be there tried. The fixing of a particular day for the trial has nothing to do with giving jurisdiction; it is simply a matter of procedure of a directory character. The fact that the judge has named a day for the trial, and does not then try the prisoner as intended, in no way prevents or limits his power to fix another day on which the trial takes place. *R. v. Stewart*, 43 N.S.R. 353, 15 Can. Cr. Cas. 331.

*If prisoner consents to a speedy trial, the charge is to be preferred and tried*—To prefer a "charge" under the Speedy Trials sections of the Code is preferring a document very analogous to an indictment. The statute requires a statement which is an indictment to all intents and purposes. *R. v. Lonar*, 25 N.S.R. 124; *R. v. Inglis*, 25 N.S.R. 261; *R. v. Cross* (1909) 14 Can. Cr. Cas. 171, 43 N.S.R. 320.

At the opening of a "speedy trial" the clerk of the peace or other prosecuting officer reads to the accused the charge laid against him

upon which he was committed for trial, and also such additional charges as may by leave of the judge be preferred by the prosecuting officer. Code secs. 827, 833, 834. When this is done the preferring of the charge is complete and constitutes the first part of the arraignment, the second part of which consists in asking the accused if he is guilty or not guilty. *R. v. Jun Goon*, 10 W.W.R. 24 at 29, 22 B.C.R. 381, 33 W.L.R. 761, 25 Can. Cr. Cas. 415.

*Joinder of counts in the charge*—Secs. 856 and 857 will apply to the joinder of counts in the charge in like manner as they do to joinder of counts in an indictment. *R. v. Cross* (1909) 43 N.S.R. 320, 14 Can. Cr. Cas. 171.

*Added or substituted charges*—Code sec. 834.

*Sub-sec. (3)—The "prosecuting officer" to prefer the charge*—The due appointment of a person as prosecuting officer is not a question of jurisdiction, using that word in its proper sense, namely, the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. *R. v. Jun Goon*, 10 W.W.R. 24, 22 B.C.R. 381, 25 Can. Cr. Cas. 415. Whether or not a matter is presented in a formal way under the speedy trials clauses by a person who professes to act as "Crown Counsel" is not a question of jurisdiction; the words "Crown Counsel" subjoined to the signature of counsel conducting the prosecution may, if necessary, be rejected as surplusage. *R. v. Jun Goon*, supra.

Counsel may be appointed *ad hoc* to prosecute cases at a session of the County Court Judge's Criminal Court without any formal appointment being produced or proved at the trial. The authority may be merely by telegram or telephone message and on counsel stating that he appears for the Crown it is competent for the judge to recognize his appointment as prosecuting officer, and to act upon the charge preferred by him if it is within the depositions. *R. v. Jun Goon*, 10 W.W.R. 24.

*Prisoner may be bailed whether electing for or against speedy trial*—Code secs. 836, 837.

*Form of record when the prisoner pleads guilty*—Code form 60, following sec. 1152.

*Sentence may include costs and expenses*—See sec. 1044.

*Defects of form*—The omission to affix a law stamp to a warrant of arrest would not affect the validity of the proceedings subsequent to the execution of the same, the defect, if any, being cured by sec. 669 of the Code. *R. v. Hamelin*, 16 Que. K.B. 501, 13 Can. Cr. Cas. 333.

The accused who has pleaded to the information, given security for his appearance and asked for a speedy trial cannot attack the legality of his arrest on the ground that the warrant does not bear law stamps under the Quebec tariff, and if the proceedings are instituted by the Crown no stamps are required. *R. v. Rodrigue*, 9 Que. P.R. 122, 13 Can. Cr. Cas. 249.

Where the information which preceded the preliminary enquiry was used in place of a formal "charge" on a speedy trial, and the accused moved to quash it as such, he thereby treats it as a *de facto* charge and cannot object to the lack of a formal document, at least where no prejudice is shown. *R. v. Daigle*, 23 Can. Cr. Cas. 92, 18 D.L.R. 56.

Annexing a new count written on a separate paper to the formal charge signed by the prosecuting officer is sufficient where done by such officer to incorporate the new count in the formal charge upon an amendment made by leave of the trial judge. A speedy trial on the new count to which the accused gave his consent to speedy trial and pleaded will not be set aside for alleged informality in, or lack of signature of the prosecuting officer under such circumstances. *R. v. Wilson*, 22 Can. Cr. Cas. 161, 5 W.W.R. 620, 26 W.L.R. 148 (Sask.).

**Demand of jury trial.—Re-election.—Procedure thereon.**

**828.** If the prisoner on being brought before the prosecuting officer or before the judge as aforesaid demands a trial by jury, he shall be remanded to gaol.

2. Any prisoner who has elected to be tried by jury may, notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge or prosecuting officer to proceed as directed by sec. 826.

3. Thereafter unless the judge, or the prosecuting officer acting under subsection 2 of sec. 826, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election, the prisoner shall be proceeded against as if his said first election had not been made.

4. Provided that if an indictment has been preferred against the prisoner the consent of the prosecuting officer shall be necessary to a re-election, and in such case the sheriff shall take no action upon being notified of the prisoner's desire to re-elect unless such consent is given in writing.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; sec. 767, Code of 1892.

*When re-election permissible*—Under the Speedy Trials Act, as it was originally passed, it was held in Ontario that a person arraigned before a county court judge and electing *against* a speedy trial without a jury, had no absolute right, after being remanded, of re-election: *Reg. v. Ballard* (1897), 1 Can. Cr. Cas. 96, 28 Ont. R. 489;

while in British Columbia a different view prevailed. There it was held that a prisoner who had elected to be tried by a jury might afterwards re-elect in favour of a speedy trial on application for leave to abandon his former election: *R. v. Prevost* (1895), 4 B.C.R. 326.

Then Parliament, by the amendment of 1900, obviously for the purpose of overcoming these conflicting decisions, passed the section which is now sub-sec. 2 of sec. 828 of the Criminal Code. While a prisoner who has elected to be tried by a jury has the right of re-electing in favour of a speedy trial without a jury, the converse of the proposition is not true; a prisoner who has elected in favour of a speedy trial without a jury is not given the right of abandoning the election so made and re-electing to be tried by a jury in the ordinary way before the court having criminal jurisdiction. Sub-sec. 2 of sec. 828 gives the accused the right of re-election only in case his first election was for trial by jury, and an election to be tried by a judge without a jury having once been made cannot be withdrawn. *R. v. Keafer*, 5 Can. Cr. Cas. 122, 2 O.L.R. 572; *R. v. Howe*, 42 N.B.R. 378, 24 Can. Cr. Cas. 215.

*At any time before such trial has "commenced"*—Sec. 828, sub-sec. 2 provides that he may exercise "the election at any time before such trial has commenced."

In the sense of the common law the arraignment of the prisoner constitutes no part of the trial. It is a preliminary proceeding and, until the party has pleaded, it cannot be ascertained whether there will be any trial or not. *Re Walsh* (*R. v. County Judge's Criminal Court*), 48 N.S.R. 1, 23 Can. Cr. Cas. 7; *Giroux v. The King*, (1917) 56 S.C.R. 63, 29 Can. Cr. Cas. 258.

*Whether an indictment has been "preferred" or not*—In *Re Walsh* (*R. v. County Court*), 48 N.S.R. 1, 23 Can. Cr. Cas. 7, it was said: "This section provides that re-election may be made after an indictment has been 'preferred' and I think also after it has been found, because it may be after indictment preferred, and at any time before the trial has commenced. There is, of course, an intervening time between the finding of the indictment and the commencement of the trial; the trial cannot commence until after the prisoner has pleaded, and the re-election may be at any time before the commencement of the trial." (23 Can. Cr. Cas. 21).

If the accused has elected speedy trial and before the trial has begun in the county judge's criminal court he is arraigned on the same charge in the jury court on the indictment found against him while he was out on bail, the accused may object to plead on the ground of his prior election of speedy trial, and the jury court thereupon may postpone the arraignment to the next sittings pending the speedy trial before the county court judge so that the accused may plead the result of the speedy trial in answer to the indictment; *R. v. Thompson*, 14 Can. Cr. Cas. 27, 17 Man. R. 608; or quash the indictment on due proof

appearing that an election had been regularly made and so gave exclusive jurisdiction to the county judge's court to try the offence. See *R. v. Burke*, 24 Ont. R. 64; *Giroux v. The King*, (1917) 56 S.C.B. 63, 29 Can. Cr. Cas. 258.

Cases under prior law: *R. v. Gibson*, 29 N.S.B. 4, 3 Can. Cr. Cas. 451; *R. v. Lawrence*, 5 B.C.R. 160, 1 Can. Cr. Cas. 295; *R. v. Wener*, 12 Que. K.B. 320, 6 Can. Cr. Cas. 406; *R. v. Komienksy* (No. 2) 12 Que. K.B. 329, 7 Can. Cr. Cas. 27; *R. v. Komienksy* (No. 1) 6 Can. Cr. Cas. 524.

*Consent of prosecuting officer to a re-election after electing a jury trial*—The proviso which for convenience of reference is here numbered (4) was added by the statute 8-9 Edw. VII, Can., ch. 9, sec. 2 but was given no number although it manifestly would not be limited to sub-sec. (3).

#### Persons jointly accused.

**829.** If one of two or more prisoners charged with the same offence demands a trial by jury, and the other or others consent to be tried by the judge without a jury, the judge, in his discretion, may remand all the said prisoners to gaol to await trial by a jury.

*Origin*—Sec. 768, Code of 1892; 52 Vict., Can., ch. 47, sec. 8.

#### Election under Parts XVI or XVII.—Re-election.

**830.** If under Part XVI or Part XVII any person has been asked to elect whether he would be tried by the magistrate or justices, as the case may be, or before a jury, and he has elected to be tried by a jury, and if such election is stated in the warrant of committal for trial, the sheriff, prosecuting officer or judge shall not be required to take the proceedings directed by this Part.

2. If such person, after his said election to be tried by a jury has been committed for trial he may, at any time before the regular term or sittings of the court at which such trial by jury would take place, notify the sheriff that he desires to re-elect.

3. In such case it shall be the duty of the sheriff to proceed as directed by sec. 826, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made.

*Origin*—Sec. 769, Code of 1892; 52 Vict., Can., ch. 47, sec. 9, 53 Vict., Can., ch. 37, sec. 30.

*Effect of prior election of mode of trial*—In the case of theft by juveniles under the age of 16, prosecuted under Part XVII, the option of the accused or of his parent or guardian is, in the terms of Code sec. 807, to be that he objects to the justices deciding upon the charge. The statutory caution given by the justices is an invitation to hear the defence, but accompanied by notice that if the accused wishes to be tried by a jury he must "object now." Likewise before the amendment made by 8-9 Edw. VII, ch. 9, sec. 2 to Code sec. 778, the election on a summary trial arraignment under Part XVI was for or against a jury trial but is now either for trial by the magistrate without a jury or for trial "in the ordinary way by the court having criminal jurisdiction."

Formerly the accused might first elect trial by a jury when before the magistrate and later elect trial without a jury when arraigned before the district judge's criminal court. Sec. 785 in Part XVI still refers to an election to be "tried before a jury," in the clause directing the magistrate to proceed with a preliminary enquiry, but this is probably due to the appropriate amendment of that section being overlooked when the amendment of sec. 778 was made by 8-9 Edw. VII, ch. 9. Under sec. 778, as amended, the magistrate is not empowered to take a more limited election of the accused to be tried by a jury as distinct from the election to be tried by "a court having criminal jurisdiction." Code sec. 778; *R. v. Price and Burnett* (1914) 7 W.W.B. 621, 25 Man. R. 26, 30 W.L.R. 1, 23 Can. Cr. Cas. 285; and see *R. v. Thompson*, 17 Man. R. 608, 14 Can. Cr. Cas. 27. An accused person, whose election is taken under sec. 778 as amended, must be dealt with as provided by secs. 825 and 827 without regard to sec. 830. Even the finding of an indictment on the charge will not bar the right to make an "election" of a speedy trial; *Giroux v. The King*, (1917) 56 S.C.R. 63, 29 Can. Cr. Cas. 258; but if the accused has once made an election for a jury trial when arraigned under Part XVIII he may re-elect for a "speedy trial" only in the event of his obtaining the written consent of the prosecuting officer. Code sec. 828 (4).

#### **Continuance of proceedings before another judge.**

**831.** Proceedings under this Part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this Part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary.

*Origin*—Sec. 770, Code of 1892; 53 Vict., Can., ch. 37, sec. 30.



*Substitution of another judge where trial judge unable to act*—Amongst other proceedings which sec. 831 validates, is the enforcement of a conviction which had been stayed pending the hearing of an appeal taken on a case reserved. *R. v. Brooks*, 9 B.C.R. 13, 5 Can. Cr. Cas. 372.

**Election after magistrate has declined to try under Parts XVI or XVII.**

**832.** If, on the trial under Part XVI or Part XVII of any person charged with an offence triable under the provisions of this Part, the magistrate or justices decide not to try the same summarily, but commit such person for trial, such person may afterwards, with his own consent, be tried under the provisions of this Part.

*Origin*—Sec. 771, Code of 1892; 52 Vict., Can., ch. 47, sec. 10.

*Where magistrate has declined to try summarily*—See secs. 784 (Part XVI) and 808 (Part XVII).

**Trial of accused.—Form of record.**

**833.** If the prisoner upon being arraigned under this Part consents as aforesaid and pleads not guilty the judge shall appoint an early day, or the same day, for his trial, and the prosecuting officer shall subpoena the witnesses named in the depositions, or such of them and such other witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner. and if he be found guilty sentence as aforesaid shall be passed upon him.

2. If he be found not guilty the judge shall immediately discharge him from custody, so far as respects the charge in question.

3. The prosecuting officer in such case shall draw up a record as nearly as may be in form 61.

*Origin*—Sec. 772, Code of 1892; 52 Vict., Can., ch. 47, sec. 11.

*Private prosecutor has no status*—In *Rex v. Gilmore* (1903), 7 Can. Cr. Cas. 219, 6 O.L.R. 286, it was decided that a private prosecutor was "no party to" a prosecution in the county court judge's criminal court for perjury, "nor indeed bound by any judgment that may be made in it," and that, though "he may, with the consent of the proper authorities, proceed in the name of the Sovereign," he has "against

the will of both parties" (i.e., the Crown and the accused) "no power over, or voice in, the prosecution." To the same effect is the decision in *R. v. Clark* (1904) 9 Can. Cr. Cas. 925 (N.S.); and see *R. v. Fraser*, 30 O.L.R. 598, 23 Can. Cr. Cas. 140.

*Powers of court*—The judge of the county court judge's criminal court is fully invested in relation to the criminal jurisdiction of that court with all the powers which a judge of the supreme court would have in exercising the criminal jurisdiction of the supreme court. *R. v. Burke*, 1 Can. Cr. Cas. 539, 545. And by sec. 839 the judge has all the powers of amendment which are possessed by any court before which an indictment may be tried.

The judge trying the case without a jury is entitled to make the like inferences from the evidence as a jury might make. *R. v. Ward* (1914) 48 N.S.B. 204, 24 Can. Cr. Cas. 75.

Code sec. 889 authorizes an amendment of the count in an indictment in certain cases of variance if the accused has not been misled or prejudiced by the variance. But if the amendment sought to be made has no reference to the same transaction and makes the charge a quite different one from that on which the accused gave his election for trial, he must again be put to his election on such new charge. *R. v. Lacelle*, 11 O.L.R. 74, 10 Can. Cr. Cas. 229.

*Sentence in excess of legal limit*—Because of the limitations of the Habeas Corpus Act in respect of commitments in execution from a court of record (sec. 824), the procedure by habeas corpus is not applicable to the reversal or correction (sec. 1120) of the illegal sentence. The proper remedy is that of an appeal by reserved case or case stated under sec. 1013 *et seq.* *R. v. Kavanagh*, 5 Can. Cr. Cas. 507 (N.S.).

*Jurisdiction at place of commitment although not locality of offence*—In *R. v. Tetrault*, 11 W.L.R. 305, 17 Can. Cr. Cas. 259 (Sask.) it was held that the place of election for speedy trial is the district to the gaol of which the accused has legally been committed on the preliminary enquiry; this is not necessarily the district in which the offence was committed. *R. v. Harrison* [1918] 1 W.W.R. 12, 10 Sask. L.R. 436, 29 Can. Cr. Cas. 159; *R. v. Anderson* [1918] 1 W.W.R. 12, 29 Can. Cr. Cas. 176; *R. v. Lynn*, 4 Sask. L.R. 324, 16 W.L.R. 324, 19 Can. Cr. Cas. 129.

*Intermixing of trials*—See *R. v. McBerny*, 26 N.S.B. 327, 3 Can. Cr. Cas. 339; *R. v. Burke*, 36 N.S.B. 408, 8 Can. Cr. Cas. 14. *R. v. Sing*, 9 B.C.R. 254, 6 Can. Cr. Cas. 156; *R. v. Bullock*, 6 O.L.R. 663, 8 Can. Cr. Cas. 8; *R. v. Reid*, 12 Can. Cr. Cas. 352 (N.S.).

Where there are two or more charges against the same person to be tried before the same county judge under the speedy trials clauses it is desirable that the practice should be to dispose of one before taking evidence in the other. *R. v. Iman Din*, 15 B.C.R. 476, 18 Can. Cr. Cas. 82. The fact that evidence was adduced on a trial upon a second

charge before the first charge pending before the same county judge was finally disposed of, is not of itself ground for setting aside the first conviction. Whether or not the trials have been intermixed so as to invalidate a conviction is a question depending upon the special circumstances relied upon to show that the accused has been prejudiced by that mode of procedure. *R. v. Iman Din*, 18 Can. Cr. Cas. 82, 15 B.C.R. 476. The accused is prejudiced if the evidence on the one charge has been taken into consideration in finding him guilty on the other. *R. v. McBerny*, 26 N.S.R. 327. As to accepting the certificate of the trial judge that he was not so influenced, the authorities are in conflict. See *R. v. Iman Din*, supra; *R. v. Bullock*, 6 O.L.R. 633, 8 Can. Cr. Cas. 8; *R. v. Fry*, (1898) 19 Cox C.C. 135, 67 L.J.Q.B. 712. For cases as to intermixing trials of summary conviction matters, see note to Code sec. 710.

Upon several charges of perjury in respect of one affidavit, the judge is bound to regard the whole affidavit as the sworn statement in respect of each charge, and should not treat each paragraph of the affidavit as an entire statement independently of the other paragraphs, as the one may qualify or explain the other. *R. v. Cohon* (or Cohn), 36 N.S.R. 240, 6 Can. Cr. Cas. 386.

*If found guilty sentence "as aforesaid" shall be passed*—This refers to the procedure under sec. 827 in case the accused had pleaded guilty. By sub-sec. (4) of sec. 827, the judge shall pass the "sentence of the law" on the prisoner, and the sentence is to have the same effect as if passed by a court having jurisdiction to try the offence in the ordinary way.

*Sentence may include costs and expenses*—See sec. 1044.

*Uncharged crime not to be considered in sentence*—In sentencing a defendant found guilty of an offence, the judge should not increase the sentence because he considers the defendant guilty of some other offence with which he has not been charged. *R. v. Bright*, [1916] 2 K.B. 441; *R. v. Harris*, 30 Can. Cr. Cas. 13 (Ont.).

*Form of record when the prisoner pleads not guilty*—Code form 61, following sec. 1152.

#### **Preferring charges other than those for which accused is committed.**

**834.** The prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge for any offence for which he may be tried under the provisions of this Part other than the charge for which he has been committed to jail for trial or bound over, although such charge does not appear or is not mentioned in the depositions upon which the prisoner was committed or is for a wholly distinct and unconnected offence: Provided that the prisoner shall not be tried under this Part or

upon any such additional charge unless with his consent obtained as hereinbefore provided.

2. Any such charge may thereupon be dealt with, prosecuted and disposed of, and the prisoner may be remanded, held for trial or admitted to bail thereon, in all respects as if such charge had been the one upon which the prisoner was committed for trial.

*Origin*—Sec. 773, Code of 1892; 52 Vict., Can., ch. 47, sec. 12.

*Consent of judge to prefer a new charge*—This consent must be obtained before the charge is preferred. *R. v. Cohon*, (1903) 36 N.S.B. 240, 6 Can. Cr. Cas. 386. The right to add a second count for another offence is not dependent upon the first count being proved. *R. v. Stickler*, (1910) 16 Can. Cr. Cas. 45 (B.C.).

*Consent to trial on new charge*—The proviso added to the new sub-sec. (1) by the amendment of 1909 makes it clear that the prisoner's consent must be obtained in respect of the added or substituted charge under the formalities of sec. 827. If he refuses so to be tried he must remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction (sec. 827) (1); that is, with a jury. He is in that event to be held for trial or admitted to bail in all respects as if such charge had been the one upon which he was committed for trial; sec. 834 (2); and an indictment preferred against him under secs. 872 and 873, or in Alberta or Saskatchewan a formal charge in lieu of an indictment. It is a matter of precaution in case of such new charge going to the jury court to obtain the consent under sec. 873 of the judge presiding over such court to the preferring of the indictment notwithstanding the consent already obtained in the county judge's criminal court under sec. 834. For cases prior to the 1909 amendment reference may be made to *R. v. Carrière*, 6 Can. Cr. Cas. 5, 14 Man. L.R. 52; *R. v. Douglas*, 12 Can. Cr. Cas. 120, 16 Man. R. 345. *R. v. Lonar*, 25 N.S.B. 124; *R. v. Morgan*, 2 B.C.R. 829; *R. v. Smith*, 25 N.S.B. 138; *Cornwall v. The Queen*, 33 U.C.Q.B. 119 (Ont.); *Goodman v. The Queen* (1883) 3 Ont. R. 18; *R. v. Clark*, 9 Can. Cr. Cas. 125; *R. v. Wener*, 12 Que. K.B. 320, 6 Can. Cr. Cas. p. 406. The charge which may be added or substituted under that section and be tried by defendant's consent to speedy trial is not necessarily one which is cognate to the one for which the accused was committed or bailed, but may be for an offence wholly disconnected therewith under the present sec. 834. In this respect, *R. v. Wener*, *supra*, is superseded.

#### **Powers of judge on trial.**

**835.** The judge shall, in any case tried before him, have the same power as to acquitting or convicting, or convicting of any

other offence than that charged, as a jury would have in case the prisoner were tried by a court having jurisdiction to try the offence in the ordinary way, and may render any verdict which might be rendered by a jury upon a trial at a sitting of any such court.

*Origin*—Sec. 774, Code of 1892; 52 Vict., Can., ch. 47, sec. 13.

*Adjourning the trial*—Code sec. 839.

*Amending the charge*—Code sec. 839.

*Autrefois convict or autrefois acquit*—Code secs. 905-909; R. v. Taylor, (1914) 5 W.W.R. 1105, 7 Alta. L.R. 72, 22 Can. Cr. Cas. 234, 26 W.L.R. 652; R. v. Clark, 9 Can. Cr. Cas. 125.

*Conviction for lesser offence proved*—Code sec. 951.

*Conviction for attempt proved*—Code sec. 949.

*Conviction where attempt charged and full offence proved*—Code sec. 950.

*Cattle stealing*—The conviction may be for the lesser offence (sec. 392) of fraudulent dealing with cattle.

*Trial of joint receivers of stolen goods*—Code sec. 954.

*View*—Code sec. 958.

*Reserved case from county court judge's criminal court*—It is not competent for the judge to submit the question "whether there is any legal evidence to sustain the conviction" and send up the whole evidence for the court of appeal to review. He may state the effect of evidence given to sustain a certain charge or give the material part of it, and reserve a question as to its sufficiency in point of law to convict, but it was never contemplated that he could send up the whole body of the evidence, and ask if that evidence is sufficient to convict. R. v. Cohon, 36 N.S.R. 240, 6 Can. Cr. Cas. 386.

The question reserved cannot be whether the judge has come to a proper conclusion on the evidence; but he may ask a question in this form: "Was there any evidence upon which the prisoner could properly be convicted?" R. v. McBrady, (1919) 15 O.W.N. 369. The question should not be whether the trial judge "was right in law and on the evidence" in finding the accused guilty. R. v. McBrady, *supra*. Where certain findings of fact are made by the judge and a conviction entered thereon the appellate court on a case reserved may decide that upon the findings the verdict should have been an acquittal, and in that case the appellate court may order a verdict to be entered accordingly. R. v. Ayoup, 39 N.B.R. 598, 16 Can. Cr. Cas. 375.

*Penitentiary sentence*—On a sentence to a penitentiary the authority of the sheriff to take the prisoner there and of the warden to receive him is a certified copy of the sentence taken from the minutes of the court which imposed it. The certified copy need not contain all the averments necessary in describing the offence in an indictment and the

venue in the absence of any other appearing will be presumed to be that indicated by the name of the county in the margin. *Smitheman v. The King*, 35 S.C.R. 490, 9 Can. Cr. Cas. 17, affirming *ex parte Smitheman*, 35 S.C.R. 189, 9 Can. Cr. Cas. 10.

**Bail if trial by judge.**

**836.** If the prisoner elects to be tried by a judge without the intervention of a jury the judge may, in his discretion, admit him to bail to appear for his trial, and extend the bail, from time to time, in case the court be adjourned or there is any other reason therefor.

2. Such bail may be entered into and perfected before the clerk of the court.

*Origin*—Sec. 775, Code of 1892; 52 Vict., Can., ch. 47, sec. 14.

*Ontario tariff for Clerks of the Peace*—

(13.) Every recognizance to appear ..... \$0.50

**Warrant for arrest of prisoner out on bail.**

**836A.** Whenever a prisoner who has been admitted to bail pursuant to sec. 836, does not appear at the time mentioned in the recognizance or to which the court is adjourned, the judge may issue a warrant for his apprehension which may be executed in any part of Canada.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2.

*Bench warrant on non-appearance of person bailed*—This section added in 1909 is intended to enable a speedy trial judge to issue a bench warrant where a prisoner admitted to bail does not appear, it having been doubted whether he formerly had that power.

*Ontario tariff for Clerks of the Peace*—

(14.) Calling parties on their recognizance and recording their non-appearance. For each person called ..... \$0.25

**Bail if trial by jury.**

**837.** If a prisoner elects to be tried by a jury the judge may, instead of remanding him to gaol, admit him to bail, to appear for trial at such time and place and before such court as is determined upon, and such bail may be entered into and perfected before the clerk of the court.

*Origin*—Sec. 776, Code of 1892; 52 Vict., Can., ch. 47, sec. 15.

**Adjournment.**

**838.** The judge may adjourn any trial from time to time until finally terminated.

*Origin*—Sec. 777, Code of 1892; 52 Vict., Can., ch. 47, sec. 16.

*Adjournment of speedy trial*—An adjournment of a speedy trial may be made in order to obtain the attendance of a material witness, although the party applying for same had elected to proceed without such witness, and although the trial had commenced. *R. v. Gordon* (1898) 6 B.C.R. 160, 2 Can. Cr. Cas. 141.

But a speedy trial should not be adjourned at the request of the Crown, simply to enable the prosecution to obtain better evidence that a witness examined on the preliminary enquiry is absent from Canada so as to admit his deposition in evidence. *R. v. Morgan* (1893) 2 B.C.R. 329.

*Ontario tariff for Sheriffs*—

(45.) Each day's attendance at an adjournment of the  
County (or District) Court Judge's Criminal Court.  
In each case ..... \$2.00  
Not more than \$4 to be allowed in respect of the same day's service.

**Powers of amendment.**

**839.** The judge shall have all the powers of amendment which are possessed by any court before which an indictment may be tried under this Act.

*Origin*—Sec. 778, Code of 1892; 52 Vict., Can., ch. 47, sec. 17.

*Powers of amendment*—If a new charge is added or substituted, the right of election on the new charge must be given. Code sec. 834; *R. v. Lacelle*, 11 O.L.R. 74, 10 Can. Cr. Cas. 229, 6 O.W.R. 911.

**Recognizance to prosecute or give evidence.—Notice to appear.**

**840.** Any recognizance taken under sec. 692, for the purpose of binding a prosecutor or a witness, shall, if the person committed for trial elects to be tried under the provisions of this Part, be obligatory on each of the persons bound thereby, as to all things therein mentioned with reference to the trial by the judge under this Part, as if such recognizance had been originally entered into for the doing of such things with reference to such trial: Provided that at least forty-eight hours' notice in writing shall be given, either personally or by leaving the same

at the place of residence of the persons bound by such recognizance as therein described, to appear before the judge at the place where such trial is to be had.

*Origin*—Sec. 779, Code of 1892; 53 Vict., Can., ch. 37, sec. 29.

*Recognizance to prosecute or give evidence*—See secs. 688, 692, 1094. Sec. 840 refers in terms only to sec. 692, and it is an open question whether a private prosecutor who has been bound over at his own request when the magistrate discharged the accused and who thereafter has preferred an indictment by leave of the court, may not, on defendant's election of trial under Part XVIII without a jury, consider his obligation under his recognizance at an end. He may, of course, be subpoenaed by the Crown prosecutor to give evidence, but his recognizance under sec. 688 was merely to "prefer and prosecute an indictment." If the recognizance be given under sec. 692, then sec. 840 operates as a statutory extension of the obligation so as to make it apply to Part XVIII subject to the proviso it contains. It is at least doubtful whether the like extension can be attached to sec. 688.

**Witnesses to attend throughout trial.—Default or contempt of court.**

**841.** Every witness, whether on behalf of the prisoner or against him, duly summoned or subpoenaed to attend and give evidence before the judge sitting on any such trial on the day appointed for the same shall be bound to attend and remain in attendance throughout the trial.

2. If he fails so to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly.

*Origin*—Sec. 780, Code of 1892; 52 Vict., Can., ch. 47, sec. 18.

**Warrant may issue for witness.—Detention thereunder or release on recognizance.—Contempt.—Penalty.—Forms.**

**842.** Upon proof to the satisfaction of the judge of the service of a subpoena, upon any witness who fails to attend before him as required by such subpoena, and upon such judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpoena, and to answer for his disregard of the same.

2. Such witness may be detained on such warrant before the said judge, or in the common gaol, with a view to secure his



presence as a witness; or, in the discretion of the judge, such witness may be released on recognizance with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpoena, as for a contempt.

3. The judge may, in a summary manner, examine into and dispose of the charge of contempt against any such witness who, if found guilty thereof, may be fined or imprisoned, or both, such a fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and he may also be ordered to pay the costs incident to the execution of such warrant and of his detention in custody.

4. Such warrant may be in form 62 and the conviction for contempt in form 13, and the same shall be authority to the persons and officers therein required to act to do as they are therein, respectively directed.

*Origin*—Sec. 781, Code of 1892; 52 Vict., Can., ch. 47, sec. 19.

*Subpœna for witnesses*—Code sec. 833.

*Form of warrant to apprehend witness*—Code form 62, following sec. 1152.

*Form of conviction for contempt*—Code form 13, following sec. 1152.

## PART XIX.

### PROCEDURE BY INDICTMENT.

#### *General Provisions as to Indictments.*

**Records, etc., need not be on parchment.**

**843.** It shall not be necessary for any indictment or any record or document relative to any criminal case to be written on parchment.

*Origin*—Sec. 608, Code of 1892; R.S.C. 1886, ch. 174, sec. 103.

*The indictment*—An indictment is defined to be a written accusation of an offence preferred to and presented upon oath as true by a grand jury at the suit of the Government. If the grand jury are satisfied of the truth of the accusation, they write on the back of the bill "a true bill." The bill is then said to be found, and is publicly returned into court; the party stands indicted, and may then be required to answer the charge against him. *R. v. Townsend*, 3 Can. Cr. Cas. 29 at 49, 28 N.S.R. 468.

When the jury have made the indorsements on the bills, they bring them publicly into court, and the clerk of the court calls each jurymen by name, and then the clerk of the peace or assize asks the jury whether they have agreed upon any bills, and bids them present them to the court. The clerk then reads over the name of the offenders and offences, with the finding of the jury, which is either "a true bill" or "no bill," as the case may be. *R. v. Townsend*, supra. Unless the context otherwise requires, "indictment" includes an information and presentment, also a formal charge under sec. 873A. See Code sec. 1 (16). It also includes any "record," i.e., the written charge under secs. 825 and 827 of Part XVIII (speedy trials).

It is a privilege of the Attorney-General to bring before the grand jury an indictment against any person suspected of being guilty of an offence, and that without there having been any preliminary inquiry or any information whatever before a magistrate. Code sec. 873.

If there has been a valid commitment for trial, an indictment may be based thereupon and presented to the grand jury. The grand jurors hear the witnesses upon this indictment and decide whether or not the accused should be put on trial; they can do this even if the proceedings before the magistrate at the preliminary hearing have not been

regular in every respect. *R. v. Morin*, (1917) 26 Que. K.B. 428, 28 Can. Cr. Cas. 269.

If it is proposed to read to the grand jury or to the petit jury, on account of absence or illness of a witness, a deposition taken at the preliminary hearing, it may be necessary to show that the deposition has been regularly taken, but for other purposes it is too late to object to the regularity of the deposition because it was not authenticated by the magistrate and the stenographer in conformity with sec. 683, if, following the preliminary hearing, the accused made option under Part XVIII to go before the assizes for a jury trial. *R. v. Morin*, supra.

*Presentation of true bill*—The mere presentation by the grand jurors of a bill forms no part of their deliberations and determination. That is disposed of in the grand jurors' room and the finding there written is simply handed in to the court. Often presiding judges direct that the foreman alone or such number of jurors as directed may do so, without the whole panel appearing. *Veronneau v. The King*, (1916) 54 S.C.R. 7, 27 Can. Cr. Cas. 211, 216, per Idington, J.

*Form of stating offences in indictment*—See Code forms 63 and 64 and Code secs. 852-857.

*Two indictments for same offence*—It is unusual and useless to have two indictments for the same offence. The accused can complain of this and demand that the Crown elect between the two indictments and proceed only upon one of them. *R. v. Morin*, (1917) 26 Que. K.B. 428, 28 Can. Cr. Cas. 269. If he does not make this demand the accused cannot escape the necessity of standing trial before the petit jury because one of the two indictments has not been withdrawn. It is certain that the accused cannot undergo two trials for the same offence. If the Crown thought of making him submit to a new trial upon the other indictment, the accused would succeed on the plea of *autrefois acquit* or *autrefois convict*. *R. v. Morin*, supra. If the accused has suffered no prejudice from the fact that there were two indictments upon which the grand jury found two true bills, leave to appeal will be refused where there has been a trial on one of them only. *R. v. Morin*, supra.

*Special provisions governing trials in Yukon Territory*—See the Yukon Act, R.S.C. 1906, ch. 63, as amended 1907, ch. 53, 1908, ch. 76; 1909, ch. 37; 1912, ch. 56; and Code sec. 9.

*Trials at bar*—Trials "at bar" before three judges representative of the full court are now unusual. Examples may be found in *A. G. v. Bradlaugh*, 14 Q.B.D. 695; *R. v. Jameson* [1896] 2 Q.B. 425, 18 Cox. 392; *R. v. Lynch* [1903] 1 K.B. 446; *R. v. Castro*, L.R. 9 Q.B. 350.

**Statement of venue in margin of indictment.—Local description.**

**844.** It shall not be necessary to state any venue in the body of any indictment, and the district, county or place named

in the margin thereof shall be the venue for all the facts stated in the body of the indictment.

2. If local description is required such local description shall be given in the body of the indictment.

*Origin*—Sec. 609, Code of 1892; R.S.C. 1886, ch. 174, sec. 104; 14-15 Vict., Imp., ch. 100, sec. 23.

*Objection to venue*—An objection to the jurisdiction in respect of venue had formerly to be raised by a special plea to the indictment. *R. v. O'Rourke*, 1 Ont. 464, which plea was required to be duly verified by affidavit or otherwise. *R. v. Malott* (1885), 1 B.C.R., pt. 2, p. 207; *Malott v. R.* (1886), 1 B.C.R., pt. 2, 212; but sec. 905 abolishes that form of special plea, and any such ground of defence may now be relied on under the plea of not guilty. Section 905 (2). As to jurisdiction of criminal courts, see Code secs. 577-588.

*Ordering change of venue*—See sec. 884-887.

*"If local description is required"*—This refers to offences such as burglary, housebreaking, theft from a dwelling-house, forcible entry, etc., where a more definite locality than the venue must appear in order properly to charge an offence. If the offence be one not requiring local description, it is assumed that the county or district named in the margin of the indictment, and which formerly indicated the district from which the grand jury had been drawn, is the county or district in which the crime was committed. *Smitheman v. The King*, 35 S.C.R. 490, 9 Can. Cr. Cas. 17.

*Jurisdiction*—If the offence be begun in one district and concluded in another, the indictment may be brought in either; *R. v. Hogle*, 5 Que. Q.B. 59, 5 Can. Cr. Cas. 53; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 108; *R. v. O'Gorman*, 18 O.L.R. 427, 15 Can. Cr. Cas. 173; or may follow a committal for trial made in the same county on the accused being found or apprehended there, if the crime were committed within the same province. Code sec. 577; *Fournier v. Attorney-General*, 19 Que. K.B. 436, 17 Can. Cr. Cas. 108.

*Certain technical averments dispensed with in indictment*—See secs. 844-859, 861-869.

*Order for particulars*—See secs. 859, 860.

### Form of indictment.

**845.** It shall not be necessary to state in any indictment that the jurors present upon oath or affirmation.

2. It shall be sufficient if an indictment begins according to form 63, or to the like effect.

so employed, it shall be sufficient to allege that the offender, or such other person, was employed in the post office of Canada at the time of the commission of such offence, without stating further the nature or particulars of his employment.

*Origin*—Sec. 624, Code of 1892; R.S.C. 1886, ch. 35, sec. 111.

*Postal offences generally*—See Code secs. 3, 207, 209, 265, 364, 365, 366, 407, 451, 510b, 516, 538, 850, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

#### **Indictment charging previous convictions.**

**851.** In any indictment for an indictable offence, committed after a previous conviction or convictions for any indictable offence or offences, or for any offence or offences, for which a greater punishment may be inflicted by reason of such previous conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places, convicted of an indictable offence or offences, or of an offence or offences, as the case may be, and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence or offences, without otherwise describing the previous offence or offences.

*Origin*—Sec. 628, Code of 1892; R.S.C. 1886, ch. 174, sec. 139.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 851, 963, 982, 1053, 1081.

*Indictment charging previous conviction*—Where a person is charged on an indictment, it is provided by sec. 851 of the Code that previous convictions may be alleged on the face of the indictment. Sections 963 and 982 provide a procedure for charging the accused in such cases with these former convictions, when so alleged on the face of the indictment, and for proving them if it should become necessary to do so. As regards proceedings by indictment, Richards, J.A., expressed the view in *R. v. Edwards*, 13 Can. Cr. Cas. 202, 17 Man. R. 288, that it was the intention of Parliament, as shown by the above sections of the Code, that the alleging of former convictions on the face of the indictment is a condition precedent to charging the accused with them. He added, "It may be that it was intended that the need for alleging former convictions on the record, where it is intended to charge the accused with them, should only apply to proceedings by indictment. At any rate there is no provision in the Code for alleging them on the record, or for proving them, when a person, brought before a magistrate for a

preliminary inquiry as to an indictable offence, elects to be tried by such magistrate. For the above reason a magistrate is placed in a doubtful position with regard to his power of considering previous convictions when such an election is made. If he cannot, after convicting a person for the offence for which he is trying him, refer to, and have proved before him, previous convictions against that person, then his power of dealing with the case is not so great in all respects as the power of a court where the trial is had on an indictment. On the other hand, the particularity of the above quoted sections of the Code and the care they show in providing that the accused and his counsel shall know that he is to be charged with them, and that the accused shall be protected from any mistake as to his identity with other persons previously convicted, or as to the existence of such previous convictions, prove such an intention on the part of Parliament to require those provisions, that it is difficult to find an intention to dispense with them on trials before a magistrate. It is a rule of administration of criminal law that the rights of an accused person shall be carefully protected. Where such rights are, as above, so fully safeguarded in the case of a trial upon an indictment, I cannot see my way, in the absence of express legislation, to hold that those safeguards are meant to be dispensed with on a trial by a magistrate."

In a later case it was held that sections 851 and 963 as to the procedure in case of a charge for a second or subsequent offence involving an increased penalty, do not apply to summary conviction offences. *R. v. Cruikshanks*, 23 Can. Cr. Cas. 23, 6 W.W.R. 524, 7 Alta. L.R. 92. The defendant is to be arraigned in the first instance upon so much only of the indictment as relates to the subsequent offence. Sec. 963. While there is no similar provision in Part XV of the Code relating to summary convictions, there are similar enactments to be found in both federal and provincial statutes as regards certain offences thereunder punishable on summary conviction. *Cf.* The Canada Temperance Act, R.S.C. 1906, ch. 152.

#### *General Provisions as to Counts.*

**Stating substance of offence.—In popular language.—In the words of the enactment or otherwise.—Form.**

**852.** Every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an

indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged.

4. Form 64 affords examples of the manner of stating offences.

*Origin*].—Sec. 611, Code of 1892.

*Application generally*].—The general provisions of secs. 852 and 853 are not to be restricted in their operation because of any of the specific matters regarding which provision is made by sec. 855. See sub-sec. (2) of the latter section.

*Manner of describing offences*].—

All that is intended by sub-secs. 2 and 3 is that it is not necessary to set forth all the legal elements of the offence but that either popular or the statutory word or words may be used. *R. v. Trainor* [1917] 1 W.W.R. 415. For instance, it is not necessary in a charge of theft to use some such phrase as "did fraudulently and without colour of right convert to his use" a certain thing "with intent to deprive the owner of such thing." It is sufficient to say "did steal" such or such a thing, the property of so and so. Or, again, for instance, under sec. 448, it is sufficient to say that the accused at such a time and place did assault so and so with intent to rob him, without setting forth the legal ingredients of the crime of robbery. But the enactment does not mean that it is sufficient to say that the accused did on such a day "commit theft" or "steal," or "did commit an assault with intent to rob," without specifying the thing stolen or identifying the person assaulted, not necessarily by name but in some way or other. *R. v. Trainor*, [1917] 1 W.W.R. 415, 10 Alta. L.R. 164, 27 Can. Cr. Cas. 232.

All that is meant is that the offence itself (*i.e.*, the kind of offence, the nature of the crime) need only be described in words of the statute creating it. *R. v. Trainor*, *supra*; *Smith v. Moody* [1903] 1 K.B. 56, 72 L.J.K.B. 43; *R. v. Stroulger*, 17 Q.B.D. 327; *R. v. Goodfellow*, 11 O.L.R. 359, 10 Can. Cr. Cas. 424.

Except for certain specific enactments in the Criminal Code, reference must be had to the common law for the rules and principles governing criminal pleading and procedure. *R. v. Bainbridge* (1918) 42 O.L.R. 203.

The first general rule respecting indictments is, that they should be framed with sufficient certainty: 1 Chitty's Criminal Law, 2nd ed., p. 169. For this purpose the charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offence, and the defendant be put upon his trial in chief for another, without any authority: *ib.* These precautions are also necessary in order that the defendant may know what crime he is called upon to answer, and may be entitled to claim any right or indulgence incident as well as that the jury may appear to be warranted in their conclusion and that the court may see

such a definite offence on record, that they may apply the judgment, and the punishment; they are also important in order that the defendant's conviction or acquittal may insure his subsequent protection; the certainty essential to the charge consists of two parts, the matter to be charged, and the manner of charging it: *ib.*, p. 169. The indictment must state the facts of the crime, with as much certainty as the nature of the case will admit: *ib.*, p. 171. The cases of an indictment for keeping a disorderly house, or a common gambling-house, may be considered as exceptions to the general rule, but they differ materially from prosecutions for offences which consist of individual acts, as the very ground of complaint in these peculiar cases consists of a series of transgressions: *ib.*: *R. v. Bainbridge* (1918) 42 O.L.R. 203.

Sec. 855 removes objections for not naming or describing with precision any person, place, or thing; but the very preciseness of the word "precision" indicates that substantiality of description is not done away with. *R. v. Bainbridge*, *supra*.

Sec. 852 states that every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified; by sub-sec. 2, the statement may be made without any technical averments or any allegations of matter not essential to be proved; and, by sub-sec. 3, such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged. But it is evident from sub-sec. 2 that matter which is essential to be proved is not to be omitted, and from sub-sec. 3 that the accused is to have notice of the offence and not merely of the character or class of the offence; while sub-sec. 1 requires that there is to be a substantial statement of an offence which, not the class of which, is specified, and which must be an indictable one. *R. v. Bainbridge*, *supra*.

Section 853 provides that so much detail of the circumstances of the alleged offence as to afford the accused reasonable information and to identify the transaction shall be given, but that the absence or insufficiency of such details shall not vitiate the count. And, by sub-sec. 2 of sec. 855, the general provisions of secs. 852 and 853 are not to be restricted or limited by other provisions in Part XIX as to matters therein mentioned. Sec. 853 relates only to details of circumstances and does not dispense with the substantial circumstances which constitute the offence.

None of these sections (852, 853, 855) dispenses with the necessity, which existed previous to the Code, of a substantial statement of facts constituting and showing by their statement that they constitute an offence. *R. v. Bainbridge* (1918) 42 O.L.R. 203, 215; *R. v. Weir*, 9 Que. Q.B. 253, 3 Can. Cr. Cas. 499; *R. v. Weir*, 8 Que. Q.B. 521, 3 Can. Cr. Cas. 102; *R. v. Cameron*, 2 Can. Cr. Cas. 173 (Que.); *R. v. France*,



1 Can. Cr. Cas. 321 (Que.); R. v. Doyle, 27 N.S.R. 294, 2 Can. Cr. Cas. 335; R. v. Fulton, 10 Que. Q.B. 1, 5 Can. Cr. Cas. 36; R. v. Thompson, 2 Terr. L.R. 383, 4 Can. Cr. Cas. 265; R. v. Flynn, 18 N.B.R. 321; R. v. Morrison, 18 N.B.R. 682; R. v. Bachrack, 28 O.L.R. 32; R. v. Darroch, 37 O.L.R. 27.

An indictment only states the legal character of the offence and does not profess to furnish the details and particulars. These are supplied by the depositions and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions what it may be intended to produce at the trial. *Mulcahey v. R.* (1868), L.R. 3 H.L. 306; *Downie v. The Queen*, (1888) 15 S.C.R. 358, 375.

If the indictment alleges only a fact which might or might not, according to the circumstances, be sufficient to prove an offence, a plea of guilty will be struck out, and the indictment quashed. *Rex v. Labourdette*, 13 B.C.R. 443, 13 Can. Cr. Cas. 379.

As a general rule the name of the person against whom an offence has been committed should be given, and any property which has been the subject of an offence should be described. But to prevent a crime going unpunished where it is impossible to give the name of the party, it is in such cases sufficient, as an exception to the general rule, for the grand jury to state that it has been committed against a person to the jurors unknown. *R. v. Taylor*, (1895) 4 Que. Q.B. 226.

A charge for doing an unlawful act on a railway in a manner likely to cause danger is bad if it does not disclose the nature of the unlawful act. *R. v. Porte*, 14 Can. Cr. Cas. 238, 18 Man. L.R. 222.

In *George v. The King*, 8 Can. Cr. Cas. 401, 35 S.C.R. 376, the charge was laid for "unlawfully stealing goods." There was no allegation that the offence was committed "fraudulently and without colour of right," which are the words used in sec. 347 of the Code in defining the crime of theft or stealing. The words, "without colour of right," in the definition of theft, are apparently used in the same sense as the word "feloniously" in the common law definition of larceny. The Supreme Court of Canada held that the offence was sufficiently stated. See also *Rex v. Yee Mock*, 21 Can. Cr. Cas. 400, 13 D.L.R. 220; *Rex v. Yaldon*, 13 Can. Cr. Cas. 489, 17 O.L.R. 179; *R. v. Gill*, 18 O.L.R. 234, 14 Can. Cr. Cas. 294. *Harris, J.*, in *R. v. Morrison* (1916) 49 N.S.R. 446, 26 Can. Cr. Cas. 26 at 34, expressed the opinion that *George v. The King* has the effect of overruling *R. v. Cohon* (or *Cohn*) 6 Can. Cr. Cas. 386, 36 N.S.R. 240, in so far as the latter dealt with the form of the charge.

Where an indictment contains in substance a statement that the accused committed the indictable offence of perjury in a judicial proceeding, and in certainty and sufficiency complies with all the requirements prescribed by the section, it is not bad by reason of the omission to allege therein that the perjury was committed with intent to deceive or mislead. *R. v. Yaldon* (1908) 17 O.L.R. 179, 13 Can. Cr. Cas. 489.

To state in the disjunctive the subject matter of the offence provided that all and every one of the matters or things set forth as the subject matter are capable of being the subject matter of the offence charged, does not make the indictment bad. Sec. 854. *R. v. Kelly*, 10 W.W.R. 1345 (Man.) at 1352. Per Prendergast, J. Same case in appeal [1917] 1 W.W.R. 46; and *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282.

No count of an indictment is to be deemed objectionable or insufficient for the reason only that it does not state who is the owner of any property therein mentioned (sec. 855); but particulars may be ordered in favour of the accused so as to give him reasonable information as to the act or omission to be proved against him and to identify the transaction referred to (secs. 853, 859). As to the application of sec. 852 to particular offences, see the various sections dealing with offences.

*Surplusage*—An unnecessary allegation in a court may be rejected as surplusage. *R. v. Walker*, 12 Can. Cr. Cas. 197, at 200, 6 Terr. L.R. 276, 4 W.L.R. 288.

*Form of examples of the manner of stating offences*—Code form 64, following sec. 1152.

*Certain technical averments dispensed with in indictment*—See secs. 844-859, 861-869.

*Order for particulars*—See secs. 859, 860.

*Amendment of indictment*—See secs. 889-893.

**Indictment.—Absence of details of circumstances.—Reasonable information to accused.—Reference to section of statute.—Each count for a single transaction.**

**853.** Every count of an indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count.

2. A count may refer to any section or subsection of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.

3. Every count shall in general apply only to a single transaction.

*Origin*—Sec. 611, Code of 1892.

*Limiting each count to a single transaction*—The practice is well established in England that several offences should not be charged in

the same count, although opinions have been expressed which indicate that this is more a matter of uniformity of practice than of strict law. *R. v. Thompson* (1913) 9 Cr. App. R. 252, at 259; and see *Castro v. The Queen* (1881) 6 A.C. at 244; note that sub-sec. (6) of Code sec. 853 uses the qualifying words "in general."

Evidence that during a defined period of less than six months a deficiency had occurred equal to the amount by which the accused had falsified an entry in his employer's books at or about the date at which he is charged with having embezzled this sum, accompanied, as it was, by evidence warranting the inference that the money stolen had reached his hands and had been misappropriated by him, suffices to sustain a conviction for theft of the entire sum (although it may have been taken in numerous small amounts at different times during the period covered by the evidence) without proving the taking of each or any of such several amounts. The case may be treated as one continuous act of theft, although there were a number of distinct takings. *R. v. Henwood* (1870), 22 L.T.R. 486, 11 Cox C.C. 526; *R. v. Bleasdale*, 2 Car. & K. 765; *R. v. Slack*, L.R. 7 Q.B. 408; *R. v. Balls*, L.R. 1 C.C.R. 328, 40 L.J.M.C. 148; *Minchin v. The King* (1914) 23 Can. Cr. Cas. 414 at 420.

*Count valid although certain statements omitted*—The general provisions of secs. 852 and 853 are not to be restricted in their operation because of any of the specific matters regarding which provision is made by sec. 855. See sub-sec. (2) of the latter section.

*Dividing or amending counts*—Although it is directed by sec. 853 (3) that every count shall in general apply only to a single transaction, it should be noted that sec. 854 enacts that a count shall not be deemed objectionable on the ground, *inter alia*, that it is double or multifarious. Sec. 892 enables an application to be made by the accused at any stage of the trial to have the count divided or amended, if it is embarrassing to the defence because of its being double or multifarious, or because of its following the statute declaring the offence by charging in the alternative matters which are so stated in the statute.

*Joinder of counts*—See Code sec. 856.

*Certain technical averments dispensed with in indictment*—See secs. 844-859, 859, 861-869.

*Order for particulars*—See secs. 859, 860.

*Amendment of indictment*—See secs. 889-893.

*"Absence or insufficiency of details"*—The words of the proviso to sec. 853, i.e., "provided the absence or insufficiency of such details shall not vitiate the count," mean only that the count cannot be quashed owing to the absence or insufficiency of the details but it does not mean that the accused is not entitled to demand them. *R. v. Trainor* [1917] 1 W.W.R. 415, 10 Alta. L.R. 164, 27 Can. Cr. Cas. 232.

*Reference to the depositions for particulars*—It has been suggested rather than decided that if the essential information to which the

accused is entitled has already been brought out in the depositions on a preliminary enquiry, it may be sufficient to reply to the demand in respect of the indictment laid in general terms, that the particulars are set out in the depositions; *R. v. Trainor* [1917] 1 W.W.R. 415, 419 (Alta.). So on a charge of seditious libel the accused would be entitled to a statement from the prosecution either that all the words quoted in the depositions were still charged against him or that some were dropped and some still charged, specifying the particular words so dropped or so retained. *R. v. Trainor* [1917] 1 W.W.R. 415, 419 (Alta.). For the sake of formality in the record it is preferable that the words which are the basis of a libel charge or the identity of the writing or paper containing them should appear in the indictment itself. *Ibid.* Although under Code sec. 861 the "words" do not need to be set out, the substance and effect should be stated. *R. v. Trainor*, *supra*; *R. v. Bainbridge* (1918) 42 O.L.R. 203. As depositions are often mislaid, the prosecutor in drawing up an indictment should not be content to leave the charge in a vague and indefinite form, but should include the information in the indictment itself. The accused should not be asked to plead to a charge merely saying that the accused "committed perjury" or "published a defamatory libel" or "uttered seditious words" without specifying at least the substance and effect of the language complained of. *R. v. Trainor* [1917] 1 W.W.R. 415, 419.

**Offences may be charged in the alternative.**

**854.** A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious.

*Origin*—Sec. 612, Code of 1892.

*Summary trial "charge" is a "count"*—Code sec. 2 (16); *R. v. Mah Sam*, 19 Can. Cr. Cas. 1.

*Where statute describes offence in the alternative*—For example, sec. 384 creates the special offence of stealing "in or from" a railway building. A charge is not multifarious in describing the offence in the same way. *R. v. White*, 34 N.S.R. 436, 4 Can. Cr. Cas. 430; and see *re Patrick White*, 31 S.C.R. 383.

*Where a count is multifarious*—Under sec. 854 it is no objection to the indictment that a count is double or multifarious. There is, however, the direction of sub-sec. (3) of sec. 853 that every count shall "in general" apply only to a single transaction. The origin and development of the rule of practice requiring trial upon only one felony charge at a time is explained by Lord Blackburn in *Castro v. The*

Queen (1881) L.R. 66 A.C. 229 at 244. But for that rule and apart from its statutory recognition, even two felonies might be charged in the same count. It is now, however, the uniform and well-established practice in England that several offences should not be charged in the same count, *R. v. Thompson* (1913) 9 Cr. App. R. 252 at 259. Code sec. 857 gives express power to direct a separate trial upon one or more separate "counts," while sec. 892 provides for the division of various charges which are included in one count if found embarrassing to the defence.

*Dividing or amending a multifarious count*—See Code sec. 892.

**Count not objectionable or insufficient on ground of omission of certain statements.**

**855.** No count shall be deemed objectionable or insufficient for the reason only,—

- (a) that it does not contain the name of the person injured, or intended, or attempted to be injured; or,
- (b) that it does not state who is the owner of any property therein mentioned; or,
- (c) that it charges an intent to defraud without naming or describing the person whom it was intended to defraud; or,
- (d) that it does not set out any document which may be the subject of the charge; or,
- (e) that it does not set out the words used where words used are the subject of the charge; or,
- (f) that it does not specify the means by which the offence was committed; or,
- (g) that it does not name or describe with precision any person, place or thing; or,
- (h) that it does not in cases where the consent of any person, official or authority is required before a prosecution can be instituted, state that such consent has been obtained.

2. No provision obtained in this Part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of secs. 852 and 853.

*Origin*—Sec. 613, Code of 1892.

*Sub-sec. (b)—Not naming owner of property*—In practice, an indictment for theft should not be preferred in which it is stated that

the goods are the property of a person unknown if the person is really known. *R. v. Carswell*, 10 W.W.R. 1027, at 1031. If, however, the prosecution lay the indictment with a stated ownership of the stolen goods, the charge is thereby restricted and such ownership would have to be proved. *R. v. Carswell* (1916) 10 W.W.R. 1027, 26 Can. Cr. Cas. 288, 34 W.L.R. 1042; *R. v. Murray*, 75 L.J.K.B. 593; *R. v. Nier*, (1915) 9 W.W.R. 838, 9 Alta. L.R. 353, 25 Can. Cr. Cas. 241, 33 W.L.R. 180.

*Substance of offence to be charged*—See Code sec. 852 and note to same; *Smith v. Moody* [1903] 1 K.B. 56; *R. v. Trainor*, [1917] 1 W.W.R. 415, 10 Alta. L.R. 164, 27 Can. Cr. Cas. 232, 35 W.L.R. 415; *R. v. Bainbridge*, 42 O.L.R. 203.

*Certain technical averments dispensed with in indictment*—See secs. 844-859, 861-860.

*Order for particulars*—See secs. 859, 860.

*Amendment of indictment*—See secs. 889-893.

#### **Joinder of counts.—Exception of murder charge.**

**856.** Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

*Origin*—Sec. 626, Code of 1892.

*Applicable to a charge tried under Part XVIII*—Secs. 856-860 are applicable to "speedy trials" under Part XVIII. *R. v. Cross* (1909) 43 N.S.R. 320, 14 Can. Cr. Cas. 171.

*No joinder with murder charge*—As to the latter, see secs. 259, 260, 263.

*Form of headings of indictment*—Code form 63, following sec. 1152.

*Persons jointly indicted*—When several persons are indicted jointly the Crown always has the option to try them either together or separately, but the defendants cannot demand as a matter of right to be tried separately. *R. v. Murray and Mahoney*, [1917] 1 W.W.R. 404, 411 (Alta.); *R. v. Weir* (No. 4), 3 Can. Cr. Cas. 351, 8 Que. Q.B. 521; *R. v. McConohy*, 5 Rev. Leg. 746 (Que.); 2 Hawk. P.C., ch. 41, sec. 8. Upon good ground being shown for a severance the presiding judge may, in his discretion, grant separate trials to the persons jointly indicted. *R. v. Littlechild*, (1871) L.R. 6 Q.B. 293; *R. v. Bradlaugh*, 15 Cox C.C. 217; *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, 411 (Alta.). As a general rule the discretion of the trial judge on such a question cannot be reviewed. *Ibid.*; *R. v. Martin*, 9 Can. Cr. Cas. 371, 383, 9 O.L.R. 218, 5 O.W.R. 317.

If one of the defendants on a joint trial offers no evidence in

defence, the trial judge has a discretion, at the close of the case for the prosecution, to submit that defendant's case separately to the jury. *R. v. Hambly*, 16 U.C.Q.B. 617 (Ont.).

If one defendant on a joint indictment pleads guilty, he is then a compellable witness as well as a competent one for either the prosecution or the defence. *R. v. Gallagher*, 13 Cox C.C. 61; *R. v. Jackson*, 6 Cox C.C. 525.

And, of course, one defendant is both competent and compellable as a witness if the Crown consents to a verdict of acquittal against him before proceeding against the others. And, although acquitted, if it appears from his testimony or otherwise that he was an accomplice, the jury should be warned that it is inadvisable to convict on an accomplice's testimony without corroboration.

The general rule is that persons jointly indicted should be jointly tried, but when, in any particular instance, this would work an injustice to any of such joint defendants, the presiding judge should, on due cause being shown, permit a severance and allow separate trials. *R. v. Murray and Mahoney*, [1917] 1 W.W.R. 404 at 411.

The discretion of the presiding judge must not be exercised in a desultory or immethodical manner, but it must be guided and regulated by judicial principles and fixed rules. *R. v. Murray and Mahoney*, [1917] 1 W.W.R. 404 at 411.

Some of the usual grounds for a severance are: That the defendants have antagonistic defences; *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, 412; that important evidence in favour of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; *R. v. Murray and Mahoney*, supra; that evidence which is incompetent against one defendant is to be introduced against another and that it would work prejudicially to the former with the jury; *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, 412; *R. v. Martin*, 9 Can. Cr. Cas. 371, 9 O.L.R. 218, 5 O.W.R. 317; that a confession made by one of the defendants if introduced and proved would be calculated to prejudice the jury against the other defendants; *R. v. Murray*, supra; that one of the defendants could give evidence for all or some of the other defendants and would become a competent and compellable witness on the separate trials of such other defendants; *R. v. Murray*, supra; and see *ex parte Ferguson*, 17 Can. Cr. Cas. 437; *R. v. Blais*, 10 Can. Cr. Cas. 354, 6 O.L.R. 345; *R. v. Connors* (1893) 3 Que. Q.B. 100; 5 Can. Cr. Cas. 70.

If the Crown is to make use of a confession by one of the prisoners he will usually be tried separately. *R. v. Weir* (No. 4) 8 Que. Q.B. 521, 3 Can. Cr. Cas. 351; *R. v. Martin*, 9 Can. Cr. Cas. 371, 9 O.L.R. 218, 5 O.W.R. 317. But the omission to do this will not always entitle the accused to a new trial. *R. v. Davis*, (1914) 5 W.W.R. 1340, 19 B.C.R. 50, 22 Can. Cr. Cas. 431, 26 W.L.R. 912.

Where two prisoners are tried together and a written statement by

one of them to the Attorney-General is put in by the counsel of that prisoner without objection by counsel of the other prisoner, but such statement contained nothing but what had been already brought out in the examination and cross-examination of the prisoner making the statement, the trial judge is justified in refusing a separate trial. *R. v. Davis, supra*.

If two persons are jointly indicted and tried together, the statements or admissions made by each are generally only evidence against him who makes them. In certain circumstances, they may be evidence against both; but, if they be only evidence against him who makes them, injustice to the other accused is guarded against by the presiding judge telling the jury that this is so. There is no sufficient reason to suppose that injustice to the accused could not be effectually guarded against by the judge instructing the jury that they should discard from their minds a statement not found to have been accepted by the accused as his own. *Christie's Case*, 10 Cr. App. R. 141, at 157 (H.L.).

In *R. v. Joachim*, (1912) 7 Cr. App. R. 222, two women were held to be properly convicted for the misdemeanour of committing malicious damage to an amount exceeding five pounds, though the damage done by one was of lesser amount. The charge was laid for breaking windows in connection with suffragist disturbances, but there was evidence that neither of the defendants knew that the other was breaking windows. Both belonged to the same association of suffragists although but slightly acquainted with each other, nor did the appellant know until after breaking a window that the other had already broken another window of the same premises. *Lawrence, J.*, for the Court of Criminal Appeal, said: "We think it was a question for the jury whether on all the evidence they were acting in concert and the jury was entitled to take all the facts into consideration. It is not necessary that each should have known the acts of the other, if, in fact, they were both acting under the direction or suggestion of a person whose orders they took, knowing that others were doing the same. They are equally guilty, although they had no knowledge of each other's actions or existence."

Where several offenders are found guilty of the same offence, it may often be proper to award different degrees of punishment.

*Evidence of one defendant for or against his co-defendant*—Canada Evidence Act, R.S.C. 1906, ch. 145, secs. 3, 4 and 5. (See Appendix to this Vol.)

**Each count may be treated as separate indictment.—Separate trial.**  
**—Joinder of charges of theft.**

**857.** When there are more counts than one in an indictment each count may be treated as a separate indictment.

2. If the court thinks it conducive to the ends of justice to



do so, it may direct that the accused shall be tried upon any one or more of such counts separately: Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of district charges of theft, not exceeding three, alleged to have been committed within six months from the first to the last of such offences, whether against the same person or not.

*Origin*].—Sec. 626, Code of 1892.

*Joinder of counts*].—Offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and on the trial he may be convicted on the one and not on the other. *Theal v. R.* (1882), 7 S.C.R. 397, 405.

The former rule was that if different felonies were stated in several counts of an indictment, while no objection could be made to the indictment on that account in point of law, the judge, in his discretion, might quash the indictment, or require the counsel for the prosecution to select one of felonies and confine himself to that. That was technically termed putting the prosecutor to his election, and was done when the prisoner, by reason of two charges being inquired into at the same time, would be embarrassed in his defence, or, as it has been said, lest it should "confound" him in his defence, a matter however only of prudence and discretion, to be exercised by the judge. Per *Ritchie, C.J.*, in *Theal v. R.* (1882), 7 S.C.R. 397, 405. A separate trial may now be directed under this section in respect of any of the counts instead of putting the prosecutor to his election.

But in misdemeanours it was no objection to an indictment that it contained several charges. *Young v. The King*, 3 Term. R. 98, 106.

In *Rex v. Dunn*, 1 Moody C.C. 146, it was held in an indictment for stealing several articles, it was no ground for confining the prosecutor's proof to some of the articles that they might have been and probably were stolen at different times, if they might have been stolen all at once; but on an indictment against a receiver for receiving several articles if it appear that they were received at different times, the prosecutor might, under the English practice, have been put to his election.

The English practice is to put the prosecutor to his election in felonies where the overt acts relied on as proving the different offences are in substance the same. *R. v. Lockett*, [1914] 2 K.B. 720, 30 Times L.R. 283, 9 Cr. App. R. 268.

A separate trial may now be directed under sec. 857 of the Code, in regard to any of the counts of an indictment, instead of, as formerly, putting the prosecutor to his election, and in order to guard the accused against surprise at the trial, he may ask the prosecution to furnish the particulars of the several charges alleged in the various counts of the

indictment, and then the court might, under sec. 859 of the Code, if satisfied that it was necessary for a fair trial, order the prosecution to furnish particulars, or direct a separate trial on each count. *R. v. Michaud*, 17 Can. Cr. Cas. 89 (N.B.).

*Where evidence admissible on one count is inadmissible on another*—If the court allows all charges to be tried together, then the evidence admissible upon each count is properly before the jury. If a part of the evidence is admissible to prove one count, but is wholly inadmissible upon another count, the judge ought to do his best to counteract any prejudice that might be caused in the trial of the latter count, by telling the jury to leave out of consideration the evidence which was not admissible upon that count. *R. v. Kelly* [1917] 1 W.W.R. 46, 27 Can. Cr. Cas. 140, 188; *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282; *Reg. v. Paul*, 25 Q.B.D. 202, at pp. 211-212, 59 L.J.M.C. 138, 54 J.P. 667, 62 L.T. 845, 17 Cox C.C. 111.

If the defence think that such a direction would not prevent the jury considering the evidence on one count in deciding the other, the remedy is to apply for a separate trial of one or more of the counts. *R. v. Strong* (1915) 43 N.B.R. 190, 24 Can. Cr. Cas. 430, 26 D.L.R. 122.

It is to be noted that the provisions of the Criminal Code relating to the joinder and trial of distinct charges of theft, differ in an important respect from the corresponding sections of the English Larceny Act (24-25 Vict., Imp., ch. 96, secs. 5-6). *R. v. Kelly*, [1917] 1 W.W.R. 46, 27 Can. Cr. Cas. 140, 182 (Man.). Per Perdue, J.A. Where five charges under several separate counts in an indictment for theft and false pretenses arose out of one continuous set of transactions, the trial judge's discretion is properly exercised in trying the five counts together and separating the trial as to a count for perjury involved with the other transactions. *R. v. Kelly* [1917] 1 W.W.R. 46 (Man.) at 51; same case on appeal, *Kelly v. The King*, [1917] 1 W.W.R. 463, 54 S.C.R. 220, 27 Can. Cr. Cas. 282; *R. v. Cross*, 43 N.S.R. 320, 14 Can. Cr. Cas. 171.

*Amendment of indictment*—See secs. 889-893.

*Certain technical averments dispensed with in indictments*—See secs. 844-857, 859, 861-865.

*Order for particulars*—See secs. 859, 860.

*Distinct charges of theft; "whether against the same person or not"*—The addition of the words "or not" in sec. 857, make the section distinguishable from the corresponding clause in the Larceny Act, 1861 (Imp.), 24 and 25 Vict., ch. 96, sec. 5, under which it has been held that the distinct charges of theft included in the one indictment must not charge one defendant in one count singly and with another defendant jointly in another. *R. v. Edwards* (1912) 8 Cr. App. R. 128, [1913] 1 K.B. 267, 82 L.J.K.B. 347.

*Doubt as to appeal from the discretionary order*—In *R. v. Hughes*, 17 Can. Cr. Cas. 450 (Ont.), MacLaren, J.A., expressed the opinion

that the discretion of the trial judge under sec. 857 to try the different counts separately or jointly would not be subject to review by the Court of Appeal.

*Multifarious counts*—Sec. 892 permits of an application being made at any stage of the trial to “amend or divide” any count which is double or multifarious and embarrassing to the defence.

*Disagreement on some counts*—As each count may be treated as a separate indictment the verdict on some counts may be accepted although there is a disagreement on others; leaving the latter for separate trial before another jury. *R. v. Toronto Ry. Co.* (No. 1), 34 O.L.R. 589, 18 Can. Cr. Cas. 417 (reversed on other grounds, *Toronto Ry. Co. v. The King*, [1917] A.C. 630, 29 Can. Cr. Cas. 29.)

**Order for trial separately.—Procedure on each count as if separate indictment.**

**858.** Any order for trial upon one or more counts of an indictment separately may be made either before or in the course of the trial, and if it is made in the course of the trial the jury shall be discharged from giving a verdict on the counts on which the trial is not to proceed.

2. The counts in the indictment as to which the jury are so discharged shall be proceeded upon in all respects as if they had been found in a separate indictment.

*Origin*—Sec. 626, Code of 1892.

*Division of multifarious counts*—See sec. 892.

### *Particulars.*

**Particulars may be ordered.**

**859.** The court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular,—

- (a) of what is relied on in support of any charge of perjury, the making of a false oath or of a false statement, fabricating evidence or subornation, or procuring the commission of any of such offences;
- (b) of any false pretences or any fraud charged;
- (c) of any attempt or conspiracy by fraudulent means;
- (d) stating what passages in any book, pamphlet, newspaper or other printing or writing are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;

- (e) further describing any document or words the subject of a charge;
- (f) further describing the means by which any offence was committed;
- (g) further describing any person, place or thing referred to in any indictment.

*Origin*—Secs. 613, 615, 616, Code of 1892.

*Order for particulars, if satisfied that it is necessary for a fair trial*—Code sec. 859 provides that particulars may be ordered if necessary for a fair trial and sec. 860 provides that on an application for particulars the court may have regard to the depositions. The purpose of the particulars is for information, and possibly the reference to the depositions is to see whether the information required is already contained therein. *R. v. Leverton* [1917] 2 W.W.R. 584, 590, 11 Alta. L.R. 355, 28 Can. Cr. Cas. 61. But the depositions may also be referred to for ascertaining what is relied on in support of the charge or the means by which the offence was committed where further details should be supplied as necessary for a fair trial (Code sec. 859).

The ordering of particulars is a matter of judicial discretion. *R. v. Stevens*, 8 Can. Cr. Cas. 387 (N.S.).

The indictment must contain a valid count identifying the charge. Then the court, being seized of the nature of the charge, may, if it thinks it essential to a fair trial, order the further particulars. *R. v. Bainbridge*, (1918) 42 O.L.R. 203.

An indictment for theft of money which discloses the date of the offence, the name of the person from whom taken and the amount, does not require particulars of the mode in which the alleged offence was committed, unless the defendant can show prejudice in his defence. *R. v. Lemelin*, 22 Can. Cr. Cas. 109.

*Effect of service of particulars*—If the trial judge orders particulars, the prosecution is bound by the particulars given in accordance with the order. *R. v. Carswell* (1916) 10 W.W.R. 1027, 1038, 26 Can. Cr. Cas. 288, 34 W.L.R. 1042. And if without an order, the prosecutor furnishes particulars he is likewise bound. *R. v. Carswell* (1916) 10 W.W.R. 1027, 1038. The particulars served do not enlarge the scope of the indictment; there can be no conviction for something stated in the particulars which would not be within the indictment itself. *R. v. Sinclair* (1906) 12 Can. Cr. Cas. 20 (Sask.). *R. v. Bainbridge* (1918) 42 O.L.R. 203.

*Failure to ask particulars as affecting a variance*—If a person is convicted on an indictment for forging a promissory note, and the fact in evidence was an incomplete note form which nevertheless under Code sec. 466 might be the subject of forgery, strict accuracy would require that the indictment be amended by calling the document an

"incomplete promissory note" and setting forth in it a detailed description of the document. But if no question is raised on the trial when an amendment could have been ordered, the conviction will stand where the defendant made no application for particulars under sec. 859 and was not misled by the discrepancy, in calling the forged document a "promissory note." *Ead v. The King* (1908) 40 S.C.R. 272, 13 Can. Cr. Cas. 348, 360. Moreover the accused might plead *autrefois convict* if again indicted for forging an "incomplete promissory note" if it were in fact the same document as the matter on which the accused was given in charge on the former trial would have been the same had "all proper amendments been made which might then have been made." (Code sec. 907). *Ead v. The King*, 13 Can. Cr. Cas. 348, 40 S.C.R. 272.

*Particulars as to specific offences*—See the appropriate Code section which deals with the specific offence.

*Amendment of indictment*—See secs. 889-893.

*Motion in arrest of judgment*—Code sec. 1007.

**Particulars.**—Copy to be furnished.

**860.** When any particular as aforesaid is delivered a copy shall be given without charge to the accused or his solicitor, and it shall be entered in the record, and the trial shall proceed in all respects as if the indictment had been amended in conformity with such particular.

2. In determining whether a particular is required or not, and whether a defect in the indictment is material to the substantial justice of the case or not, the court may have regard to the depositions.

*Origin*—Sec. 617, Code of 1892.

### *Special Cases.*

**Libel, etc.—Sufficiency.—Specifying sense.—What proof necessary.**

**861.** No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal,

specifying that sense without any prefatory averment showing how the matter was written in that sense.

3. On the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

*Origin*].—Sec. 615, Code of 1892.

*Criminal libel*].—Seditious libel, secs. 132-134; blasphemous libel, sec. 198; defamatory libel, secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045.

*Obscene publications*].—See sec. 207.

*Count for seditious libel*].—A defendant was charged with publishing a seditious libel. The indictment as presented by the grand jury was that he did in a certain year and at a certain place "publish a seditious libel contrary to the Criminal Code sec. 184." The defendant pleaded "not guilty" to the indictment without making any objection. On a later date the case came on for trial, when the defendant sought to demur to the indictment or to move to quash it, for defects apparent on the face. The trial judge refused leave to raise the question, as the defendant had already pleaded. Particulars had been (without previous demand) delivered by the Crown after the plea had been made, stating that the defendant did "publish seditious libel by publishing the following pamphlets." Then followed pars. 1 to 7, mentioning respectively seven pamphlets, each bearing a different title to the others, except that the seventh was not stated to have any title, and the seditious character and the purpose of publishing each was stated separately in its own paragraph, but no reference was made to any particular part or passage of any of them. The publications mentioned had been before the grand jury when they found the indictment. In view of these facts and of secs. 859 and 860 of the Code, as to the delivery of particulars, the trial judge amended the indictment by changing the figures "184" into "134"—sec. 134 of the Code being obviously intended—and by adding the words "to wit the matters contained in the annexed particulars." The indictment was not sent back to the grand jury, nor was the defendant called upon to plead again. The trial then proceeded, and the petit jury found the defendant guilty on the amended indictment with regard to two of the publications mentioned in the particulars. It was held, upon a case stated, that the demurrer to the indictment and the motion to quash should have been allowed; that the verdict did not make the indictment good; that the amendments should not have been made without the privity and consent of the grand jury; that the accused had been tried upon seven libels and convicted upon two, when the grand jury had found a bill upon only one, which was not known to be either of the two; and that the accused was, therefore, entitled to be discharged notwithstanding the verdict of the jury, a motion in arrest of judgment having been made under sec. 1007 and disallowed. *R. v. Rainbridge*, (1918) 42 O.L.R. 208.

**Perjury.—What statements unnecessary in count.**

**862.** No count charging perjury, the making of a false oath or of a false statement, fabricating evidence or subornation, or procuring the commission of any of these offences, shall be deemed insufficient on the ground that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made, or the subject of the inquiry, or the words used or the evidence fabricated, or on the ground that it does not expressly negative the truth of the words used.

*Origin*].—Sec. 616, Code of 1892; R.S.C. 1886, ch. 174, sec. 107.

*Particulars*].—The prosecutor may be ordered under sec. 859 to furnish particulars of what is relied on in support of the charge, but by sec. 862 the count is not to be deemed insufficient, and the indictment could not therefore be quashed for not having included such particulars in the bill found by the grand jury. See also sec. 852, as to stating the substance of the offence. Sec. 862 makes it unnecessary to state the nature of the authority of the tribunal before which the oath was taken. *R. v. Morrison*, (1916) 49 N.S.R. 446, 26 Can. Cr. Cas. 26.

*Perjury and cognate offences*].—See secs. 170-177.

"*Procuring the commission of " perjury, etc.*].—By secs. 69 and 70, aiders and abettors are declared to be parties to the offences procured to be committed. They may therefore be charged as principals with such particulars as are necessary or may be ordered under secs. 852-853, 859 and 860. Subornation of perjury is specially included in sec. 174 with the same maximum punishment as for the perjury itself (14 years).

**Indictment.—False pretenses.—Fraud.**

**863.** No count which charges any false pretense, or any fraud, or any attempt or conspiracy by fraudulent means, shall be deemed insufficient because it does not set out in detail in what the false pretenses or the fraud or fraudulent means consisted.

*Origin*].—Sec. 616, Code of 1892; R.S.C. 1886, ch. 174, sec. 107.

*False pretense or fraud*].—See secs. 404-444. Sec. 405A as to fraudulently obtaining credit uses the phrase "under false pretenses or by means of fraud." The offence should, however, be described with sufficient particularity that the accused may know with what he is charged. Code secs. 852, 853 and 859, and notes to same.

*Attempts to commit indictable offences*].—See secs. 570, 571.

*Conspiracy by fraudulent means*].—See sec. 444 and note to same.

*How and in whom Property may be Laid.***Statements sufficient in certain cases in indictments.**

**864.** An indictment shall be deemed sufficient in the cases following:—

- (a) If it be necessary to name the joint owners of any real or personal property, whether the same be partners, joint tenants, parceners, tenants in common, joint stock companies or trustees, and it is alleged that the property belongs to one who is named, and another or others, as the case may be;
- (b) If it is necessary for any purpose to mention such persons and one only is named;
- (c) If the property in a turnpike road is laid in the trustees or commissioners thereof without specifying the names of such trustees or commissioners;
- (d) If the offence is committed in respect to any property in the occupation or under the management of any public officer or commissioner, and the property is alleged to belong to such officer or commissioner without naming him;
- (e) If for an offence under sec. 371 the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place.

*Origin*—Sec. 619, Code of 1892; R.S.C. 1886, ch. 174, secs. 118, 119, 120, 121, 123.

*Certain technical averments dispensed with in indictments*—See secs. 844-857, 859, 861-869.

*Order for particulars*—See secs. 859, 860.

*Amendment of indictment*—See secs. 889-893.

**Property of body corporate.**

**865.** All property, real and personal, whereof any body corporate has, by law, the management, control or custody, shall, for the purpose of any indictment or proceeding against any other person for any offence committed on or in respect thereof, be deemed to be the property of such body corporate.

*Origin*—Sec. 620, Code of 1892; R.S.C. 1886, ch. 174, sec. 122.



**Stealing ores or minerals.**

**866.** In any indictment for any offence mentioned in secs. 373 and 424 it shall be sufficient to lay the property in His Majesty, or in any person or corporation, in different counts in such indictment.

*Origin*—Part of sec. 621, Code of 1892; R.S.C. 1886, ch. 174, sec. 124.

*Theft and other unlawful dealings with gold or silver mine products*—See secs. 353, 378, 424, 424A, 637, 750(d), 866, 893.

*Amendment at trial when property wrongly laid*—See sec. 893.

**Indictment for offences in respect of postal cards, etc.**

**867.** In any indictment for any offence committed in respect of any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, or by, or by the authority of, any corporate body for the payment of any fee, rate or duty whatsoever, the property therein may be laid in the person in whose possession, as the owner thereof, it was when the offence was committed, or in His Majesty if it was then unissued or in the possession of any officer or agent of the Government of Canada or of the province by authority of the legislature whereof it was issued or prepared for issue.

*Origin*—Sec. 622, Code of 1892; R.S.C. 1886, ch. 174, sec. 125.

*Post offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510D, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

**Theft by public servants.**

**868.** In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under sec. 359, paragraph (c), or 391, the property in any such chattel, money or valuable security may, in any warrant by the justice before whom the offender is charged, and in the indictment preferred against such offender, be laid in His Majesty, or in the municipality, as the case may be.

*Origin*—Sec. 623, Code of 1892; R.S.C. 1886, ch. 174, sec. 126.

*Theft by public employees*—See sec. 359 (c).

*Government or municipal employee unlawfully refusing to deliver up public property*—See sec. 391.

**Offences respecting letter bags, etc.**

**869.** When an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be laid in the Postmaster General; and it shall not be necessary to allege in the indictment, or to prove upon the trial or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.

2. The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in His Majesty, if the same is the property of His Majesty, or if the loss thereof would be borne by His Majesty, and not by any person in his private capacity.

*Origin*—Sec. 624, Code of 1892; R.S.C. 1886, ch. 35, sec. 111.

*Certain technical averments dispensed with in indictments*—See secs. 844-857, 859, 861-869.

*Order for particulars*—See secs. 859, 860.

*Amendment of indictment*—See secs. 889-893.

*Post offences generally*—See Code secs. 3, 209, 265, 364, 365, 366, 400, 407, 449, 451, 510b, 516, 538, 867, 869, and the Post Office Act, R.S.C. 1906, ch. 66.

*Preferring Indictment.*

**Order for by judge when perjury committed before him.—Commitment in such case.—Recognizance may be required.**

**870.** Any judge of any court of record before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceeding made or taken before him, direct such person to be prosecuted for such perjury, if there appears to such judge a reasonable cause for such prosecution.

2. Such judge may commit such person until the next term, sittings or session of any court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit him to enter into a recognizance, with one or more sufficient sureties, conditioned for his appearance at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave.

3. Such judge may require any person he thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against the person so directed to be prosecuted.

*Origin*—R.S.C. 1886, ch. 154, sec. 4.

*Court of record may order prosecution for perjury*—A committal of a witness pursuant to the judge's direction that he be held and prosecuted for perjury does not prevent the same judge from making an order for bail, and the judge is not *functus officio* by reason of the first order. *Re Ruthven*, 6 B.C.R. 115, 2 Can. Cr. Cas. 39.

A police magistrate holding a summary trial under sec. 777 has been held not to be a "court of record" for the purposes of the Habeas Corpus Act. *R. v. Gibson*, 29 Ont. R. 660, 2 Can. Cr. Cas. 302.

**Any one bound over may prefer indictment.—Application to quash.  
—Quashing during trial.**

**871.** Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice.

2. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such count if satisfied that it is not so founded.

3. If at any time during the trial it appears to the court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it.

*Origin*—Sec. 641 of the 1892 Code as amended by 63-64 Vict., ch. 46, sec. 3.

*Recognition to prefer indictment*—See secs. 688, 689, 692.

*Security for costs*—The court before which the indictment is to be tried or a judge thereof may in its or his discretion order that the prosecutor who has been bound over to prosecute under sec. 688 at his own request, shall not be permitted to prefer any such indictment until he has given security for the costs which might be ordered against him under sec. 689 (1) in favour of the accused, including the latter's costs of appearance on the preliminary enquiry. Sec. 689 (2).

*Any one who is bound over to prosecute "any person"*—It would seem that corporations are now included as to offences of which a corporation can be guilty. See definition of person in Code sec. 2 (13) and *Re Schofield* (1913) 22 Can. Cr. Cas. 93, distinguishing the cases of *Re Chapman* and *City of London*, 19 O.R. 33, decided before the passing of the Code interpretation clause 2 (13) by which "person" includes all public bodies, bodies corporate, companies, etc., "in relation to such acts and things as they are capable of doing and owning respectively."

*Motion to quash for lack of consent to prefer*—See sec. 873.

*Motion to quash generally*—See sec. 898.

#### **Crown counsel may prefer indictment.**

**872.** The counsel acting on behalf of the Crown at any court of criminal jurisdiction may prefer against any person who has been committed for trial at such court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3.

*Any charge founded on the depositions*—The Crown prosecutor representing the Attorney-General has a right to present bills to the grand jury for all the offences disclosed by the depositions taken before the police magistrate. There is no restriction that the bill shall be for only one offence disclosed. *R. v. Mooney*, 11 Can. Cr. Cas. 333, at 340, 15 Que. K.B. 57.

If the depositions sent up by the magistrate were not taken in his presence but by a stenographer in another room, the indictment founded on same may be quashed, if sec. 872 is the only authority for bringing it. *R. v. Traynor*, 10 Que. Q.B. 63, 4 Can. Cr. Cas. 410. The defect in the depositions might be cured by procuring a consent under sec. 873 to prefer an indictment without regard to the depositions. And slight defects in the form in which a magistrate returns depositions to

the proper court cannot be taken advantage of to support a contention that a charge should be quashed upon the ground that there had been no preliminary enquiry. *R. v. McClain*, (1915) 7 W.W.R. 1134, 8 Alta. L.R. 73, 23 Can. Cr. Cas. 488. As to indictments by direction of the Attorney-General or by leave of the court, see secs. 873, 873A.

A bill of indictment in Quebec preferred by the Crown prosecutor under Cr. Code, sec. 872, for a charge founded on the evidence taken before the committing justice, need not in addition to the signature of the Attorney-General's representative to the bill include a statement that he was in fact such representative. *Gagnon v. The King*, 24 Can. Cr. Cas. 51, 23 Que. K.B. 390.

The right to prefer an indictment under sec. 872 is displaced by the quashing of the commitment in habeas corpus proceedings on the ground that there was no evidence to sustain the commitment. *R. v. Mackey* (1918) 29 Can. Cr. Cas. 419 (N.S.); *R. v. Mackey*, 29 Can. Cr. Cas. 167 (N.S.). And the court may refuse its consent to an indictment under such circumstances. *R. v. Mackey* (1918) 29 Can. Cr. Cas. 419, in which defendant's counsel raised the point by way of preliminary objection to the bill being submitted to the grand jury.

*What is indictable*—The law is thus stated in *Hawkin's Pleas of the Crown*, bk. 2, ch. 25, sec. 4: "Wherever a statute prohibits a matter of public grievance to the liberties and security of a subject or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it."

This rule has been generally approved and followed. See *R. v. Durocher*, 21 Can. Cr. Cas. 382; *R. v. Buchanan*, 8 Q.B. 883; *R. v. Tyler and International Commercial Co.* [1891] 2 Q.B. 538, at p. 592; *R. v. Hall* [1891] 1 Q.B. 747; *In re R. v. Meehan*, 3 O.L.R. 567.

*North-West Territories*—By sec. 36 of the North-West Territories Act, R.S.C., ch. 62, no grand jury shall be summoned or sit in the Territories, and by sec. 52 the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as in an indictment the offence wherewith he is charged.

*Yukon Territory*—The administration of criminal law in the Yukon Territory is subject to the special provisions of the Yukon Act, R.S.C., ch. 63, one of which (sec. 63) is that no grand jury shall be summoned or sit in the Yukon Territory and that where there is a trial with a jury the jury shall be composed of six jurors (sec. 67). The power of summary trial by a judge without a jury is conferred under sec. 65 as to certain offences, while sec. 66 provides for the summary trial of any other criminal offence without a jury on the defendant's consent to that mode of trial.

**Attorney General may prefer indictment.—Any one by order.—Who may prefer an indictment.**

**873.** The Attorney General or any one by his direction or any one with the written consent of a judge of any court of criminal jurisdiction or of the Attorney General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent.

2. Any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

3. It shall not be necessary to state such consent or order in the indictment and an objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

4. Except as in this Part previously provided no bill of indictment shall be preferred in any province of Canada.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3; sec. 641, Code of 1892.

*Attorney-General*—See definition in sec. 2, sub-sec. (2).

*Application of sec. 873*—The omission in sec. 873 to restrict its operation to persons already before the court or any other class, if it was intentional as we must assume that it was, could reasonably have no other significance than that no restriction was intended. That the omission was intentional, and that it was therefore meant that the application of the section should be general, is shown by the great particularity with which secs. 871 and 872 specify the classes of persons to which they respectively apply, and the sharp contrast which exists in that respect between these sections and sec. 873 in question. Observing that the three sections come under the general heading "Preferring Indictments" and follow in numerical order, if on their plain reading the first two sections, as the fact is, are special in their application and the third of a general character, there is no reason or justification for introducing in the latter any restriction. *R. v. Kelly*. Moreover, in secs. 871 and 872 the particularity in defining the offences for which they may be so indicted are in perfect logical harmony; whilst with respect to sec. 873, no other construction than that any person may be indicted thereunder, could be consistent with the statement therein that the indictment may be preferred for "any offence." *R. v. Kelly*, 10 W.W.R. 1345, 27 Can. Cr. Cas. 94 (Man.), and see same case in appeal, *R. v. Kelly* [1917] 1 W.W.R. 46, 27 Man. R. 105, 27 Can. Cr. Cas. 140 and *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.B. 220, 27 Can. Cr. Cas. 282.

*Limitation of indictments*—In considering the effect of secs. 871, 872 and 873, it is well to remember that at common law any person might prefer a bill before the grand jury against any one whom he

accused of committing an indictable offence, and this might be done without previous enquiry before a magistrate, or by leave from the court or otherwise. This right was liable to be abused, and so the Vexatious Indictments Act, 22 Vict. (Imp.), chapter 17, was passed, and the right has been cut down so that now by virtue of sec. 873 no bill can be preferred in Canada except as provided in secs. 870, 871, 872, 873. *R. v. Faulkner*, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

In Ontario and Quebec there was the Vexatious Indictments Act, 1861, Can., expressly taking away the right to prefer indictments for certain misdemeanours except with the consent of certain judges or officers. *Re Criminal Code*, 43 S.C.R. 447, 448, 16 Can. Cr. Cas. 459.

*Indictment by direction of Attorney-General*—Although an indictment under sec. 872 may have been set aside by the court for irregularities in procedure at the preliminary inquiry, nothing prevents the Attorney-General from presenting a new indictment which will be submitted to the grand jury without there having been any preliminary inquiry or any information whatever before a magistrate. *R. v. Robert* (No. 2), 12 Que. P.R. 9; *R. v. Lepine*, 4 Can. Cr. Cas. 145.

The fact that an accused person has been sent up for trial pursuant to a preliminary inquiry, does not deprive the Attorney-General of the right to bring an indictment before the grand jury and to ignore altogether the proceedings already taken before the magistrate. *R. v. Houle*, 12 Que. P.R. 4, 17 Can. Cr. Cas. 407; *R. v. Pawliski* (1915) 24 Can. Cr. Cas. 147, 31 W.L.R. 675.

In *R. v. Duncan*, (1918) 15 O.W.N. 163, an indictment for murder was preferred by consent of the court although the commitment was for manslaughter only. The case resulted in a verdict for manslaughter. An indictment not preferred with the consent of the judge or the direction of the Attorney-General under Code sec. 873 may be quashed if not founded upon facts disclosed in the depositions taken on the preliminary enquiry. *R. v. Eliasoph*, 16 Can. Cr. Cas. 131, 19 Que. K.B. 232.

If the bill is preferred under authority of the Attorney-General's consent, the consent should be in writing and should be specific as to the offence. *R. v. Townsend*, 28 N.S.R. 468, 3 Can. Cr. Cas. 29; *R. v. Hamilton*, 31 N.S.R. 322, 2 Can. Cr. Cas. 178.

*Indictment by leave of the judge*—The consent of the judge is to be in writing and obtained before the indictment goes to the grand jury. *R. v. Beckwith*, 7 Can. Cr. Cas. 450 (N.S.); *R. v. Weir*, 3 Can. Cr. Cas. 155 (Que.).

*Leave to private prosecutor to prosecute*—When a person preferring a charge requires the magistrate, who has discharged the accused, to bind him over to lay and prosecute an indictment and does submit such an indictment to the grand jury, at the following sitting of the court, he has no right to appear, by himself or through counsel, before the grand jury without the permission of the court under the long-estab-

lished practice in the Court of King's Bench for Quebec. *R. v. Hoo Yoke*, 14 Que. K.B. 540, 10 Can. Cr. Cas. 211; and see *R. v. St. Louis*, 1 Can. Cr. Cas. 141, where the Minister of Justice obtained leave to prosecute.

*Lost or stolen indictment*—If the original indictment to which the accused had pleaded at a previous sittings has been lost or stolen, the court may direct that a new indictment be preferred, to go before another grand jury. *R. v. McAuliffe* (1906) 17 Can. Cr. Cas. 495 (Ont.).

*Election of speedy trial notwithstanding indictment*—See notes to secs. 825-828.

*Proceedings against a corporation for an indictable offence*—Leave to prefer an indictment may be applied for under sec. 873; *R. v. Standard Soap Co.*, 12 Can. Cr. Cas. 290; and for offences triable summarily under sec. 773, the procedure of sec. 773A will apply. Secs. 918-920 deal with the notice of indictment to be served on a corporation defendant. As to summary conviction offences, see also sec. 720A.

*Formal proceedings in jury courts in Ontario*—The following are the forms and instructions for the use of clerks of assize and criers:

*Upon opening Court the Crier makes Proclamation:*

Oyez, Oyez, Oyez.—All persons having anything to do before my Lord the King's Justice of the Supreme Court of Ontario at its sittings of Assize and Nisi Prius Oyer and Terminer and general gaol delivery (if a Civil Court omit the words *Oyer and Terminer and general gaol delivery*), for the County of \_\_\_\_\_ draw near and give your attendance.—God save the King.

Oyez, Oyez, Oyez.—Sheriff of the County of \_\_\_\_\_ return the several writs and precepts to you directed returnable here this day that my Lord the King's Justice may proceed thereon.

*After the precept has been handed to the Clerk the Crier proclaims:*

Oyez, Oyez, Oyez.—You good men who are summoned as Grand Jurors to enquire for our Sovereign Lord the King and the County of \_\_\_\_\_ answer to your names and save your fines.—God save the King.

*The Clerk asks the Grand Jurors to select their foreman, who is sworn as follows:*

You, A.B. as foreman of this Grand Inquest for the body of this County of \_\_\_\_\_ shall diligently enquire and true presentment make of all such matters and things as shall be given you in charge; the King's counsel, your fellows and your own, you shall keep secret; you shall present no one for envy, hatred or malice, neither shall you leave any one unrepresented for fear, favour or affection, gain, reward or hope thereof; but you shall present all things truly as they come to your knowledge, according to the best of your understanding.—So help you God.



*The rest of Grand Jury (according to custom three at a time) are sworn thus:*

The same Oath your foreman hath taken on his part, you and every of you, shall well and truly observe and keep on your part.—So help you God.

*The Crier then proclaims:*

Oyez, Oyez, Oyez.—All persons are commanded to keep silence while my Lord the King's Justice delivers the charge to the Grand Inquest upon pain of imprisonment.

*Judge charges Grand Jury.*

*A Bailiff is sworn to attend the Grand Jury as follows:*

"You swear that you will diligently attend the Grand Inquest during the present Assizes, and carefully deliver to them all such Bills of Indictments, or other things as shall be sent to them by the Court without alteration.—So help you God."

*The Grand Jury may then retire:*

*The Crier then proclaims:*

Oyez, Oyez, Oyez.—You good men who are summoned here as Petit Jurors answer to your names and save your fines.—God save the King.

*The panel of Petit Jurors is then called.*

*When an adjournment is made the Crier announces:*

This Court stands adjourned until (the time named).

*When the Court resumes the Crier announces:*

The sittings of the Supreme Court of Ontario, for the County of will now be resumed.

*Where a formal adjournment is made the Crier announces:*

Oyez, Oyez, Oyez.—All persons having anything further to do before my Lord the King's Justice of the Supreme Court of Ontario at its Sitting of Assize and Nisi Prius, for the County of may depart hence at this time and give their attendance here again to-morrow morning at

(Formal adjournment of Criminal Court is not now necessary. Code sec. 945, sub-sec. 6.)

*Upon the return of bills by the Grand Jury:*

*When Grand Jury bring in indictment the Clerk reads True Bills first; then says: "The King v. A.B., Forgery" (or as the offence may be) "True Bill, C. D. Foreman."*

*Then to Grand Jury after reading True Bills only the Clerk says:—*

*"You are content the Court shall amend matter of form, altering no matter of substance, in this Bill (or these Bills) you have found, without your privity."*

*The Clerk then reads those returned "No Bill" thus—"The King v A.B., Forgery (or as the offence may be) 'No Bill.' C. D., Foreman."*

#### PROCEEDINGS UPON A TRIAL.

*The accused being placed in the dock and standing he is arraigned by the Clerk as follows:*

*"You stand indicted by the name of \_\_\_\_\_." The Clerk then reads the indictment (beginning at "The Jurors of our Lord the King, etc."), and asks the accused:*

*"How do you plead? Guilty or not guilty?"*

*If the accused pleads not guilty the Clerk marks on the indictment the words "Po Se" (Ponit se super patriam, i.e., Puts himself upon the country), and the date and signs it with his initials and asks the accused:*

*"Are you ready for your trial?"*

*If the accused pleads guilty the Clerk hands the indictment to the judge, who records the plea and returns it to the Clerk, who addresses the accused:*

*"Harken to your plea as the Court records it. You plead guilty as within charged."*

*Calling the Jury:—*

*The Clerk calls as many names of jurors as directed by the judge. Code sec. 927 (3) and addresses the prisoner thus:—*

*"These good men that you shall now hear called and who do appear are the Jury which are to pass between Our Sovereign Lord the King and you on your trial, if therefore you (or any of you) shall challenge them or any of them, you must do so as they come to the Book to be sworn, before they are sworn, and you shall be heard."*

*The clerk then proceeds to swear Jury, each Juror being sworn in the order in which his name is drawn (Code sec. 927, s.s. 4) as follows:*

*Oath:—"Prisoner look at the juror, juror look at the prisoner. (At this point pause to permit of challenge; if none the Crier should hand the Book to the juror and then proceed.) You shall well and truly try and true deliverance make between Our Sovereign Lord the King and the prisoner at the bar whom you shall have in charge and true verdict give according to the evidence.—So help you God."*

*When the Jury is complete the Clerk calls over the names of the Jurors, who answer "Sworn," and then addresses them as follows:*

"Gentlemen of the Jury, look upon the prisoner and harken to his charge. He stands indicted by the name of (reads indictment). Upon this indictment he hath been arraigned.—Upon his arraignment he pleaded Not Guilty, and for his trial he hath put himself upon the Country, which Country you are. Your charge therefore is to enquire whether he be guilty of the indictable offence charged, or not guilty, and to harken to the evidence."

*Oaths to Constable:—*

*On Jury retiring.*—You swear you will keep every one of this Jury in some private and convenient place, you shall not suffer any person to speak to them or any of them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed upon their verdict, without leave of the Court.—So help you God.

*On a Jury retiring during trial.*—You shall attend such of the Jury as wish to retire, remain with them and return them to court, suffer no one to speak to them, nor speak to them yourself with reference to this cause.—So help you God.

*When Jury locked up for night on adjournment of case.*—You shall attend this Jury and remain with them during the night and return them to the court to-morrow morning at o'clock; suffer no one to speak to them, nor speak to them yourself with reference to this cause.—So help you God.

*When Jury comes in with verdict the Clerk calls over their names, and the Crier numbers them. The Clerk then asks:*

"Gentlemen, have you agreed on your verdict? Do you find the prisoner at the bar guilty or not guilty?"

*After the verdict has been recorded the Clerk says to Jury:*

"Hearken to your verdict as the Court hath recorded it. You say the prisoner at the bar is guilty, (or 'not guilty'). So say you all."

*If the verdict is guilty, and there are counts for previous convictions, Clerk reads them to prisoner, and then says:*

"Are you the A.B. mentioned in this count of the indictment?" If "Yes," he says: "Do you admit this previous conviction just read to you?" If the answer is "Yes," Judge endorses: "admits previous conviction." If prisoner denies it, witnesses are sworn before the same jury, who remain in their box and try it, but are not resworn.

*Oath to witness.*—The evidence you shall give to the court and jury sworn between Our Sovereign Lord the King and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth.—So help you God.

*When a recognizance is to be estreated:*

*The Crier proclaims three times:*

"A.B., come forth and answer to the charge preferred against you, or you forfeit your recognizance."

*And to each surety three times:*

"C.D., bring forth the body of A.B. to answer to the charge preferred against him as you undertook or you forfeit your recognizance."

*Where a witness is to be placed in default the Crier proclaims:*

"A.B.—Come forth and give evidence in *The King v. —*, pursuant to your subpoena."

*Juror's oath when issue of insanity tried (Code sec. 967).*

You shall well and truly try whether A.B. is or is not on account of insanity unfit to take his trial.—So help you God.

*Oath of triers.*—You shall well and truly try whether A.B., one of the Jurors, stands indifferently to try the prisoner at the bar and a true verdict give according to the evidence.—So help you God.

*Oath of witness before them.*—The evidence you shall give to the Court and triers upon this inquest shall be the truth, etc.

*Interpreter's Oath.*—You shall well and truly interpret the oath to the witness, and all questions put to the witness, and his answers thereto, and all such matters and things as shall be required of you, to the best of your skill and understanding.—So help you God.

#### **Formal charge in Saskatchewan and Alberta in lieu of indictment.**

**873A.** In the provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged.

2. Such charge may be preferred by the Attorney General or an agent of the Attorney General, or by any person with the written consent of the judge of the court or of the Attorney General, or by order of the court.

*Origin*—6 and 7 Edw. VII, ch. 8; N.W.T. Act, 54 and 55 Vict., Jan., ch. 22, sec. 11.

*"Attorney-General"*—See definition in sec. 2, sub-sec. (2).

The deputy of the Attorney-General for either of the provinces of Alberta and Saskatchewan has no authority to prefer a charge under

sec. 873A without the written consent of the Judge or of the Attorney-General or an order of the court. *Re Criminal Code*, 43 Can. S.C.R. 434, 16 Can. Cr. Cas. 459.

Section 17 of the Lord's Day Act provides that "no action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed, nor after the expiration of sixty days from the time of the commission of the alleged offence." It was held that the deputy of the Attorney-General of a province has no authority to grant such leave.

In *re Criminal Code* and the Lord's Day Act, 43 Can. S.C.R. 434, 16 Can. Cr. Cas. 459; and see *Abrahams v. The Queen*, 6 S.C.R. 10.

*Criminal courts constituted without a grand jury under provincial law*—While the territory now included in the Provinces of Alberta and Saskatchewan was, as part of the North-West Territories, subject in all matters to the legislative jurisdiction of the Dominion Parliament, the statute in force provided that "no grand jury shall be summoned or sit in the Territories." R.S.C. (1886) ch. 50, sec. 65. The courts of criminal jurisdiction of the Territories were constituted without grand juries. The provincial legislatures of these two provinces continued this constitution of their courts.

Having to deal with courts so constituted, Parliament found itself obliged to provide some substitute for the methods of commencing criminal trials prescribed for other parts of Canada in which grand juries form part of the criminal courts as constituted by the provincial legislatures. In the North-West Territories trials were begun "by a formal charge in writing setting forth as in an indictment the offence . . . charged" (54 and 55 Vict., ch. 22, sec. 11).

When the Provinces of Alberta and Saskatchewan were created Parliament thought proper to make a more formal and definite provision, and for this purpose enacted, in 1907, what is now clause 873A of the Criminal Code. This provision is a re-enactment of sec. 11 of ch. 22 of 54 and 55 Vict., and an application of sub-sec. 1, of sec. 873, of the Criminal Code to the criminal courts as constituted in these provinces. Parliament does not assume to deal with the constitution of these courts; it merely provides a procedure suited to the courts as it finds them constituted. *Re Criminal Code*, 43 Can. S.C.R. 434, at 456, 16 Can. Cr. Cas. 459, per Anglin, J.

*The "charge" is equivalent to an indictment*—The term "indictment," as used in the Criminal Code, includes (unless the context shows otherwise) a formal charge brought in lieu of an indictment in Saskatchewan or Alberta. Code sec. 2 (16).

Every count of an indictment, and therefore of the formal charge, is, as a general rule, to apply to a single transaction only (sec. 853 (c)); and the accused may during the trial apply to have any count amended

or divided because of charges brought in the alternative or because it is double or multifarious and embarrasses the defence. Sec. 892.

*Charge by the Attorney-General*—In exercising a discretion as to whether a charge shall or shall not be preferred under Code sec. 873A (in Alberta and Saskatchewan), the Attorney-General is practically performing the functions of a grand jury. *Re Criminal Code*, 43 S.C.R. 434, 16 Can. Cr. Cas. 549; *R. v. Weiss* (1915) 7 W.W.R. 1160 (Sask.).

A charge may be laid in Alberta by the agent of the Attorney-General without the holding of any preliminary enquiry before a justice. *Re Criminal Code*, 16 Can. Cr. Cas. 459; 43 S.C.R. 434, overruling, on this point, *R. v. Duff* (No. 2), 2 Sask. L.R. 388, 15 Can. Cr. Cas. 454; *R. v. Leverton*, [1917] 2 W.W.R. 584, 590, 11 Alta. L.R. 355, 28 Can. Cr. Cas. 61.

This section continues the practice adopted from the Territories. *R. v. Wallace*, 8 W.W.R. 671, 673. The agent of the Attorney-General who signs a charge under Code sec. 873A does not examine witnesses like a grand jury, and Code sec. 876, as to indorsing the names of witnesses does not apply in Alberta or Saskatchewan where there is no grand jury. *R. v. McClain*, 7 W.W.R. 1134, 23 Can. Cr. Cas. 488 (Alta.). It is not an objection to a trial on formal charge under Code sec. 873A that the Crown was permitted to call witnesses who were not called at the preliminary enquiry and whose names were not endorsed upon the charge. *Ibid.* Where sec. 873A applies, the case is not in the trial court until the charge is laid, so if the Attorney-General gives instructions that no charge is to be laid, there are no proceedings to stay as there would be on an indictment by a grand jury in provinces having grand juries. *R. v. Weiss*, (1915) 7 W.W.R. 1160, 23 Can. Cr. Cas. 460 (Sask.). After a direction by the Attorney-General not to prefer a charge, a private prosecutor desiring to take up the prosecution would be required to show very strong reasons on applying under Code sec. 873A for the consent of the judge or an order of the court to permit him to prefer a charge. *R. v. Weiss*, 7 W.W.R. 1160 (Sask.). An abuse of the Attorney-General's discretion, or an attempt to stifle a proper prosecution would be sufficient. *Haultain, C.J.*, in *R. v. Weiss*, *supra*.

In preparing a formal charge it is sufficient to use the Code forms or popular language to designate the class of offence with which the accused is charged. Code sec. 852; Code form 64 (manner of stating offences). *R. v. Trainor*, [1917] 1 W.W.R. 415, 417, 10 Alta. L.R. 164, 27 Can. Cr. Cas. 232. For instance, it is not necessary in a charge of theft to use some such phrase as "did fraudulently and without colour of right convert to his use with intent to deprive the owner," etc. It is sufficient to say "did steal" such or such a thing the property of a person named. *R. v. Trainor*, [1917] 1 W.W.R. 415, 417 (Alta.). So it is sufficient on a charge of assault with intent to rob (sec. 448), to say that the accused at such a time and place did assault a person

named with the intent to "rob" him, without setting forth the legal ingredients of the crime of robbery. *R. v. Trainor*, [1917] 1 W.W.R. 415, 417, 10 Alta. L.R. 164, 27 Can. Cr. Cas. 232. But the Code enactment dispensing with technical averments (sec. 852) was not intended to make it sufficient to merely indicate the class of offence in the indictment or charge; although after verdict it may be too late to raise an objection on that score if not raised at an earlier stage of the trial. *R. v. Trainor* [1917] 1 W.W.R. 415; *R. v. Stroulger*, 55 L.J.M.C. 137; *R. v. Bainbridge*, (1918) 42 O.L.R. 203. Absence or insufficiency of the details which might be supplied by particulars will not, however, vitiate the count (sec. 853). If there has been a preliminary examination, the depositions there may indicate the Crown's case and give the accused the reasonable information as to the act or omission to be proved against him to which he is entitled. *R. v. Trainor*, [1917] 1 W.W.R. 415, 10 Alta. L.R. 164. So on a charge of seditious libel the accused would have a right to demand to be told what words he was charged with using. *Ibid.* at 419; *R. v. Bainbridge* (1918) 42 O.L.R. 203.

Every count should contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him. Secs. 853, 860.

*Venue*—The place of trial will still be fixed by the local judicial district in like manner as in other provinces, but subject to a change of venue under sec. 884 on good cause being shown. *R. v. Lynn* (1910) 3 Sask. L.R. 339, 15 W.L.R. 336, 17 Can. Cr. Cas. 354 (Sask.); Code secs. 577, 580, 582, 584, 587, 771, 823, 824.

*Amendment of charge*—See secs. 889-893, and sec. 2, sub-sec. (16).

An amended charge in Saskatchewan or Alberta has the same validity as the original charge, if preferred as required by the Code by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the judge of the court or of the Attorney-General or by order of the court. *R. v. Wallace* (1915) 8 W.W.R. 671, 8 Alta. L.R. 472; *R. v. Standard Soap Co.*, 6 W.L.R. 64 (Terr.).

### *Proceedings before the Grand Jury.*

#### **Witness before grand jury.**

**874.** It shall not be necessary for any person to take an oath in open court in order to qualify him to give evidence before any grand jury.

*Origin*—Sec. 643, Code of 1892.

*Formal proceedings in jury courts*—See note to sec. 873.

*Objection to indictment on ground that grand jury improperly constituted*—See Code sec. 899 (2).

*Presentment by grand jury*—The statutory definition of “indictment” and “count” includes a presentment by the grand jury as well as an indictment, unless the context otherwise requires; Code sec. 2, sub-sec. (16); and sec. 918 provides for notice being given by the clerk of the court when an indictment against a corporation is founded on a presentment of the grand jury, while otherwise the notice of the indictment would be given by the prosecutor. Code sec. 918.

When the accusation for a criminal offence is found by a grand jury without any bill brought before them, and is afterwards reduced to a formal indictment, it is called a “presentment.” *R. v. Connor* (1885) 1 Terr. L.R. 45, 2 Man. R. 235.

Sec. 873 restricts the “preferring” of bills of indictment, but, as a presentment emanates from the grand jury without being “preferred,” it would seem that such restriction does not prevent a grand jury from calling witnesses of its own motion and making a presentment in respect of an offence on the evidence so secured. As pointed out in *Verroneau v. The King*, (1916) 27 Can. Cr. Cas. 211, 213, 54 S.C.R. 7, the duty of a grand juror is to diligently enquire and a true presentment make of all such matters and things as shall be given him in charge or shall otherwise come to his knowledge. Formerly grand jurors might make a presentment of their own knowledge and information, without examining any witnesses. *R. v. Connor* (1885) 1 Terr. L.R. 4, 2 Man. R. 235; *Verroneau v. The King* (1916) 54 S.C.R. 7, 27 Can. Cr. Cas. 211. Possibly the right is still subsisting, but there seems to have been no reported case on the subject since the enactment of the Code. A pamphlet on the subject of grand juries, issued in 1898, gave the contrary opinion of Würtele, J., (Montreal), expressed in the charge to a grand jury, that this right of presentment had been taken away and that a grand jury under the Criminal Code could proceed only upon the indictments laid before it.

It has been held that the grand jury as a secret tribunal is not bound by any rules of evidence; *R. v. Bullard*, 12 Cox C.C. 353; *R. v. Russell, C. & Mar.* 247; *R. v. Gerrans*, 13 Cox C.C. 158; but they may insist upon the same strict proof as upon a trial. *R. v. Clements*, 20 L.J.M.C. 193, 2 Den. C.C. 251.

#### **Oath administered by foreman.**

**875.** The foreman of the grand jury or any member of the grand jury who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who appears before such grand jury to give evidence in support of any bill of indictment; and every



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such person may be sworn and examined upon oath by such grand jury touching the matters in question.

*Origin*—Sec. 644, Code of 1892; R.S.C. 1886, ch. 174, sec. 174; Grand Jury Act, 1856, Imp., ch. 54.

**Names of witnesses endorsed on bill.**

**876.** The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment.

*Origin*—Sec. 645, Code of 1892; R.S.C. 1886, ch. 174, sec. 175; 1-2 Vict., Imp., ch. 37, sec. 1.

*"Examined or to be examined"*—It is held that the context shows that the examination of witnesses here referred to is that taken before the grand jury and has no reference to the examination at the trial before the petit jury. *R. v. McClain*, 7 W.W.R. 1134, 1139, 23 Can. Cr. Cas. 488, 8 Alta. L.R. 73.

*Formal charge under 873A excluded*—The extended meaning given to the word "indictment" by Cr. Code, sec. 2 (16), would be applicable to include a "formal charge" under sec. 873A, only if the context were not inconsistent with that meaning as secs. 874 to 876 were held to be in *R. v. McClain* (1915) 7 W.W.R. 1134, 23 Can. Cr. Cas. 488, 8 Alta. L.R. 73.

*Initialing names of witnesses a directory enactment only*—Dealing with the corresponding English law, Tindal, L.C.J., said in *O'Connell v. The Queen*, 11 Cl. & F. 155: "As a matter of convenience, at the trial, in order to ascertain at a glance whether the witness examined before the Crown jury was one of those who appeared before the grand jury, such direction ought undoubtedly to have been complied with; but it cannot be the law that, after the witness has been duly sworn and examined, and the bill returned a true bill upon his evidence, it can be deprived of its legal operation and character by reason of the foreman of the grand jury having neglected to comply with such direction of the statute."

Reference may be made also to the cases of *R. v. Townsend*, (1896) 28 N.S.R. 468, 3 Can. Cr. Cas. 29, 48; *R. v. Buchanan*, 12 Man. R. 190; *R. v. Holmes*, 9 B.C.R. 296; cases of *The Commonwealth v. Edwards*, 4 Gray (Mass.) 1; *State v. Wilkinson*, 76 Maine, 317, and to vol. 9, Am. and Eng. Encyc. of Law, pages 14 to 16. [Contra, see *R. v. Belanger*, 12 Que. K.B. 69.]

**Names of witnesses to be submitted to grand jury.**

**877.** The name of every witness intended to be examined on any bill of indictment shall be submitted to the grand jury by the officer prosecuting on behalf of the Crown, and no others shall be examined by or before such grand jury unless upon the written order of the presiding judge.

*Origin*—Sec. 646, Code of 1892; R.S.C. 1886, ch. 174, sec. 176; Grand Jury Act, 1856, Imp., 19-20 Vict., ch. 54.

*"Every witness intended to be examined"*—This provision is directory only and an omission to endorse the names of the witnesses or of any of them does not invalidate the indictment. *R. v. Holmes*, 6 Can. Cr. Cas. 402, 9 B.C.R. 294; and see *R. v. Holmes*, 9 Can. Cr. Cas. 112.

*"No others shall be examined unless upon the written order of the presiding judge"*—This is a limitation upon the action of the Crown officer prosecuting an indictment; but the grand jury may, nevertheless, require the attendance of other witnesses in support of the charge. If they examine other witnesses, the court will direct that the names of the others be indorsed and initialed so that the accused will know upon whose testimony the bill was found. *R. v. Holmes*, 6 Can. Cr. Cas. 402. The grand jury may conduct their inquiry as they please, having regard to the oath each has taken. *R. v. Mathurin*, (1903) 12 Que. K.B. 494, 8 Can. Cr. Cas. 1. They may not find it necessary to examine all the witnesses whose names are endorsed before finding a true bill, but they are not to find "no bill" without examining all the witnesses who are in attendance in respect of the charge. *R. v. Mathurin*, supra.

The grand jury may send for any depositions in the case and consider them whether or not the proof necessary, at a trial to make them admissible is given. *R. v. Howes* (1886) 1 B.C.R. pt. 2, p. 307; *R. v. Gerrans*, 13 Cox C.C. 158; *R. v. Bullard*, 12 Cox C.C. 353. But if it appears that certain *ex parte* depositions were taken by the committing justice without any opportunity by the accused for cross-examination, a motion by the prosecution to send them to the grand jury is properly disallowed. *R. v. Carbray*, 13 Que. L.B. 100.

**Fees for swearing witnesses.**

**878.** Nothing in this Act shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall be payable as if the witnesses had been sworn in open court.

*Origin*—Sec. 647, Code of 1892; R.S.C. 1886, ch. 174, sec. 177. Grand Jury Act, 1856, Imp., 19-20 Vict., ch. 54.

*Proceedings when Person Indicted at Large.***Bench warrant.**

**879.** When any one against whom an indictment has been duly preferred and has been found, and who is then at large, does not appear to plead to such indictment, whether he is under recognizances to appear or not, the court before which the accused ought to have been tried may issue a warrant for his apprehension, which may be executed in any part of Canada.

2. The officer of the court at which said indictment is found, or, if the place of trial has been changed, the officer of the court before which the trial is to take place, shall, at any time after the time at which the accused ought to have appeared and pleaded, grant to the prosecutor, upon application made on his behalf and upon payment of twenty cents, a certificate of such indictment having been found which may be in form 65, or to the like effect.

*Origin*—Sec. 648, Code of 1892; R.S.C. 1886, ch. 174, secs. 33, 34, 35.

*Ontario tariff for Clerks of the Peace*—

(11) Issuing bench warrant ..... \$1.00

*Form of certificate of indictment being found*—Code form 65, following sec. 1152.

*Informalities of bench warrant*—A bench warrant directed to a sheriff and to all constables, etc., requiring them to arrest a man and bring him before the court to find securities for his appearance, was signed by the clerk of the peace, but had no seal. It was tested in open sessions at the court house, and was delivered by the clerk of the peace in court to the sheriff, who handed it to his deputy. It was held that the want of a seal did not make the warrant invalid. *Fraser v. Dixon* (1848), 5 U.C.Q.B. 231.

It is not a valid objection to a warrant issued for the arrest of the accused upon default under such recognizance, that the warrant directed incarceration in the gaol "until delivered in due course" and omitted any special direction to bring him before the judge presiding at the trial sittings then pending, as the prisoner would in such case have to be taken at once before the presiding judge. *R. v. Keizer* (No. 1), 18 Can. Cr. Cas. 32.

An order refusing the defendant's application to set aside a bench warrant for alleged default in the recognizance of bail is a proceeding in a criminal matter, and a provincial court has no jurisdiction to give leave to appeal from its decision to the Privy Council. *R. v. Keizer* (No. 2), 18 Can. Cr. Cas. 39.

**Warrant by justice on certificate.**

**880.** Upon production of such certificate to any justice for the county or place in which the indictment was found, or in which the accused is or resides or is suspected to be or reside, such justice shall issue his warrant to apprehend him, and to cause him to be brought before such justice, or before any other justice for the same county or place, to be dealt with according to law.

2. The warrant may be in form 66, or to the like effect.

*Origin*—Sec. 648, Code of 1892; R.S.C. 1886, ch. 174, secs. 33, 34, 35.

*Certificate of indictment being found*—See sec. 879 (2) and Code form 65, following sec. 1152.

*Form of warrant to apprehend a person indicted*—Code form 66, following sec. 1152.

**Committal of accused or admission to bail.**

**881.** If it is proved upon oath before such justice that any one apprehended and brought before him on such warrant is the person charged and named in such indictment, such justice shall, without further inquiry or examination, either commit him to prison by a warrant which may be in form 67, or to the like effect, or admit him to bail as provided in other cases: Provided that if it appears that the accused has without reasonable excuse broken his recognizance to appear he shall not in any case be bailable as of right.

*Origin*—Sec. 648, Code of 1892; R.S.C. 1886, ch. 174, secs. 33, 34, 35.

*Form of warrant of commitment of a person indicted*—Code form 67, following sec. 1152.

**Warrant when accused in gaol.**

**882.** If it is proved before the justice upon oath that any such accused person is at the time of such application and production of the said certificate as aforesaid confined in any prison for any other offence than that charged in the said indictment, such justice shall issue his warrant directed to the warden or gaoler of the prison in which such person is then confined as

aforesaid, commanding him to detain him in his custody until by lawful authority he is removed therefrom.

2. Such warrant may be in form 68, or to the like effect.

*Origin*—Sec. 648, Code of 1892; R.S.C. 1886, ch. 174, secs. 33, 34, 35.

*Form of warrant to detain a person indicted who is already in custody for another offence*—Code form 68, following sec. 1152.

### *Place of Trial.*

#### **Order for removal of prisoner to place of trial.**

**883.** If after removal by the Governor in Council or the lieutenant governor in council of any province of any person confined in any gaol to any other place for safe keeping or to any other gaol, a true bill for any indictable offence is returned by any grand jury of the county or district from which any such person is removed against any such person, the court into which such true bill is returned may make an order for the removal of such person from the place for safe keeping or gaol in which he is then confined to the gaol of the county or district in which such court is sitting for the purpose of his being tried in such county or district.

*Origin*—Sec. 650, Code of 1892; R.S.C. 1886, ch. 174, sec. 99.

#### **Change of venue.**

**884.** Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same province, named by the court or judge in such order.

2. Such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused as the court or judge thinks proper to prescribe.

*Origin*—Sec. 651, Code of 1892; R.S.C. 1886, ch. 174, sec. 102; 32-33 Vict., Can., ch. 29, sec. 11.

*Grounds for changing place of trial*—It should be made to appear that a fair trial cannot be had at the present venue. *R. v. Ponton*, 18 P.R. 201 and 429 (Ont.), 2 Can. Cr. Cas. 192, 417; *R. v. Nicol*, 7 B.C.R. 278, 4 Can. Cr. Cas. 1; *R. v. Stauffer*, 4 Sask. L.R. 284, 19 Can. Cr. Cas. 205.

Riotous demonstrations at a trial at which the jury disagreed and attempts to intimidate the jurors form a good cause for ordering the change. *R. v. Ponton*, 18 P.R. 429.

Infringement by an official in charge of the jury list of a provincial law dealing with the constitution of the jury whereby the names drawn were to be kept secret by him until a few days before the opening of the court has been considered a good ground for changing the venue. *R. v. Graves*, 19 Can. Cr. Cas. 402 (N.S.).

The power to change the venue is to be used with caution. *R. v. Russell*, (1878) *Ramsay's Cases*, 199 (Que.); *ex parte Corwin*, 24 L.C. Jur. 104; *R. v. Roy*, 18 Que. K.B. 506, 14 Can. Cr. Cas. 368; *R. v. O'Gorman*, 18 O.L.R. 427, 12 Can. Cr. Cas. 230, 13 O.W.R. 1189; *R. v. Lynn*, 3 Sask. L.R. 354, 15 W.L.R. 336, 17 Can. Cr. Cas. 354.

The fact that the Crown did not challenge for cause nor exhaust the jury panel will be considered adversely to an application by the Crown. *R. v. Stauffer*, 4 Sask. L.R. 284, 19 Can. Cr. Cas. 205. Nor is it enough that two abortive trials resulted in disagreement of the jury at the original venue. *R. v. Nicol*, 7 B.C.R. 278, 4 Can. Cr. Cas. 1. It is not a ground for making the change that the court trying the case had jurisdiction only because the accused was arrested in its district and that the alleged offence was committed in another district of the same province. *R. v. McKeown*, 20 Can. Cr. Cas. 492; Code secs. 577, 580, 582, 587, 653.

*Second order changing place of trial*—There is power to make a second or subsequent order changing the venue following a first order; and a transfer may even be made back to the original venue on the judge being satisfied that the cause of prejudice has ceased which was the basis of the first change of venue. *R. v. Roy*, (1909) 18 Que. K.B. 506, 14 Can. Cr. Cas. 368. After an abortive trial at the place fixed by the first order, the venue may again be changed if the court deems it in the interests of justice. *R. v. Spintlum*, (1913) 5 W.W.R. 977, 1199, 22 Can. Cr. Cas. 483, 18 B.C.R. 606, 26 W.L.R. 849.

*Sub-sec. (2)—Additional expense*—An order is valid which makes no provision for additional expense, if any, where terms in regard to the additional expense were not asked for by the objecting party. *Re*

Sproule, 12 S.C.R. 140; *re* Sproule, 1 B.C.R. pt. 2, p. 219; *R. v. Coleman*, 30 Ont. R. 93, 2 Can. Cr. Cas. 523.

*Decision on the facts basing a change of venue not reviewable by reserved case*—By sec. 884 the judge is given power to change the place of trial whenever it appears to him to be expedient to the ends of justice to do so. When he is seized of facts from which it could properly be inferred that it is expedient to the ends of justice to make the change, his decision becomes one of fact, not one of law, and hence not open to review by way of case stated to the appellate court. Per Macdonald, C.J.A. in *R. v. Spintlum*, (1913) 5 W.W.R. 977, 22 Can. Cr. Cas. 483, 18 B.C.R. 606, 26 W.L.R. 849.

*Special provision as to Quebec*—Code sec. 887 applies where there is to be no sitting of the King's Bench, criminal side, in the ordinary trial district.

#### **Transmission of record.**

**885.** Forthwith upon such order being made by the court or judge, the indictment, if any has been found against the prisoner, and all inquisitions, informations, depositions, recognizances and other documents relating to the prosecution against him, shall be transmitted by the officer having the custody thereof to the proper officer of the court at the place where the trial is to be had, and all proceedings in the case shall be had, or, if previously commenced, shall be continued in such district, county or place, as if the case had arisen or the offence had been committed therein.

*Origin*—Sec. 651, Code of 1892; R.S.C. 1886, ch. 174, sec. 102.

#### **Order sufficient authority for removal of prisoner.—Recognizance binding.—Notice to appear.**

**886.** The order of the court, or of the judge, made as aforesaid shall be a sufficient warrant, justification and authority, to all sheriffs, gaolers and peace officers, for the removal, disposal and reception of the prisoner, in conformity with the terms of such order; and the sheriff may appoint and empower any constable to convey the prisoner to the gaol in the district, county or place in which the trial is ordered to be had.

2. Every recognizance entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence, as of any person for any offence, shall, in case of any

such order, be obligatory on each of the persons bound by such recognizance as to all things therein mentioned with reference to the trial at the place where such trial is so ordered to be had, in like manner as if such recognizance had been originally entered into for the doing of such things at such last mentioned place. Provided that notice in writing shall be given either personally or by leaving the same at the place of residence of the persons bound by such recognizance, as therein described, to appear before the court, at the place where such trial is ordered to be had.

*Origin*—Sec. 651, Code of 1892; R.S.C. 1886, ch. 174, sec. 102.

**Order in Quebec for changing place of trial.**

**887.** Whenever, in the province of Quebec, it has been decided by competent authority that no term of the Court of King's Bench, holding criminal pleas, is to be held, at the appointed time, in any district in the said province within which a term of the said court should be then held, any person charged with an indictable offence whose trial should by law be held in the said district, may in the manner hereinbefore provided obtain an order that his trial be proceeded with in some other district within the said province, named by the court or judge.

2. All provisions contained in the three last preceding sections shall apply to the case of a person so applying for and obtaining a change of venue as aforesaid.

*Origin*—57-58 Vict., Can., ch. 57, sec. 1; sec. 651, Code of 1892; R.S.C. 1886, ch. 174, sec. 102; 32-33 Vict., Can., ch. 29, sec. 11.

**Offence committed in one province not triable in another.**

**888.** Nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed entirely in another province: Provided that every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed.

*Origin*—Sec. 640, Code of 1892.

*Jurisdiction of courts generally*—See secs. 577, 580, 582, 587, 653.



*Newspaper libels*—The proviso to sec. 888 was in itself an exception to a proviso in sec. 640 of the Code of 1892. If the defendant resides in one province and the newspaper is "printed" in another, the prosecution may be in either of those provinces, but not in a third province in which also there may have been a "publication" of the libel. It would probably be held not to apply at all to the prosecution of a person temporarily in Canada but not residing there, for an alleged libel in a newspaper not "printed" in Canada, although in circulation throughout Canada.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905-934, 947, 958, 1045.

#### *Amendments.*

**In case of variance between evidence and charge.—Where indictment under wrong Act or contains defective statement.**

**889.** If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular furnished as provided in sec. 859, the court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negated, but that the matter omitted is proved by the evidence, the court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

3. The trial in either of these cases may then proceed in all respects as if the indictment or count had been originally framed as amended.

*Origin*—Sec. 723, Code of 1892.

*What amendments permissible in indictment*—

The trial judge has a discretion to allow an amendment of the indictment before verdict so as to make it conform to the evidence. *R. v. Nier* (1915) 9 W.W.R. 838, 9 Alta. L.R. 353, 33 W.L.R. 180, 25 Can. Cr. Cas. 241; *R. v. Carswell*, (1916) 10 W.W.R. 1027, 1039, 26 Can. Cr. Cas. 288, 34 W.L.R. 1042 (Alta.).

While great simplicity is introduced, the essential features of the former practice have not been changed. It is still necessary in every case, as expressly provided in Code form 64 (see sec. 852), that the indictment shall in itself reasonably identify not only the nature of the crime charged, but the act or transaction forming the basis of the crime named. *R. v. Bainbridge*, 42 O.L.R. 203. This is necessary, first in order that the accused may properly prepare for his trial, and shall be able to plead *autrefois acquit* if again charged, and that the accused may not, through mistake or otherwise, be put upon his trial on a charge which has not been passed upon by the grand jury, and that the trial judge may know the particulars of the very act passed upon by the grand jury, and not some act which the Crown or Crown officer may say was the very act or transaction. The accused is to have reasonable information identifying the act for which the grand jury has committed him for trial. *R. v. Bainbridge*, (1918) 42 O.L.R. 203, 220.

A charge may be laid in the words of the Code and a count of an indictment for theft is not bad for indefiniteness because of the use of the word "or other property" in charging the stealing of "money, valuable securities or other property," to a stated amount, from the Government, but particulars may be ordered by the judge. *R. v. Kelly*, 10 W.W.R. 1345 (Man.). This results entirely from the statutory definition of "theft" in the Criminal Code (sec. 347); and the words "other property" in an indictment for theft drawn in that form are to be read as if followed by the words "capable of being stolen." *R. v. Kelly*, 10 W.W.R. 1345, at 1351 (Man.), per Prendergast, J. Same case in appeal [1917] 1 W.W.R. 46 and 463. The maxim *noscitur a sociis* may also apply. *R. v. Kelly*, 10 W.W.R. 1345 (Man.).

An indictment that "A.B. attempted to kill and murder C.D." sufficiently discloses an indictable offence; and the court has power to allow it to be amended so as to read that "A.B., with intent to commit murder, shot at C.D." *R. v. Mooney*, 11 Can. Cr. Cas. 333, 15 Que. K.B. 57.

The true name of the person against whom the offence was alleged to have been committed may be substituted by the court in an indictment after the grand jury has found a true bill, where the name originally in the indictment was that by which the same person was commonly known. *R. v. Faulkner*, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

The offence of conspiracy is not one upon which a person could

have been convicted on the charge of cheating, and the change of the latter to the former charge is not such a "proper amendment" as is contemplated by sec. 907. *R. v. Weiss and Williams* (1913) 4 W.W.R. 1358, 1360.

If the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made. *R. v. Weir* (No. 3), 3 Can. Cr. Cas. 262 (Que.). But, on an indictment for perjury alleged to have been committed on a trial for burning a barn, an amendment was allowed to charge that such trial was for firing a stack. *R. v. Neville* (1852), 6 Cox C.C. 69. Where the ownership of stolen property is wrongly stated an amendment may be allowed. *R. v. Vincent* (1852), 2 Den. 464; *R. v. Marks* (1866), 10 Cox C.C. 367. And on a charge of theft of money the amount thereof may be amended to conform with the evidence. *R. v. Gumble* (1872), L.R. 2 C.C.R. 1.

When the false pretence in a charge of obtaining money under false pretences was erroneously laid in the indictment as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," as appeared from the depositions taken on the preliminary inquiry, the trial judge may allow an amendment of the indictment to conform with the proof. Although upon the indictment in its original form the charge would be merely upon a false pretence that there was in store "a large quantity of beans," and the number of bushels would not be required to be proved, the variance by reason of the amendment is not such as would mislead or prejudice the accused in his defence. *R. v. Patterson* (1895) 26 Ont. R. 656, 2 Can. Cr. Cas. 339.

*Amendment of date of offence*—The date can be amended only when the act or transaction which forms the foundation for the charge is the same, and a mistake was made in the information, evidence or indictment as to the true date of the occurrence. *R. v. Lacelle*, 11 O.L.R. 74, 10 Can. Cr. Cas. 229, 233; *Verroneau v. The King* (1916) 25 Que. K.B. 275, 26 Can. Cr. Cas. 278.

Apart from the effect of Code enactments, the general rule was that the date assigned as that of commission of the offence need not be the one actually proved; Archbold, Criminal Pleading and Ev. (23rd ed.), 297; Roscoe, Criminal Ev. (13th ed.), p. 73; Taylor on Evidence, sec. 283 (4), note 5. But at common law there were certain exceptions and "if any *material* time stated in the pleading is to be proved by matter of record, it should be correctly stated. Any variance between the time so stated and that appearing from the deed or record when produced, will be fatal unless amended. See *R. v. Ingham*, 5 B. & S. 255. The effect of that exception to the rule, if it could be considered applicable under the operation of the Code, would merely be to establish that it was necessary that the amendment should be made. *Verroneau v. The King* (1916) 25 Que. K.B. 275, 26 Can. Cr. Cas. 278.

It might happen, as in *R. v. Lacelle*, *supra*, that by reason of a legal characteristic of the particular offence (*e.g.*, seduction) an amendment to change the date would be tantamount to charging a different offence.

*When amendment may be made*—It is not too late to permit the amendment after the close of the taking of the evidence. The rule would appear to be that the amendments ought to be made before the defendant's counsel address the jury: *Archbold*, 23rd ed., p. 296; *R. v. Bymes*, 3 C. & K. 326; *R. v. Frost*, *Dears.* 474; though in some cases an amendment may be made at any time before the case goes to the jury; *Bowen-Rowlands*, *Criminal Proc.* (2nd ed.), p. 245, Rule 263; or, even at any time before verdict: *Russell on Crimes* (Can. ed.), p. 1979; *Verroneau v. The King* (1916) 25 Que. K.B. 275, 26 Can. Cr. Cas. 278; same case on appeal on other points; *Verroneau v. The King*, 54 S.C.R. 7, 27 Can. Cr. Cas. 211.

*Omission to negative any exception*—The omission of the words "not being his wife" in describing an offence under sec. 301 was held to be an exception, the failure to negative which in the indictment, will not invalidate a conviction thereon where no objection was taken before pleading. *R. v. Wright*, 11 Can. Cr. Cas. 221, 39 N.S.R. 103.

*Objection to be taken for defects apparent on the face of the indictment*—Code sec. 898.

*Amendment of indictment*—See secs. 889-893, 898, 915.

#### **Adjournment if accused prejudiced.—How determined.**

**890.** If the court is of the opinion that the accused has been misled or prejudiced in his defence by any such variance, error, omission or defective statement, but that the effect of such misleading or prejudice might be removed by adjourning or postponing the trial, the court may in its discretion make the amendment and adjourn the trial to a future day in the same sittings, or discharge the jury and postpone the trial to the next sittings of the court, on such terms as it thinks just.

2. In determining whether the accused has been misled or prejudiced in his defence the court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case.

3. The propriety of making or refusing to make any such amendment shall be deemed a question for the court, and the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal by appeal like any other question of law.

*Origin*—Sec. 723, Code of 1892; R.S.C. 1886, ch. 174, secs. 237, 238, 239.

*Amendment of indictment*—See secs. 889-893, 898, 915.

*Appeals on questions of law*—Code sec. 1013 *et seq.*

**Amendment to be endorsed on the record.**

**891.** In case an order for amendment as provided for in the two last preceding sections is made it shall be endorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the court.

*Origin*—Sec. 724, Code of 1892; R.S.C. 1886, ch. 174, sec. 240.

*Form of record where indictment amended*—See sec. 915.

**Application to amend or divide counts.**

**892.** The accused may at any stage of the trial apply to the court to amend or divide any count of an indictment which charges in the alternative different matters, acts or omissions, stated in the alternative in the enactment describing the offence or declaring the matters, acts or omissions charged to be an indictable offence, or which is double or multifarious on the ground that it is so framed as to embarrass him in his defence.

2. The court, if it is satisfied that the ends of justice require it, may order any such count to be amended or divided into two or more counts; and on such order being made such count shall be so divided or amended and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

*Origin*—Sec. 621, Code of 1892; R.S.C. 1886, ch. 174, sec. 124.

*Alternative charges in one count*—Sec. 852 expressly enacts that the charge may be in the words of the enactment describing the offence; and sec. 854 that a count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions, which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts or omissions charged, to be an indictable offence, or on the ground that it is double or multifarious.

**Theft of ores.—Unlawful sales.—Amendment at the trial when property wrongly laid.**

**893.** Upon a prosecution for any offence under sec. 378 or 424, any variance when the property is laid in a person or cor-

poration, between the statement in the indictment and the evidence adduced, may be amended at the trial.

2. If no owner is proved, the indictment may be amended by laying the property in His Majesty.

*Origin*—Sec. 621, Code of 1892; R.S.C. 1886, ch. 174, sec. 124.

*Theft of minerals from mines*—Sec. 378 deals with the theft of ores or minerals from mines and of stone from quarries; and see secs. 852-855, 864-866, as to the sufficiency of certain statements in an indictment.

*Gold and silver mines*—Sec. 424 deals with the offence of fraud on the owners of gold and silver mines, and the unlawful sale of mineral products of such mines; and see secs. 864-866, as to stating ownership of the minerals.

### *Inspection and Copies of Documents.*

**Right of accused to inspect depositions and have indictment read.**

**894.** Every accused person shall be entitled at the time of his trial to inspect, without fee or reward, all depositions, or copies thereof, taken against him and returned into the court before which such trial is had, and to have the indictment on which he is to be tried read over to him if he so requires.

*Origin*—Sec. 653, Code of 1892; R.S.C. 1886, ch. 174, sec. 180.

*Depositions returned into court*—The depositions here referred to are those taken on the preliminary enquiry at which there was a committal for trial under sec. 690, or the alternative order under sec. 696, requiring the accused to find sureties for his appearance to answer an indictment. The depositions are required to be transmitted to the trial court under sec. 695. Sec. 691 permits the accused at any time before the trial to obtain copies on payment of the fees for same. The indictment may be for the charge on which the accused was committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice. Sec. 872. And by leave of the Attorney-General or of the trial court, an indictment may be preferred without any preliminary enquiry, and consequently without any returned depositions. See sec. 873.

**Accused entitled to copy of indictment.**

**895.** Every person indicted for any offence shall, before being arraigned on the indictment, be entitled to a copy thereof on paying the clerk five cents per folio of one hundred words for

the same, if the court is of opinion that the same can be made without delay to the trial, but not otherwise.

*Origin*—Sec. 654, Code of 1892; R.S.C. 1886, ch. 174, sec. 181.

*Arraignment*—The arraignment of prisoners against whom true bills for indictable offences have been found by the grand jury consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him; and thirdly, asking him whether he is guilty or not of the offence charged. As soon as the indictment has been read over to the prisoner, the clerk of the arraigns or officer of the court demands of him:

“How say you, are you guilty or not guilty?”

If the prisoner pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment. If the prisoner pleads “not guilty,” his plea is recorded by the officer of the court, and the prisoner is said to have “put himself upon the country.” If the accused wilfully refuses to plead or will not answer directly, the court may order the proper officer to enter a plea of not guilty. Sec. 900.

*Motion to divide or amend multifarious or alternative count in indictment*—See sec. 892.

*Election of “speedy trial” without a jury*—Code sec. 823 *et seq.*

#### **Accused entitled to copy of depositions.**

**896.** Every person indicted shall be entitled to a copy of the depositions returned into court on payment of five cents per folio of one hundred words for the same.

2. If a copy is not demanded before the opening of the assizes, term, sittings or sessions, the person indicted shall be entitled to such copy if the court is of opinion that the same can be made without delay to the trial, but not otherwise.

3. The court may, if it sees fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged.

*Origin*—Sec. 655, Code of 1892; R.S.C. 1886, ch. 174, sec. 182.

*For clerks of the peace at the Sessions*—*Ontario tariff* (22)—Copies of depositions or examinations furnished to prisoners accused of felony, or their counsel, per folio of 100 words, when required by the accused, or his counsel, and ordered by the court. (This fee not to be charged when copies are furnished by the Crown Attorney..... \$0.10

**Indictment for treason.—Details to be furnished the accused.—  
Witnesses to delivery.**

**897.** When any one is indicted for treason, or for being accessory after the fact to treason, there shall be delivered to him after the indictment has been found, and at least ten days before his arraignment,—

- (a) a copy of the indictment;
- (b) a list of the witnesses to be produced on the trial to prove the indictment; and,
- (c) a copy of the panel of the jurors who are to try him returned by the sheriff.

2. The list of the witnesses and the copy of the panel of the jurors must mention the names, occupations, and places of abode of the said witnesses and jurors.

3. The documents aforesaid must all be given to the accused at the same time and in the presence of two witnesses.

4. This section shall not apply to cases of treason by killing His Majesty, or to cases where the overt act alleged is any attempt to injure his person in any manner whatever, or to the offence of being accessory after the fact to any such treason.

*Origin*].—Sec. 658, Code of 1892.

*Details to be furnished prisoner in treason charge*].—Compare the corresponding English statutes, 7 Anne, c. 21, sec. 11, 39-40 Geo. III, c. 93; 57 Geo. III, c. 6, s. 1, 6 Geo. IV, c. 50, sec. 21; 5 and 6 Vict., c. 51, sec. 3. The trial may be postponed if the ten days has not elapsed. *R. v. Frost*, 4 St. Tr. N.S. 85, 9 C. & P. 163.

The direction of sub-sec. 3 seems to be imperative and there would be a mis-trial if it were not complied with. *R. v. Frost*, supra (the Chartist's case).

*Treason*].—See secs. 74, 75, 76.

### *Objections, Pleas and Record.*

**Objections before plea.—Amendments.—No motion in arrest of judgment for amendable defect, etc.**

**898.** Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the court or judge before whom the trial takes place, and every court before which any such



objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

2. No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

*Origin*—Sec. 629, Code of 1892; R.S.C. 1886, ch. 174, sec. 143; 32-33 Vict., Can., ch. 29, sec. 32.

*Amending indictment on demurrer or motion to quash*—There is a radical difference between sec. 898 of the Code and the English statute 14-15 Vict., Imp., ch. 100. That statute conferred similar powers in case of any "formal" defect, while the Code omits the word "formal" and consequently has a much wider scope. *Ead v. The King*, (1908) 40 S.C.R. 272, 13 Can. Cr. Cas. 348; *R. v. Mason*, 22 U.C.C.P. 246, 250.

*Demurrer*—By a demurrer the defendant refers it to the court to pronounce whether, admitting the matters of fact alleged against him to be true, they do, in point of law, constitute him guilty of an offence sufficiently charged against him. 1 Starkie, 315. The defendant cannot, as of right, plead and demur concurrently, but if the demurrer is overruled a motion may be made for leave to plead not guilty. At common law a demurrer could be made either orally or in writing, but the provincial rules of court (see Code sec. 576) must be referred to for ascertaining whether the common law rule has been varied in the particular province or district by a rule making it essential that a demurrer should be in writing. The court has a discretion to allow a plea to be withdrawn, so that a demurrer may be filed. *R. v. Mitchel*, 3 Cox C.C. 21; *R. v. Odgers*, 2 M. & Rob. 480.

*Demurrer and joinder thereto*—The demurrers filed separately by the defendants in *R. v. Weir* (No. 1) 3 Can. Cr. Cas. 102, 8 Que. Q.B. 521, were in the following form:—

"And the said W.W. (defendant), in his own proper person cometh into court here and having heard the said indictment read, saith, that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, do not disclose an indictable offence, and are not sufficient in law, and that he, the said W. W. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment in his behalf, the said W. W. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified."

The following joinder to the demurrer was filed by the Crown Prosecutor:—

"For answer to the demurrer to indictment in this case made on

behalf of W. W. (defendant), without admitting the right of the accused to plead separately the Crown saith: that the said demurrer is unfounded and that the said indictment and the matters therein contained, disclose an indictable offence and are sufficient in law, and that the said W. W. is bound by the law of the land to answer the same: Wherefore, the said demurrer should be dismissed. "

*Defects apparent on the face of the indictment*—An indictment setting forth an offence which is not indictable will be quashed on motion to that effect. *R. v. Beauvais*, 28 Que. S.C. 498, 7 Can. Cr. Cas. 494; *R. v. Weir* (No. 5), 9 Que. Q.B. 253, 3 Can. Cr. Cas. 499; *R. v. Bainbridge*, 42 O.L.R. 203; *R. v. Trainor*, [1917] 1 W.W.R. 415, 27 Can. Cr. Cas. 232, 10 Alta. L.R. 164, 35 W.L.R. 415.

In charging an offence declared by statute, the omission of the words "against the form of the statute in such case made and provided" is not a defect and no amendment is necessary. *R. v. Doyle*, (1894) 27 N.S.R. 294.

*Double or multifarious counts in indictment*—Code sec. 854.

*Defective statement of anything requisite to constitute the offence*—See Code sec. 889 (2).

*Negating exceptions*—See sec. 889 (2).

*Refusal to plead*—See sec. 900.

*Ordering particulars of count*—See secs. 859, 860.

*Count for greater offence includes the lesser*—See sec. 951.

*Motion to postpone trial*—See sec. 901.

*Objection to constitution of grand jury*—See sec. 899.

*Ontario tariff for Clerks of the Peace at the Sessions*—

(27.) Recording plea, or receiving and filing demurrer.... \$0.50

**No plea in abatement.—Constitution of grand jury.**

**899.** No plea in abatement shall be allowed.

2. Any objection to the constitution of the grand jury may be taken by motion to the court, and the indictment shall be quashed if the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise.

*Origin*—Sec. 656, Code of 1892.

*Forms of oath to grand jurors*—See note to sec. 873.

*Motion to quash on ground that grand jury not properly constituted*—The fact of one member of a grand jury being disqualified from interest or bias with respect to one of the bills brought before that body for consideration, does not affect the constitution of the grand jury generally. *Verroneau v. The King* (1916) 54 S.C.R. 7, 27 Can. Cr. Cas. 211, affirming *Verroneau v. The King*, 25 Que. K.B. 275, 26 Can. Cr. Cas. 278.

Such a disqualified person cannot take any part in the proceedings or findings of the jury with respect to the bill in which he is interested, but such disqualification is a personal and limited one and does not affect the constitution of the jury as a whole or the right of the juror so partially disqualified from taking part in all the proceedings or findings of the jury on other bills in which he has no interest or bias. *Verroneau v. The King*, 54 S.C.R. 7.

Anything which destroys the competency of the grand jury as a whole or the competency of any of its members affects the constitution of that body and affords a ground of objection which may be raised by a motion to the court under sec. 899. A grand juror may be well qualified as to all the cases on the docket save one and wholly unfit to pass upon that one. As to that case the jury would not be properly constituted while he sat upon it. *Verroneau v. The King*, (1916) 54 S.C.R. 7, 21 Can. Cr. Cas. 211. *R. v. Gorbet*, 1 P.E.I. Rep. 162; *R. v. Upton St. Leonards* (inhabitants of) 10 Q.B. 827; *R. v. Hayes*, 9 Can. Cr. Cas. 101, disapproved.

Where one grand juror was a witness in the particular case, but took no other part in the proceedings, his mere physical presence in the grand jury room will not affect the result of the grand jurors' deliberations or constitute an interference with the privacy of their proceedings. *Verroneau v. The King*, (1916) 54 S.C.R. 7. There is no impropriety in some one or more proper persons being present with the grand jury during their inquiries on bills of indictment: *Reg. v. Hughes*, 1 C. & K. 519.

If an unauthorized person has been present in the grand jury room on the consideration of a bill, and returns into court with the grand jury (having been summoned to serve, but not having been sworn), the court may send back the grand jurors already sworn so that they may reconsider the bill. *R. v. Kelly*, 8 Can. Cr. Cas. 130 (Qua.). If the mode of summoning the grand jurors has been so irregular that persons not qualified to be grand jurors are returned for the consideration of an indictment, the indictment must be quashed. *R. v. Kirwan*, 31 St. Tr. 543; 11 Hen. 4, ch. 9.

The whole jury should be impanelled before the grand juror's oath is administered to any of them. *R. v. Belanger*, 12 Que. K.B. 69, 6 Can. Cr. Cas. 295.

The number of grand jurors to be summoned may be fixed by provincial law as a part of the constitution of the court; but the number to find a bill is to be regulated by federal law as a matter of criminal procedure. *R. v. Cox*, 31 N.S.R. 311, 2 Can. Cr. Cas. 207. Where there has been no limitation by statute of the number of grand jurors, twenty-three are to be sworn, but the summoning of more does not invalidate the panel. *R. v. McGuire*, 34 N.B.R. 430, 4 Can. Cr. Cas. 12. Where the number on the panel is declared by provincial law to be thirteen, or a lesser number, but not less than seven, Code sec. 921

makes it possible for seven to find a true bill. It is probably sufficient that of the entire panel there are in attendance at least seven grand jurors, where there is legislation so reducing the panel. *R. v. Girard*, (1898) 7 Que. Q.B. 575, 2 Can. Cr. Cas. 216; contra, see *R. v. Hayea* (1902) 9 B.C.R. 574, 7 Can. Cr. Cas. 453.

*"That the accused has suffered or may suffer prejudice thereby but not otherwise"*—Before the Code the question whether a motion to quash an indictment should be granted or not was largely in the discretion of the court. *R. v. Belyea* (1854) 2 N.S.R. 220. Under the Code, and when it is a question whether the grand jury was properly constituted or not, that discretion is taken away in the sense that if two conditions arise the indictment shall be quashed, but if either condition fails it is not to be quashed even if the objection is well founded. *R. v. Morrow* (1914) 24 Can. Cr. Cas. 310, at 318, 21 B. de Juris. 380 (Que.).

*Specifying grounds of objection*—The objecting party must specifically set forth his grounds of objection, and will not be given the benefit of a ground not specified. *R. v. Morrow*, 24 Can. Cr. Cas. 310, 21 B. de Juris. 380 (Que.).

*Challenging the array*—See sec. 925.

*Grand juries in British Columbia*—In judicial districts to which the Jurors Act, R.S.B.C. 1911, ch. 121, applies, it is necessary to summon only 15 grand jurors. As to the grand jury system of British Columbia, see *R. v. Bonner* (1913) 4 W.W.R. 1255, 21 Can. Cr. Cas. 442, 25 W.L.R. 112.

*Ontario*—If thirteen grand jurors do not appear, the court may require the sheriff to name and appoint from persons present or who can be found, a sufficient number to make up the deficiency. The Jurors' Act, R.S.O. 1914, ch. 64, sec. 67.

*Procedure in jury courts in Ontario*—See note to sec. 873.

### **Pleas.—Refusal to plead.**

**900.** When the accused is called upon to plead he may plead either guilty or not guilty, or such special plea as is in this Part subsequently provided for.

2. If the accused wilfully refuses to plead, or will not answer directly, the court may order the proper officer to enter a plea of not guilty.

*Origin*—Sec. 657, Code of 1892; R.S.C. 1886, ch. 174, sec. 145.

*Wilful refusal to plead or answer directly*—Compare the English statute, 7 and 8 Geo. IV, ch. 28, sec. 2; *R. v. Bitton*, 6 C. & P. 92; and see *R. v. McAuliffe*, (1906) 17 Can. Cr. Cas. 495 (Ont.).

*Trial as to sanity*—See sec. 967-970.

*Leave to withdraw plea of guilty*—After pleading guilty to all the counts of an indictment, the accused will not without the consent of

the Crown be given leave to withdraw that plea as to all but one so that he may plead *autrefois convict* as to the others. *R. v. Lombard*, (1914) 22 Can. Cr. Cas. 232, 5 W.W.R. 1089, 26 W.L.R. 647; and see *R. v. Miles*, 24 Q.B.D. 423.

A plea of guilty operates as an admission of all the essential facts which would be before the jury as necessary to constitute the offence charged in the indictment. *R. v. Inglis* (1917) 23 Argus L.R. (Austr.) 378. If the judge at the trial on looking at the depositions for the purpose of sentencing, comes to the conclusion that in point of law there is no case disclosed, he should advise the accused to withdraw his plea; but it is for the accused himself to decide whether or not he will do so. *R. v. Inglis*, *supra*.

The judge may properly advise and permit a withdrawal of the plea of guilty if the facts, though not inconsistent with the prisoner's guilt, show a very doubtful probability of their being proved so as to induce the jury to find him guilty. *R. v. Inglis*, *supra*.

*Plea of guilty operates as conviction*—A plea of guilty operates in law as a conviction although no penalty is imposed. *R. v. Blaby*, [1894] 2 Q.B. 170, 18 Cox C.C. 5, 63 L.J.M.C. 133.

No one should be taken to have admitted his guilt except in the most unmistakable terms. A conviction should not be recorded on a doubtful plea. If there is any ambiguity, a plea of "not guilty" should be entered and evidence given in the ordinary way. *R. v. Golathan* (1915) 84 L.J.K.B. 758, 11 Cr. App. R. 79, 24 Cox C.C. 704, per Lord Reading; *R. v. Ingleson*, [1915] 1 K.B. 512, 84 L.J.K.B. 280, 11 Cr. App. R. 21. The court may of its own motion strike out a plea of guilty on its appearing that the indictment discloses no criminal offence, and order the indictment quashed. *R. v. Labourdette*, 13 B.C.R. 143, 13 Can. Cr. Cas. 379.

*Finding deaf mute insane if incompetent to understand the proceedings when interpreted*—See *R. v. Dyson*, 7 C. & P. 805; *R. v. Berry*, (1876) 45 L.J.M.C. 123, 1 Q.B.D. 447.

*Right to counsel*—See sec. 942, 944.

*Special pleas*—See secs. 905-913.

**Time to plead to indictment.**—Allowing further time to plead or demur.—**Bail.**—**Witnesses to attend.**

**901.** No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court, or to imparl, or to have time allowed him to plead or demur to any such indictment.

2. If the court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to

prepare for his defence, or otherwise, such court may grant such further time and may adjourn the trial of such person to a future time in the sittings of the court, or to the next or any subsequent session or sittings of the court, and upon such terms, as to bail or otherwise, as to the court seem meet, and may, in the case of adjournment to another session or sittings, respite the recognizances of the prosecutor and witnesses accordingly.

3. In such case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings without entering into any fresh recognizances for that purpose.

*Origin*—Sec. 630, Code of 1892; R.S.C. 1886, ch. 174, sec. 141.

*Time to plead*—Sec. 901 changes the practice whereby at common law a person indicted for misdemeanour was entitled to traverse or postpone the trial till the assizes or sessions next after the finding of the indictment. 4 Bl. Com. 351, 4 Chit. Cr. L. 278, 2 Pollock & Maitland Hist. Eng. Law 649.

Indictments for felonies were tried at the same assizes or sessions at which they are preferred to and found by the grand jury, but might be postponed to the next assizes or sessions at the instance of the prosecutor or the defendant, on showing to the court a sufficient cause. Archbold Crim. Pleading, 110.

*Time of application to postpone*—An adjournment may be ordered prior to and contingent upon a true bill being found. *R. v. Doran* (1914) 10 Cr. App. R. 67; *R. v. Taylor*, (1882) 15 Cox C.C. 8. But in general, a trial will not be postponed to the next assizes before a bill is found. *R. v. Heesom*, 14 Cox C.C. 40.

The court has power to adjourn the case, although the trial has commenced. *B. v. Gordon*, 6 B.C.R. 160, 2 Can. Cr. Cas. 141.

*Postponing trial because of prejudice of jury by newspaper item*—If the court is satisfied upon the affidavits that the minds of the jury-men have been affected to the prejudice of the accused by the publication of press notices stating that the accused had confessed the crime, a postponement is proper. *The King v. Willis*, (1913) 4 W.W.R. 761, 23 Man. R. 77, 23 W.L.R. 702, 21 Can. Cr. Cas. 64. *R. v. Davies*, [1906] 1 K.B. 32.

*Postponing trial because of absence of witnesses*—To grant a postponement of trial on the ground of absence of witnesses, three conditions are necessary: 1st, the court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shown that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and 3rd, the court must be satisfied that there is a reasonable expectation that the

witnesses can be procured at the future time to which it is prayed to put off the trial. *R. v. D'Eon*, 3 Burr. 1514; *R. v. Mulvihill*, (1914) 5 W.W.R. 1229, 19 B.C.R. 197, 22 Can. Cr. Cas. 354, 26 W.L.R. 955.

It is no ground of "surprise" that the prisoner had no knowledge of the evidence to be produced against him, for no one is obliged, by pleading, or otherwise, to disclose the evidence by which his case is to be supported. It is sufficient that the party is fully apprised of the case or charge which it is proposed to prove against him, and he must then, being so informed, prepare himself to repel it. *R. v. Slavin* (1866), 17 U.C.C.P. 205.

Where it appears by affidavit that a necessary witness for the prisoner is ill (*R. v. Hunter*, 3 C. & P. 591), or that a witness for the prosecution is ill (*R. v. Bowen*, 9 C. & P. 509), or unavoidably absent or is kept out of the way by the contrivance or at the instigation of the prisoner, the court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness's depositions before a magistrate. *Roscoe Cr. Evidence*, 11th ed., 185.

If the application is made on the ground of the absence of a material witness, the judge will require an affidavit stating the points which the witness is expected to prove in order to form a judgment whether the witness is a material one or not. *R. v. Savage*, 1 C. & K. 75.

*Mode of proof on motion to postpone*—Proof should be made by affidavit; *R. v. Mulvihill*, (1914) 5 W.W.R. 1229, 19 B.C.R. 197, 22 Can. Cr. Cas. 154, 26 W.L.R. 955; *R. v. Dougall* (1874) 18 L.C. Jur. 85; but *viva voce* testimony may be taken. *R. v. Savage*, 1 Car. & K. 257; *R. v. Bridgman*, C. & Mar. 271.

On an application by the Crown because of the absence of Crown witnesses, the court may accept the statement of the Crown counsel that reasonable efforts were made to procure their attendance without requiring proof upon oath; the accused is not entitled to particulars of the efforts made to procure their attendance. *McCraw v. The King*, (1907) 13 Can. Cr. Cas. 337.

*Insufficiency of grounds for postponement*—It has been decided that a postponement will not be granted for the purpose of making inquiries respecting fresh witnesses not called before the committing justices: *R. v. Mulvihill* (1914) 5 W.W.R. 1229, 19 B.C.R. 197, 22 Can. Cr. Cas. 354; *R. v. Johnson* (1847) 2 Car. & K. 354; nor because the accused had no knowledge of the evidence to be produced against him: *R. v. Slavin* (1866) 17 C.C.C. at p. 205; but see as to exceptional circumstances. *R. v. Flannagan* (1884) 15 Cox C.C. 403, at p. 407.

It is not usual to postpone a trial for the purpose of obtaining character witnesses. *R. v. Jones*, 8 East 34.

While it is not incumbent on the prosecution to abstain from giving at the trial any additional evidence which may be discovered subsequently to the taking of the depositions, it is only fair that the prisoner's counsel should be apprised of the character of such evidence. *R. v. Ward*, 2 Car. & K. 759.

In *R. v. Johnson* (1847) 2 C. & K. 354, Alderson, B. refused to postpone the trial of a prisoner charged with murder, where the postponement was sought to give an opportunity of investigating the evidence and characters of certain witnesses for the prosecution who had not been examined before the committing magistrate, but who were to be called to prove previous attempts by the prisoner on the life of the deceased.

*Revoking postponement order*—If the witness, because of whose absence a postponement has been ordered, soon afterwards appears in court, the judge has jurisdiction to order the trial to go on. *R. v. Redd*, 21 Man. R. 785, 20 Man. B. 645.

*Refusal to postpone not generally reviewable as question of law*—

There may arise cases in which it would be clear that there had not been any exercise of judicial discretion in granting or refusing postponement of trial, and in such cases there might be error of law which would be properly reviewable; but where, in what was clearly an exercise of his discretion, the trial judge has refused a postponement because he was "of the opinion" that further time should not be allowed (s. 901, s.s. 2), the propriety of that exercise of discretion is not reviewable by an appellate court and is not properly the subject of a reserved case under s. 1014. *Mulvihill v. The King* (1914) 6 W.W.R. 462, 49 S.C.B. 587, 23 Can. Cr. Cas. 194. *Reg. v. Charlesworth* (1861) 1 B. & S. 460, 31 L.J.M.C. 25; *Winsor v. Reg.*, L.R. 1, Q.B. 890, 35 L.J.M.C. 65; *Rex v. Lewis* (1909) 78 L.J.K.B. 722.

*Special provisions as to Ontario*—See Code secs. 902-904.

*Taking bail in open court*—The following is the Ontario practice in taking a recognizance of bail in open court:—

The persons entering into the recognizance must be severally asked if they are content to acknowledge to owe to Our Sovereign Lord the King, His Heirs and Successors, the sums in which they are severally to be bound, on the condition named in the recognizance, which must be fully stated. For this purpose they are each addressed in the second person, thus:—

"A.B. (*the accused*): Are you content to acknowledge to owe to Our Sovereign Lord the King, His Heirs and Successors, the sum of            dollars, of good and lawful money of Canada, to be made and levied of your goods and chattels, lands and tenements respectively, to the use of Our Sovereign Lord the King, His Heirs and Successors, if you fail to personally appear at the sittings of the Supreme Court of Ontario for the trial of criminal actions to be held in and for the County of            at the city (or town) of            on the            day of            , then and there to take your trial on (or plead to) a certain indictment found against you by the Grand Jury of the said County on a charge of            ?"

And to C.D. (a surety): "C.D., are you content, etc., etc.            ?"



And to E.F. (the other surety): "E.F., are you content, etc., etc.?"

The recognizance is then signed by the Clerk of Assize (it is not signed by the persons bound), and the following entry made by him in the Minute Book of the Assize:—

"A.B. this day in open court entered into his recognizance in the sum of                      dollars, with two sureties, C.D. and E.F., each in the sum of                      dollars, for the appearance of the said A.B. at the next sittings of this court to plead to (or to stand his trial) on an indictment for                      (naming the offence)."

The following form of bond may be used:—

#### RECOGNIZANCE OF BAIL.

ONTARIO,	{	BE IT REMEMBERED, that on the                      day
COUNTY OF		of                      , in the year of Our Lord
.....		one thousand nine hundred and                      and in
To Wit:		the                      year of the Reign of His Majesty

King George V, at the sittings of the Supreme Court of Ontario for the trial of criminal actions (or at the sittings of the General Sessions of the Peace, or County Court Judge's Criminal Court, as the case may be), now being held in and for the County of                      at the city (or town) of                      A.B., of                      : carpenter, C.D., of                      , cooper, and E.F., of                      , grocer, personally came before the said court, and in open court acknowledged themselves to owe to Our Sovereign Lord the King, His Heirs and Successors, the sums following, that is to say: The said A.B. the sum of                      dollars, and the said C.D. and E.F., each the sum of                      dollars, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements, respectively, to the use of Our Sovereign Lord the King, His Heirs and Successors, if the said A.B. fail in performing the condition hereunder written.

Taken and acknowledged the day and year	{	"X. Y.,"
first above mentioned in open Court,		Clerk of Assize,
before me.		(or Clerk of the Peace).

The condition of the above written recognizance is such, that if the above-bounden A.B. shall personally appear at (naming the court, etc., to be holden, etc.), then and there to take his trial (or plead as the case may be) in a certain indictment found against him by the Grand Jury of the said County on a charge of                      , and do not depart the said Court without leave, then the said recognizance to be void, or else in full force and virtue.

**Time to plead in Ontario.**

**902.** If any person is prosecuted in any division of the High Court of Justice for Ontario for any indictable offence, by information there filed, or by indictment there found or removed into such court, and appears therein in term time in person, or, in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid judgment may be entered against such defendant for want of a plea.

*Origin*—Sec. 757, Code of 1892; R.S.C. 1886, ch. 174, sec. 273.

*Formal proceedings in jury court in Ontario*—See note to sec. 873.

*Ordering further time to plead or demur*—See sec. 903.

**When defendant appears by attorney.—Allowing further time.**

**903.** If such defendant appears to such information or indictment by attorney, he shall not imparl to a following term, but a rule, requiring him to plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or judgment in default may be entered in the same manner as might have been done formerly in cases in which the defendant had appeared to such information or indictment by attorney in a previous term; but the court, or any judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment.

*Origin*—Sec. 758, Code of 1892; R.S.C. 1886, ch. 174, sec. 274.

**Ontario.—Defendant may bring on trial.—Notice to Attorney General.**

**904.** If any prosecution for an indictable offence, instituted by the Attorney General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution, of which application twenty days'

previous notice shall be given to such Attorney General, may make an order authorizing such defendant to bring on the trial of such prosecution; and thereupon such defendant may bring on such trial accordingly unless a *nolle prosequi* is entered to such prosecution.

*Origin*].—Sec. 759, Code of 1892; R.S.C. 1886, ch. 174, sec. 275.

*Form of Nolle Prosequi*].—

Afterwards, on the                      day of                      , before our said Lord the King at the (court) come as well the said Attorney-General for the province of                      , of our said Lord the King, in the (court), who for our said Lord the King in this behalf prosecutes in his proper person, as the said A.B., by his solicitor. And the said Attorney-General for our said Lord the King says that he will not further prosecute the said A.B. upon the indictment aforesaid. Whereupon all and singular the premises being seen and fully understood by the court now here, it is considered and adjudged, by the said court here, that all proceedings upon the said indictment against the said A.B. be altogether stayed, and that the said A.B. be discharged of and from the said indictment.

*Stay of proceedings by Attorney-General*].—See Code sec. 962.

**Special pleas.**—*Autrefois acquit*.—*Autrefois convict*.—**Pardon.**

**905.** The following special pleas and no others may be pleaded according to the provisions hereinafter contained, that is to say, a plea of *autrefois acquit*, a plea of *autrefois convict*, a plea of pardon, and such pleas in cases of defamatory libel as are hereinafter mentioned.

2. All other grounds of defence may be relied on under the plea of not guilty.

*Origin*].—Sec. 631, Code of 1892; R.S.C. 1886, ch. 174, sec. 146.

*Plea of autrefois acquit*].—This plea may be made *ore tenus* unless required by court rules to be in writing (see sec. 576); but is ordinarily made in writing and signed by counsel for the accused. The following form of plea is given by Archbold, 22nd ed., p. 157:—

“And the said J.S. in his own proper person cometh into court here, and having heard the said indictment read, saith that our Lord the King ought not further to prosecute the said indictment against the said J.S., because he saith, that heretofore, to wit, at the general sessions of the peace holden at                      , in and for the county of                      , he the said J.S. was lawfully acquitted of the said offence charged in the said indictment. And this he, the said J.S., is ready to verify; wherefore he prays judgment, and that by the court here he may be dis-

missed and discharged from the premises in the present indictment specified."

*Plea of autrefois convict*].—This plea will be similar to that of *autrefois acquit*, but will state that the accused was "lawfully convicted" of the offence where the other form uses the phrase "lawfully acquitted."

*Plea of pardon*].—A plea of pardon is a plea that the Sovereign has pardoned the accused for the offence and unless it is a statutory pardon it must be specially pleaded at the earliest opportunity on arraignment or it will be considered as waived. *R. v. Lord Norris*, 7 Rolfe B. 297. The accused will be allowed to plead over on the plea of pardon being disallowed. *R. v. Strahan*, 7 Cox C.C. 85.

*Pardons free or conditional*].—See secs. 1076-1080.

**Special pleas together.—Pleading not guilty afterwards.—Statement of previous acquittal or conviction.**

**906.** The pleas of *autrefois acquit*, *autrefois convict*, and pardon may be pleaded together, and if pleaded shall be disposed of before the accused is called on to plead further.

2. If every such plea is disposed of against the accused he shall be allowed to plead not guilty.

3. In any plea of *autrefois acquit* or *autrefois convict* it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal or conviction.

*Origin*].—Sec. 631, Code of 1892; R.S.C. 1886, ch. 174, sec. 146.

*Pleading over*].—A plea of not guilty and *autrefois acquit* cannot be made concurrently; *R. v. Banks*, 27 Times L.R. 575; but sec. 906 gives the absolute right to plead over after the plea of *autrefois* has been disallowed.

**Issue on pleas of *autrefois acquit* and *autrefois convict*.—What determines.**

**907.** On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of

which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts.

2. If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

*Origin*].—Sec. 631, Code of 1892; R.S.C. 1886, ch. 174, sec. 146.

*Common law defence of autrefois convict*].—*Autrefois convict* is a common law defence applicable whether the charges were before a jury or before a magistrate or other tribunal trying the cases without a jury. *Wemyss v. Hopkins*, L.R. 10 Q.B. 378, 44 L.J.M.C. 101.

*Sec. 907 a supplementary provision; its limitations*].—*Stuart, J.*, in *R. v. Pope* (1914) 5 W.W.R. 1070, 22 Can. Cr. Cas. 327, 7 Alta. L.R. 169, 26 W.L.R. 659, said:—"The first thing that strikes one on looking at these provisions is that there is good reason for thinking that the "former trial" referred to is a trial upon indictment in a Superior Court and not a summary trial before a justice or justices of the peace. A comparison is instituted between what can be done in the present court and what could have been done in the former one. It seems to me that the two clauses proceed upon the supposition of identity of general jurisdiction and that they were not expressly intended to cover cases where the proceedings in the former court were necessarily limited in their scope by a narrow limitation upon the jurisdiction of that court, resting, not upon the absence of some ingredient of aggravation in the crime, but upon an arbitrary rule as to value only. This view is borne out by the use of the expressions "given in charge" and "proposed to give him in charge." It seems to me that the legislature was here thinking of *giving in charge to a jury*. That is the usual connection in which the expression 'given in charge' is used." . . . "The reference to 'all proper amendments which might have been made' tends, although perhaps only slightly, to confirm the view that the legislature had in mind a previous trial upon indictment where the question of what proper amendments may or may not be made is a much more serious one and the subject of much more legislation and judicial decision than the question of amending an information before a justice of the peace. For this reason it seems to me that sec. 907 should be interpreted upon the assumption that the legislature had in

mind only a former court of at least equal jurisdiction, and that impossibility of conviction on the former charge for the present offences, *due merely to lack of jurisdiction*, should not stand in the way of the present plea; nor should sec. 907 be treated as absolutely exhausting the law upon the question, so that in no case can a person plead *autrefois acquit* or *convict* unless he brings himself within its terms." *R. v. Pope* (1914) 22 Can. Cr. Cas. 327, 334, 5 W.W.R. 1070, 7 Alta. L.R. 169.

But it seems probable that a defendant, whose former trial was before a magistrate under Part XVI would be held entitled to the benefit of it in like manner as if he had a jury trial. *R. v. Pope* (1914) 5 W.W.R. 1070, 1075, (Stuart, J.).

*Defence of autrefois in county judge's criminal court*—Under the speedy trials clauses (Part XVIII) there is no express provision for the tender or reception of the formal plea of *autrefois convict*, or for any plea other than those of guilty or not guilty. That Part of the Code created a special statutory jurisdiction and a special procedure; but there seems to be no doubt that an accused person upon pleading not guilty (assuming that no provision is made for a previous formal plea of *autrefois convict*) must have the right to raise as a defence the fact of a previous conviction for the same offence; otherwise the benefit of a speedy trial might be denied him in the very case where he should be particularly entitled to it. *R. v. Taylor* (1914) 5 W.W.R. 1105, 7 Alta. L.R. 72, 22 Can. Cr. Cas. 234.

The special plea appears to have been received without objection on the part of the prosecution on "speedy trials" in *R. v. Clark*, 9 Can. Cr. Cas. 125, and in *R. v. Taylor*, *supra*.

*Common law defence of res judicata*—Although the plea of the accused under sec. 906 of the Criminal Code cannot be upheld, the circumstances may give him a good defence at common law which has been reserved to him by sec. 16 of the Code which reads as follows: "All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith."

A maxim of the common law is *Nemo debet bis vexari pro una et eadem causâ*. This has been held to govern in a case where a defendant was convicted of two offences under different statutes, which were different in form, but held to be the same in substance: *Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 378. In that case Lord Blackburn said at p. 381: "The defence does not arise on a plea of *autrefois convict*, but on the well established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter." And see *Regina v. Miles*, 24

Q.B.D. 423, 17 Cox C.C. 9; R. v. Weiss (1913) 4 W.W.R. 1358 (Alta.); R. v. Weiss (1913) 5 W.W.R. 48.

The principle of *res judicata* applies equally to an acquittal as to a conviction. The substance of the issue rather than the form must be looked to. In R. v. Quinn, 10 Can. Cr. Cas. 412 at 417, 11 O.L.R. 242, a second charge was laid for perjury in taking an election oath when personating a voter after an acquittal for the personation. It was held that the acquittal in the first case established that it was not the accused who had committed the personation, and this had become *res judicata* as between the Crown and the accused. The main issue in both trials was the same—a question of identity. At the first trial this issue was determined adversely to the Crown, and while that decision stood it was not open to the Crown to have it tried a second time. To arrive at the verdict which they did it was necessary for the second jury to find that it was the accused who had personated, and thus in effect to override and overrule the contrary verdict of the first jury. This defence is not one of *autrefois acquit* under sec. 906 of the Code, but under sub-sec. 2 may be relied on under the plea of “not guilty.” Maclaren, J.A., said: “It is really a defence at common law as pointed out by Blackburn, J., in *Wemyss v. Hopkins*, L.R. 10 Q.B. 378, and by Hawkins, J., in *Regina v. King*, [1897] 1 Q.B. 214. There being nothing inconsistent with it in the Code, it is a defence that may still be claimed and exercised; indeed it is stated in the above cases that it is a well established rule and one of the very first principles of the criminal law.”

It was held on a case reserved that the trial judge should, because of the first trial and acquittal, have directed the jury to find a verdict of “not guilty,” and then have discharged the accused, although his ruling that the plea of *autrefois acquit* was not supported was correct in law. R. v. Quinn, *supra*. See also R. v. Pope (1914) 5 W.W.R. 1070, 22 Can. Cr. Cas. 327, 7 Alta. L.R. 169, 26 W.L.R. 659; *Wentworth v. Mathieu* [1900] A.C. 212, 3 Can. Cr. Cas. 429.

When a prisoner is discharged merely by reason of a defect in the commitment or in consequence of the want or excess of jurisdiction in the committing court, or in the committing magistrate, he can be again arrested and tried for the same cause before a competent magistrate. *Ex parte Seitz* (1899) 3 Can. Cr. Cas. 127, 131, 8 Que. Q.B. 392; *Attorney-General for Hong Kong v. Kwok a Sing*, L.R. 5 P.C. 179, 42 L.J.P.C. 64, 12 Cox C.C. 565; R. v. Young Kee (No. 2), [1917] 2 W.W.R. 654, 28 Can. Cr. Cas. 236.

An acquittal upon a charge of assisting a prisoner to escape from the charge of a constable is a bar to a subsequent charge of assaulting a police officer who was assisting the constable in the pursuit of such escaping prisoner if both charges depended upon the same facts. R. v. Stanhope (1913) 22 Can. Cr. Cas. 76 (N.S.).

It would seem that any question of *res judicata* under Cr. Code sec.

15 in favour of the accused; because of a prior conviction and not covered by a plea of *autrefois convict* will be barred by a plea of guilty entered for the accused after the dismissal of the plea of *autrefois convict*. *R. v. Pope*, (1914) 5 W.W.R. 1070, 22 Can. Cr. Cas. 327, 7 Alta. L.R. 169, 22 Can. Cr. Cas. 327, 26 W.L.R. 659.

*The onus of proof*—The burden of establishing a plea of *autrefois convict* or *autrefois acquit* or a defence of *res judicata* is upon the accused; it is therefore necessary for him to make out all the facts requisite to support the plea. *R. v. Carver* [1917] 2 W.W.R. 1170, 1172, 29 Can. Cr. Cas. 122 (Alta.); *R. v. Taylor* (1914) 5 W.W.R. 1105, 7 Alta. L.R. 72, 22 Can. Cr. Cas. 234, 26 W.L.R. 652; *R. v. Pope* (1914) 5 W.W.R. 1070, 7 Alta. L.R. 169, 22 Can. Cr. Cas. 327, 26 W.L.R. 659; *ex parte Flanagan*, 34 N.B.R. 577, 5 Can. Cr. Cas. 82; *R. v. Mitchell*, 24 O.L.R. 324, 19 Can. Cr. Cas. 113; *R. v. Hill*, (1903) 36 N.S.R. 240. Assumptions of facts requisite to support a plea of *autrefois acquit* or *autrefois convict* are not to be made in favour of the plea. *R. v. Carver*, [1917] 2 W.W.R. 1170, 29 C.C.C. 122 (Alta.); *R. v. Taylor*, 5 W.W.R. 1105, 7 Alta. L.R. 72, 22 Can. Cr. Cas. 234, 26 W.L.R. 652.

*Defence of prior conviction or acquittal*—*Autrefois convict* is a special plea in bar which goes to the merits of the indictment, and gives a reason why the prisoner ought not to answer at all, nor put himself on his trial for the alleged crime. No man shall be placed in peril of legal penalties more than once on the same accusation—*nemo debet bis puniri pro uno delicto*—and if a man is once fairly tried before a court of competent jurisdiction he may answer all subsequent proceedings for the same offence, or involving the same circumstances as the former prosecutions; and a difference in colour or degree, does not alter the rule of law, for it is not one of mere designation, but of substantial fact. *R. v. Johnson*, 21 Can. Cr. Cas. 215.

To support the plea *autrefois acquit*, the defendant must have been in actual peril. A quashed indictment, a *nolle prosequi*, or a mistrial will not entitle a defendant to so plead, nor will it sustain such a plea. *Reg. v. Mulholland*, 4 P. & B. 512; *Reg. v. Sirois*, 27 N.B.R. 610.

"When we talk of a man being twice tried, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man twice put in jeopardy, we mean put in jeopardy by the verdict of a jury; and he is not tried or put in jeopardy until a verdict is given." Cockburn, C.J., in *Reg. v. Charlesworth*, 1 B. & S. 507.

The statement of law for which the case of *R. v. Clark*, 1 Brod. & B. 473, is often cited in support, has been much qualified by recent decisions. It was said on the authority of that case that the true test on a plea of *autrefois* was whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first. Archbold Cr. Pleading, 24th ed., 177; *R. v. Magrath*, 26 U.C.Q.B. 385; *R. v. Johnson*, 21 Can. Cr. Cas. 215, 218 (N.B.); *R. v.*



Mitchell, 24 O.L.R. 324. That such is not a correct statement of the law is pointed out in a recent English case holding that *R. v. Clark*, (1820) 1 Brod. & B. 473, is not an authority for the test as to the sufficiency of a plea of *autrefois convict* laid down in Archbold's Criminal Pleading, 24th ed., at p. 177. *Rex v. Tonks*, [1916] 1 K.B. 443. 85 L.J.K.B. 396, 11 Cr. App. R. 284.

It is not open to the Crown to proceed on a second charge in which a conviction could only be had by the second jury overruling the contrary verdict of the first jury. *R. v. Quinn*, 10 Can. Cr. Cas. 412, 11 O.L.R. 242; *R. v. Hill*, (1903) 36 N.S.R. 240; *R. v. Marsham*, *ex parte* Pethick Lawrence [1912] 2 K.B. 362, 82 L.J.K.B. 665; *R. v. Bulmer*, 5 L.N. 92 (Que.).

In the case of *R. v. King*, [1897] 1 Q.B. 214, the head note states that a defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot afterwards be convicted upon a further indictment charging him with larceny of the same goods. That head-note is criticized in *R. v. Barron*, (1914) 10 Cr. App. R. 81, where it is pointed out that the decision in *R. v. King* was given either because in the exercise of his discretion the judge should not have permitted the trial for larceny, or because the verdict in the first trial was based upon a view of facts which was inconsistent with that necessary to support the further indictment. At the first trial the conviction implied that the property in the goods passed to the defendant with the consent of the owner who was induced thereto by false pretences, whereas conviction at the trial for larceny implied that the defendant feloniously took the goods without the consent of the owner. The substantial identity of the offence was recognized in *R. v. King* as an essential condition to the validity of the plea of *autrefois convict* or *autrefois acquit*, and made no change in the well settled principle of law applicable to those pleas. The test is not whether the facts relied upon are the same in the two trials. An acquittal of the whole of an offence does not involve an acquittal of every part of it. *R. v. De Salvi*, 10 Cox C.C. 481 (n), 46 Cent. Cr. Court Papers 884. An acquittal on a graver charge does not necessarily involve an acquittal of the minor offence. *R. v. Barron*, [1914] 2 K.B. 570, 10 Cr. App. R. 81, at 89. But if the minor offence be one which is included in the greater, and there might, under sec. 951, have been a verdict for the lesser offence if proved, an acquittal of the greater offence will be in effect an acquittal of the lesser included offence.

A charge of theft does not by implication include that of having received the thing stolen, and a prisoner acquitted on indictment for theft cannot, on that account, plead *autrefois acquit* to an indictment for receiving. *R. v. Groulx*, 18 Que. K.B. 118, 15 Can. Cr. Cas. 20.

The addition of statements merely aggravating the offence first charged and making the accused liable, if the aggravating circumstances

had been first included and proved, to a more onerous penalty, but still for the same crime, will not deprive the accused of the benefit of the defence. Code sec. 909.

"If all proper amendments had been made"—If a person is convicted on an indictment for forging a promissory note, and the fact in evidence was an incomplete note form which, nevertheless, under Code sec. 466 might be the subject of forgery, the accused might plead *autrefois convict* if again indicted for forging an "incomplete promissory note," as the matter on which the accused was given in charge on the former trial would have been the same had "all proper amendments been made which might then have been made." *Ead v. The King*, 13 Can. Cr. Cas. 348, 40 Can. S.C.R. 272.

If an indictment were so radically defective that it was not amendable (*R. v. Bainbridge*, 42 O.L.R. 203), the weight of authority seems to establish that in contemplation of law the accused was never in jeopardy; *R. v. Drury*, 18 L.J.M.C. 189, 3 C. & K. 193; *Vaux's case*, 4 Coke 44; because of the presumption that the court will set aside the proceedings before judgment, *Hale*, P.C. 248, 394; 1 *Starkie*, Cr. Pl., 2nd ed., 320; *R. v. Weiss* (No. 1) 4 W.W.R. 1358, 21 Can. Cr. Cas. 438, 25 W.L.R. 286; *R. v. Weiss* (No. 2) 5 W.W.R. 48, 22 Can. Cr. Cas. 42, (Alta.). There has been no jeopardy if the trial proves abortive, and the jury is discharged without a verdict. *R. v. Charlesworth*, 9 Cox C.C. 44, 31 L.J.M.C. 25, 1 B. & S. 460; *R. v. Murphy* L.R. 2 P.C. 584; *Winsor v. The Queen*, L.R. 1 Q.B. 311.

The previous indictment must have been one upon which his life or liberty was not merely in imaginary, but in actual, danger. *R. v. Marsham, ex parte Pethick Lawrence*, [1912] 2 K.B. 362, 82 L.J.K.B. 665.

*Prior acquittal of complete offence an answer to second charge of attempt*—Where the full offence is charged, but only an attempt is proved, sec. 949 authorizes a conviction for the attempt upon the count for the complete offence. Code sec. 949; *R. v. McCarthy*, 41 O.L.R. 153, 29 Can. Cr. Cas. 448, 13 O.W.N. 210; *R. v. Hamilton*, 4 Can. Cr. Cas. 251 (Ont.).

So, an acquittal on the charge of a completed offence is a defence to a subsequent charge of an attempt of that offence inasmuch as there might have been a conviction for the attempt, if proved, on the indictment for the completed offence. *R. v. Weiss & Williams*, (1913) 4 W.W.R. 1358, 1360 (Alta.); *R. v. Cameron*, 4 Can. Cr. Cas. 385.

*Competency of court on the previous trial*—Where the plea of *autrefois convict* sets up the previous decision of an inferior court, the burden of proving that the court was a court of competent jurisdiction rests upon the party pleading the previous decision; the maxim "*omnia præsumuntur*" does not apply to give jurisdiction. *Falkingham v. Victorian Ry. Commissioners*, 69 L.J.P.C. 89, [1900] A.C. 452, 463. *R. v. Taylor* (1914) 5 W.W.R. 1105, 7 Alta. L.R. 72, 22 Can. Cr. Cas. 234, 26 W.L.R. 652.

true, and that it was for the public benefit that the matters charged should be published in the manner and at the time when they were published.

2. Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defamatory matter bears without any such specification; or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each as if two libels had been charged in separate counts.

3. Every such plea must be in writing, and must set forth the particular fact or facts by reason of which it was for the public good that such matters should be so published.

4. The prosecutor may reply generally denying the truth thereof.

*Origin*—Sec. 634, Code of 1892; R.S.C. 1886, ch. 174, secs. 148, 149, 150, 151.

*Form of plea of justification*—See note to sec. 334.

*Libel; Replication to plea of justification*—The accused is not entitled to be acquitted on the ground that the plea of justification had not been traversed and must therefore be taken to be a good plea. *R. v. Yousry*, 84 L.J.K.B. 1272, [1914] W.N. 338. The omission to formally join issue on the plea of justification will not prevent the court from admitting and considering evidence disputing the averments of that plea. *R. v. Yousry*, supra; *R. v. De la Porte*, (1895) 59 J.P. 617, and *Odgers on Libel*, 5th ed., 725, criticized.

*When truth a defence to criminal libel*—Code secs. 331, 333, 334, 910, 911.

*Defamatory libel generally*—See secs. 317-334, 861, 871, 888, 905-934, 947, 956, 1045.

**911.** The truth of the matters charged in an alleged libel shall in no case be inquired into without the plea of justification aforesaid unless the accused is put upon his trial upon any indictment or information charging him with publishing the libel knowing the same to be false, in which case evidence of the truth may be given in order to negative the allegation that the accused knew the libel to be false.

2. The accused may, in addition to such plea, plead not guilty and such pleas shall be inquired of together.

3. If, when such plea of justification is pleaded, the accused is convicted, the court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea.

*Origin*—Sec. 634, Code of 1892; R.S.C. 1886, ch. 174, secs. 148, 149, 150, 151.

*Publishing with knowledge of falsehood*—This is the offence specified in Code sec. 333.

*Defamatory libel generally*—See secs. 317-334, 861, 871, 888, 905-934, 947, 956, 1045.

**Publication by order of a legislative body.—Certificate of speaker or clerk.**

**912.** Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by order or under the authority of any legislative council, legislative assembly or house of assembly, may submit to the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, upon twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of such legislative council, legislative assembly or house of assembly, as the case may be, verified by affidavit, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings are commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of the legislative council, legislative assembly or house of assembly, as the case may be.

2. Such court or judge shall, upon such certificate being so submitted, immediately stay such criminal proceedings, and the same shall thereupon be deemed finally ended, determined and superseded.

*Origin*—R.S.C. 1886, ch. 163, sec. 6.

*Defamatory matter in parliamentary papers*—See sec. 321.

**Copy of legislative report may be laid before the court.—Stay of proceedings and dismissal.**

**913.** In any criminal prosecution for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant may submit to the court or judge before which or whom such prosecution is pending a copy of such report, paper, votes or proceedings, verified by affidavit, and the court or judge shall immediately stay such criminal prosecution, and the same shall thereupon be deemed to be finally ended, determined and superseded.

*Origin*—R.S.C. 1886, ch. 163, sec. 7.

*Stay of proceedings on producing verified copy of parliamentary paper*—Sec. 913 applies in terms to a criminal prosecution "for or on account or in respect of the publication of any copy of such report, paper, etc., i.e., those parliamentary papers to which the preceding sec. 912 applies; and presumably an extract or abstract from a parliamentary paper will, when separately published under legislative authority, come under the protection of secs. 912 and 913.

**Form of record of conviction or acquittal.—Entry of record.—Criminal court rules may apply to inferior courts.**

**914.** In making up the record of any conviction or acquittal on any indictment it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading.

2. The statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as heretofore, subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively.

3. Such rules shall also apply to such inferior courts of criminal jurisdiction as are therein designated.

*Origin*—Sec. 726, Code of 1892; R.S.C. 1886, ch. 174, sec. 244.

*Record of arraignment and trial*—For the Crown Rules in the various provinces, see sec. 576.

If there is no "arraignment," as where no bill was found, no record is made up, and the fact that the grand jury found "no bill" may be proved by producing the original indictment endorsed in that manner.

*Tanghe v. Morgan* (1905) 11 B.C.R. 455; *R. v. Tanghe*, 10 B.C.R. 297, 8 Can. Cr. Cas. 160.

*Proving termination of criminal proceedings*—The result of the more recent authorities is that the termination of the proceedings in favour of the accused may be proved by evidence other than a formal record or certificate of acquittal where there is no such record or certificate. *Tamblen v. Westcott*, 23 Can. Cr. Cas. 391, 7 W.W.R. 1037, 30 W.L.R. 542 (Alta.).

For a long time in the Province of Ontario it was held to be the law that it was necessary to produce the record of the proceedings where the trial had been on an indictment and that before the record could be made up it was necessary to procure an order of the judge presiding at the criminal trial or the fiat of the Attorney-General before the Clerk of the Peace could make up the record. See *Begina v. Ivy*, 24 U.C.C.P. 78, and *Hewitt v. Cane*, 26 O.R. 133. These cases were in effect overruled by the decision in *Attorney-General v. Scully*, 6 Can. Cr. Cas. 167, 4 O.L.R. 394. It was during the time when the stricter view of the law was adhered to that such cases as *McCann v. Preveneau*, 10 Ont. R. 573, was decided. But even during this time it had been held in *Sinclair v. Haynes*, 16 U.C.R. 247, where the charge had been before magistrates, that it was unnecessary to show any record or adjudication in writing. *Tamblen v. Westcott*, *supra*.

At one time it was also held that the entry of a *nolle prosequi* was not a sufficient termination to found an action for malicious prosecution, for the reason that a new charge might subsequently be laid: *Goddard v. Smith*, 6 Mod. 262. The contrary view was, however, held in *Gilchrist v. Gardner*, 12 N.S.W.L.R. 184, and it has been held in Saskatchewan that the direction of the Attorney-General to his agent not to prefer a charge after a committal for trial has been had is a sufficient termination. See *Mortimer v. Fisher*, (1913) 4 W.W.R. 454, 23 W.L.R. 905 (Sask.), 11 D.L.R. 77.

In *Beemer v. Beemer*, 9 O.L.R. 69, oral proof of an informal termination of the prosecution was admitted and held sufficient; and see *Baxter v. Gordon Ironsides & Fares Company*, 13 O.L.R. 598.

In *Fancourt v. Heaven*, 18 O.L.R. 492, it was held that the withdrawal of the charge in open court by the Crown Attorney was a sufficient termination.

The termination of the prosecution is not sufficiently pleaded by an allegation that the accused was discharged on a habeas corpus order, for that would not necessarily terminate the criminal proceedings. *McKinnon v. McLaughlin Carriage Co.*, 37 N.B.R. 3.

*Records in Ontario courts*—See the Judicature Act, R.S.O. 1914. ch. 56, secs. 132 and 151, and *Re Chantler*, 8 Can. Cr. Cas. 245, 8 O.L.R. 111.

**Form of record in case of amendment.**

**915.** If it becomes necessary to draw up a formal record, in any case in which an amendment has been made, such record shall be drawn up in the form in which the indictment remained after the amendment, without taking any notice of the fact of such amendment having been made.

*Origin*—Sec. 725, Code of 1892; R.S.C. 1886, ch. 174, sec. 243.

*Amendment of indictment*—See secs. 889, 890, 891, 915.

*Proceedings in Case of Corporations.***Corporations may appear by attorney.**

**916.** Every corporation against which a bill of indictment is found at any court having criminal jurisdiction shall appear by attorney in the court in which such indictment is found and plead or demur thereto.

*Origin*—Sec. 725, Code of 1892; R.S.C. 1886, ch. 174, sec. 244.

*Indictment of corporation*—Any corporation convicted of an indictable or other offence punishable with imprisonment, may, in lieu of the prescribed punishment, be fined in the discretion of the court before which it is convicted. Code sec. 1035, sub-sec (3); *Union Colliery Co. v. The Queen* (1900) 31 S.C.R. 81, 4 Can. Cr. Cas. 400.

Regarding Chapman's case (*Re Chapman and City of London*, 19 O.R. 33), Meredith, C.J.C.P., said, in *Re Schofield and Toronto* (1913) 22 Can. Cr. Cas. 93, at 97, that since it was decided one of the strongest points made in it in support of the prohibition has been turned the other way by the legislation now contained in the Code, expressly making its provisions applicable to corporations: sec. 2, sub-sec. (13); so that it is difficult to imagine any good reason why a corporation may not now be duly summoned to and appear at a preliminary investigation of a criminal charge against it taken under the provisions of the Criminal Code.

But it was not necessary to determine the question in the Schofield case in view of the willingness of the corporation, expressed by counsel, that the ordinary course of procedure before a magistrate be taken. See *Regina v. Birmingham and Gloucester R. Co.* (1840), 9 C. & P. 469; and *Pharmaceutical Society v. London and Provincial Supply Association Limited* (1880), 5 App. Cas. 857. But even if there were power to hold a preliminary inquiry if the corporation appeared, it is still doubtful whether a corporation can be compelled to appear, or whether the procedure of a preliminary enquiry and committal for trial is adaptable to a corporation.

Two or more corporations may be indicted for conspiracy in furtherance of a trade combine under sec. 498 of the Code, without joining a personal defendant. *R. v. Central Supply; (R. v. Master Plumbers)* 12 Can. Cr. Cas. 371.

A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. *R. v. Great West Laundry Co. (1900)*, 3 Can. Cr. Cas. 514, 13 Man. R. 66.

The manager of a corporation is not criminally liable as for wilful disobedience of a statute under Code sec. 164 in respect of the corporation's neglect not due to any active participation on his part, to perform a statutory duty imposed upon it. *R. v. Hays (1907)* 12 Can. Cr. Cas. 423; *R. v. Hendrie*, 10 Can. Cr. Cas. 208, 11 O.L.R. 202. Where the offence is non-feasance it is an offence only of the corporation or party upon whom the duty is imposed by statute. *People v. Clark*, 14 N.Y. Supp. 642.

*Formal charge in lieu of indictment*—In Alberta and Saskatchewan, where there is no grand jury system, a formal charge is made by the Attorney-General or by his direction or by any person with his consent or the consent of the court. Code sec. 873A. Such a formal charge is included in the statutory meaning given the words "indictment" and "count" by sec. 2, sub-sec. (16), unless the context otherwise requires. The procedure of sec. 918 *et seq.* applies to such a formal charge. *R. v. Standard Soap Co. (1907)* 12 Can. Cr. Cas. 290.

*Certiorari not required.—Distringas not necessary.*

**917.** No writ of *certiorari* shall be necessary to remove any such indictment into any superior court with the view of compelling the defendant to plead thereto; nor shall it be necessary to issue any writ of *distringas*, or other process, to compel the defendant to appear and plead to such indictment.

*Origin*—Sec. 636, Code of 1892; R.S.C. 1886, ch. 174, sec. 156.

**Notice to corporation.**

**918.** The prosecutor, when any such indictment is found against a corporation, or the clerk of the court when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless such corporation appears and pleads thereto in two days after the



service of such notice, a plea of not guilty will be entered thereto for the defendant by the court, and that the trial thereof will be proceeded with in like manner as if the said corporation had appeared and pleaded thereto.

*Origin*—Sec. 637, Code of 1892; R.S.C. 1886, ch. 174, sec. 157.

**Proceeding on default.**

**919.** If such corporation does not appear in the court in which the indictment has been found, and plead or demur thereto within the time specified in the said notice, the judge presiding at such court may, on proof to him by affidavit of the due service of such notice, order the clerk or proper officer of the court to enter a plea of not guilty on behalf of such corporation, and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea.

*Origin*—Sec. 638, Code of 1892; R.S.C. 1886, ch. 174, sec. 158.

**Trial may proceed in absence of defendant corporation.**

**920.** The court may, whether such corporation appears and pleads to the indictment, or a plea of not guilty is entered by order of the court, proceed with the trial of the indictment in the absence of the defendant in the same manner as if the corporation had appeared at the trial and defended the same; and in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations.

*Origin*—Sec. 639, Code of 1892; R.S.C. 1886, ch. 174, sec. 159.

*Fine in discretion of court*—See sec. 1029.

*Juries.*

**Qualification of juror.—When seven grand jurors may find bill.**

**921.** Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any province of Canada shall be duly qualified to serve as such juror in criminal cases in that province.

2. Seven grand jurors, instead of twelve, may find a true bill in any province where the panel of grand jurors is not more than thirteen.

*Origin*—57-58 Vict., Can., ch. 57, sec. 1, sec. 662, Code of 1892; R.S.C. 1886, ch. 174, sec. 160.

*Constitution of the grand jury*—A provincial legislature has power to determine the number of grand jurors to serve at courts of oyer and terminer and general sessions this being a matter relating to the constitution of the courts, but the selection and summoning of jurors, including talesmen, and fixing the number of grand jurors by whom a bill may be found, relate to procedure in criminal matters in respect of which the Dominion Parliament alone has power to legislate. The Dominion Parliament can exercise its power by adopting the provincial law and has done so by s. 662 of the Criminal Code of 1892 (now sec 921); *R. v. Cox*, (1898) 31 N.S.R. 311, 2 Can. Cr. Cas. 207; *R. v. Walton*, 12 O.L.R. 1, 10 Can. Cr. Cas. 269, 7 O.W.R. 312; *R. v. O'Rourke* (1882) 32 U.C.C.P. 38; *R. v. O'Rourke*, 1 Ont. R. 464; and see *R. v. Battista* 21 Can. Cr. Cas. 1 (Que.); *R. v. Morrow* (1914) 24 Can. Cr. Cas. 310 (Que.); *Brisebois v. The Queen*, 15 S.C.R. 421; *Chantler v. Attorney-General*, 9 Can. Cr. Cas. 465, same case, *sub nom. re Chantler*, 9 O.L.R. 529.

In *Veronneau v. The King*, (1916) 54 S.C.R. 7, 27 Can. Cr. Cas. 211, 220, Anglin, J., whose dissent in the result was based upon other grounds, said: "Anything which destroys the competency of the grand jury as a whole, or the competency of any of its members, I think, affects the constitution of that body and affords a ground of objection which may be raised by a motion to the court under sec. 899. A grand juror may be well qualified as to all the cases on the docket save one and wholly unfit to pass upon that one. As to that case the jury would not be properly constituted while he sat upon it. In *The King v. Hayes*, 9 Can. Cr. Cas. 101, 11 B.C.R. 4, the contrary view was taken, apparently based largely upon what, with respect, would appear to have been a misconception of sec. 662 of the Criminal Code then in force. (Paragraph 1 of sec. 921 of the present Code.) Apart from any question as to the constitutional validity of this section as a provision dealing with the constitution of the court rather than with criminal procedure, it should be noted that the qualification which it declared sufficient was not merely that prescribed by the provincial statute law, but qualification "according to the laws in force for the time being in any province of Canada." I know of no law in force in any province which has taken away the common law right to object to a juror *propter affectum* or deprived an accused in the Province of Quebec, as in Ontario and the other older provinces, of the right, before conviction for an indictable offence, to have his case passed upon first by a body of impartial grand jurors and afterwards by a petit jury likewise com-

posed of indifferent men. 4 Blackstone's Com., par. 306." *R. v. Gorbet* (1866) 1 P.E.I. Rep. 232 approved; *R. v. Hayes*, 9 Can. Cr. Cas. 101, 11 B.C.R. 4, disapproved. And see *R. v. Maguire*, 4 Can. Cr. Cas. 12. An objection to the constitution of the grand jury may be taken by motion to quash the indictment. Code sec. 899.

*Qualification of petit jurors*—As to the omission of a name from the panel and other irregularities in the method of selection of jurors, see Code sec. 1010. The latter section does not, however, dispense with the necessity for qualification in a juror who acts; it does not deprive the prisoner of the right to be tried by a petit jury of twelve jurors having the required qualification; *R. v. McCraw*, 12 Can. Cr. Cas. 253, 16 Que. K.B. 103; but objection must be taken at the trial and unless this is done it cannot be raised after verdict and sentence. Sec. 1010; *R. v. Battista*, 21 Can. Cr. Cas. 1 (Que.); *R. v. Morrow*, 24 Can. Cr. Cas. 310 (Que.). On an appeal under secs. 1013-1015, if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial must be granted. Sec. 1019. But in a civil case it has been laid down after a consideration of both civil and criminal cases that when the provisions of a statute relate to the performance of a public duty and the case is such that 'to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, such provisions are to be considered as directory only and the neglect of them though punishable will not affect the validity of the acts done. *Montreal Street Ry. Co. v. Normandin* [1917] A.C. 170. It was decided in the latter case that the verdict of a jury will not be set aside on account of irregularities in the due revision of the jury list unless the applicant proves prejudice. There had been no challenge to the array in that case and this the applicant sought to excuse on the ground that at the trial he had no means of knowledge of the irregularity, which was the failure to revise the grand jury list under R.S. Que. 1909, art. 3426, and the consequent omission of a revised civil jury list. The decision in *Mulcahy v. The Queen*, L.R. 3 H.L. 306, was distinguished upon the question of jurisdiction as in that case each list had been duly made and the question was merely which list should be taken. *Montreal Street Ry. Co. v. Normandin* [1917] A.C. 170 at 177; and see *Belanger v. The King*, 12 Que. K.B. 69; *R. v. Leicester Justices* (1827) 7 B. & C. 6; *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266.

Personation of a duly summoned jurymen may amount to an attempt to pervert the course of justice and was punishable as a misdemeanour at common law. *R. v. Wakefield* (1918) 87 L.J.K.B. 319.

*Challenging the array*—Code secs. 925, 926.

*Formal proceedings in jury courts in Ontario*—See note to sec. 873.

*British Columbia*—The Jury Act, 1913, ch. 34. If the panel of

jurors has already been summoned, a new provincial law governing the selection of names to be summoned will be presumed not to affect the qualification of the panel already summoned if nothing appears in it to the contrary. *R. v. McNamara*, 22 Can. Cr. Cas. 351.

*North-West Territories*—For special provisions as to trial, see N.W.T. Act, R.S.C., ch. 62, secs. 37-55.

*Quebec*—R.S. Que. art. 3405 *et seq.*; *R. v. Morrow*, 24 Can. Cr. Cas. 310; *R. v. Battista*, 21 Can. Cr. Cas. 1; Code sec. 923.

*Trial with jury in Yukon Territory*—The Yukon Act, R.S.C. 1906, ch. 63, and its amendments, control as to trials in that territory. Code sec. 9.

#### **Jury de medietate linguæ, abolished.**

**922.** No alien shall be entitled to be tried by a jury *de medietate linguæ*, but shall be tried as if he was a natural born subject.

*Origin*—Sec. 663, Code of 1892; R.S.C. 1886, ch. 174, sec. 161; 33-34 Vict., Imp., ch. 34.

*Aliens*—An alien is declared by the Naturalization Act, 1914, Can., sec. 18, to be triable in the same manner as if he were a natural born British subject. The former right to a jury *de medietate* was that an alien might demand that the jury should be half foreigners, if so many are found in the place. It did not apply to treason and it seems it could be waived. *R. v. Courvoisier* (1840) Ann. Reg. 229.

#### **Mixed juries in Quebec.**

**923.** In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed, one-half of persons speaking the English language, and one-half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists.

*Origin*—Sec. 664, Code of 1892; R.S.C. 1886, ch. 174, sec. 166; 27-28 Vict., Can., ch. 41.

*Mixed juries in Quebec*—A prisoner arraigned for trial in certain districts of Quebec has the right to claim a jury composed for one-half at least of persons speaking his language if French or English. After having claimed a mixed jury and the recording of the order therefor by the court, the prisoner has no absolute right to relinquish such claim and to have the order for a mixed jury superseded, but revocation may

be ordered on such an application in the discretion of the court. *R. v. Sheehan* (1897), 1 Can. Cr. Cas. 402, 6 Que. Q.B. 139.

It has been held that this right to a mixed jury, conferred by 27-28 Vict., ch. 41, Statutes of the Province of Canada, still exists in criminal cases, notwithstanding the statute 46 Vict., ch. 16 (Que.), purporting to repeal the former Act. *R. v. Yancey* (1899), 2 Can. Cr. Cas. 320, 8 Que. Q.B. 252. A statute of the former Province of Canada in force at the time of Confederation, which conferred the right to a mixed jury in Lower Canada, now the Province of Quebec, remains in force thereafter as a matter of "criminal procedure" as to that province, and can be varied or repealed only by the Parliament of Canada. *B.N.A. Act*, sec. 91 (27); *R. v. Sheehan*, *supra*; *R. v. Yancey*, *supra*. The prosecuted party may, upon arraignment, demand a jury composed for the one-half at least of persons skilled in "the language of his defence," whether French or English; but this does not give the accused an option to choose either language as the language of the defence, nor to have at least one-half of the jurors drawn from those skilled in the language in which counsel for the accused proposes to conduct the defence. The "language of the defence" in that connection means the language habitually spoken by the accused. *R. v. Yancey*, *supra*.

Where six English jurors had been sworn after several jurors had been directed to stand aside at the instance of the Crown, and the clerk recommenced to call the panel alternately from the English and the French lists, and one of them previously ordered to stand aside was again called, it was held that the previous "stand aside" stood good and did not need to be withdrawn until the panel was exhausted. *R. v. Dougall* (1874), 18 L.C. Jur. 242.

**Mixed juries in Manitoba.—When panel exhausted, additional jurors.**

**924.** Whenever any person who is arraigned before the Court of King's Bench for Manitoba demands a jury composed, for the one-half at least, of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one-half at least of the persons whose names stand first in succession upon the general panel and who, on appearing and not being lawfully challenged, are found, in the judgment of the court, to be skilled in the language of the defence.

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional

number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors.

*Origin*—Sec. 665, Code of 1892; R.S.C. 1886, ch. 174, sec. 167.

**Challenging the array.—In writing.—Objection in writing.**

**925.** Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud, or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned, but on no other ground.

2. Such challenge shall be by way of objection in writing, and shall state that the person returning the panel was partial, or was fraudulent, or wilfully misconducted himself, as the case may be.

3. Such objection may be in form 69, or to the like effect.

*Origin*—Sec. 666, Code of 1892.

*Form of written challenge to the array*—The statutory form 69 appears to allow the grounds of challenge to be stated in a general way without particulars such as are required under the English practice as to which see *R. v. Hughes*, 1 C. & K. 235.

Under form 69 the charge against the sheriff or his deputy may be alleged as partiality, fraud, or wilful misconduct in returning the panel; and by sec. 1152 a statutory form is to be deemed "good, valid and sufficient." This latter phrase, however, probably goes no further than to make the statutory form unassailable on a motion to quash, leaving it to the court to exercise its discretion to require particulars to be furnished or to give time to answer any matter brought up as to which the opposite party is taken by surprise.

In *R. v. Morrow* (1914) 4 Can. Cr. Cas. 310 (Que.), it was said to be the rule that the party challenging is not to have the benefit of any ground which he has not specifically set forth, but the effect of the statutory form 69 does not appear to have been considered, and moreover, the objection there was a double one as to the same default of the sheriff in respect of the petit jury list and the grand jury list as to which latter Code sec. 899 (2) governs and as to which there is no statutory form of objection.

*Triers on challenge to the array*—See sec. 926.

**Trial of ground of challenge.—New panel when.**

**926.** If partiality, fraud or wilful misconduct, as the case may be, is denied, the court shall appoint any two indifferent persons to try whether the alleged ground of challenge is true or not.

2. If the triers find that the alleged ground of challenge is true in fact, or if the party who has not challenged the array admits that the ground of challenge is true in fact, the court shall direct a new panel to be returned.

*Origin*—Sec. 666 (2), Code of 1892.

*Misconduct of sheriff in drafting jury panel*—See secs. 925 and 1011.

#### **Empanelling the jury.**

**927.** The name of each juror on a panel returned, with his number on the panel and the place of his abode, shall be written on a distinct piece of card, and all such pieces of card shall be as nearly as may be of equal size.

2. The cards shall be delivered to the officer of the court by the sheriff or other officer returning the panel, and shall, under the direction and care of the officer of the court, be put together in a box to be provided for that purpose and shall be shaken together.

3. If the array is not challenged or if the triers find against the challenge, the officer of the court shall in open court draw out the said cards, one after another, and shall call out the name and number upon each such card as it is drawn, until such a number of persons have answered to their names as in the opinion of the court will probably be sufficient to provide a full jury after allowing for challenges of jurors and directions to stand by.

4. The officer of the court shall then proceed to swear the jury, each juror being called to swear in the order in which his name is so drawn, until, after substracting all challenges allowed and jurors directed to stand by, twelve jurors are sworn.

5. If the number so answering is not sufficient to provide a full jury such officer shall proceed to draw further names from the box, and call the same in manner aforesaid, until, after challenges allowed and directions to stand by, twelve jurors are sworn.

*Origin*—Sec. 667, Code of 1892.

*Duties of the Clerk of Assize*—A "record" book is kept by each clerk of assize in Ontario. In it are entered: the title of the cause; the names of the counsel; the motion to quash or for particulars; the request of the prisoner's counsel to have witnesses for the defence

subpœnaed by the Crown; the finding by the grand jury of a true bill; the arraignment of the prisoner; the names of the jurors sworn, ordered to stand aside, and challenged; the names of the witnesses sworn for the Crown and for the prisoner; a statement of the exhibits produced; the hours at which the addresses for the Crown and for the prisoner and the judge's charge were delivered, and of the retirement and return of the jury, and their verdict as recorded by the trial judge; and generally the course of the trial.

*Calling the jury*—See note to sec. 873 as to formal proceedings in jury courts.

*Challenges peremptory and for cause*—A challenge once allowed excludes a juror from serving on the jury being formed; for in cases of a peremptory challenge the other party might afterwards exhaust his peremptory challenges and the privilege of withdrawing it might therefore operate as a fraud upon him. Then in the case of a challenge for cause the withdrawal of the challenge would not change the decision of the triers that the juror did not stand indifferent, and that he, therefore, was an improper person to serve on the jury. *R. v. Lalonde* (1898), 2 Can. Cr. Cas. 188 (Que.).

When the accused does not challenge, the Crown may either challenge peremptorily, or may challenge for cause, or direct the juror to stand by.

*Direction to stand by*—The direction to stand by is really a challenge by the Crown for cause without it being necessary to show and establish the ground on which it is founded until the panel has been exhausted without twelve jurors having been accepted and sworn. It is in fact a deferred challenge for cause; and the term "to stand by" means that the Crown shall have time to show the cause of challenge. *R. v. Barsalou* (No. 1) (1901) 10 Que. K.B. 180; 4 Can. Cr. Cas. 343; *R. v. Geach* (1839), 9 C. & P. 499; *Mansell v. The Queen*, 8 E. & B. 54.

Subject to sec. 933, the Crown may direct any number of jurors to stand by, but when the panel is exhausted they cannot be stood by a second time. *R. v. Boyd* (1896), 4 Can. Cr. Cas. 219; 5 Que. Q.B. 1; *R. v. Morin* (1890), 18 S.C.R. 407.

The order to stand by must be given at a time when a challenge could be made. *R. v. Barsalou* (No. 1) (1901), 10 Que. K.B. 180, 4 Can. Cr. Cas. 343. The right to challenge must be exercised before the juror has taken the book, by direction of the clerk of the court, to be sworn. *Ibid.*; and sufficient time is always allowed before this order is given to allow the parties to exercise the right of challenge. After the book has been taken, the taking of the oath is deemed to have commenced, and then it is too late to challenge, and also too late to direct the juror to stand by. *R. v. Frost* (1839), 9 C. & P. 129. A limitation of the Crown's privilege to direct jurors to stand by is made by the proviso in sec. 933 (1) added in 1917 by 7-8 Geo. V, Can., ch. 13.



The provision of the Code relating to the right of the Crown to have jurors stand aside is not inconsistent with the provisions of the North-West Territories Act in force in Alberta. *R. v. Murray*, (1915) 9 W.W.R. 804, 25 Can. Cr. Cas. 214, 33 W.L.R. 148 (Alta.).

*Irregularities of procedure*—The fact that the jurors were set aside, rejected or sworn as they were drawn, without first calling the full number required for a jury, does not invalidate the trial, nor constitute a deprivation of the full right of challenge. *R. v. Weir* (No 3) (1899), 3 Can. Cr. Cas. 262 (Que.).

Where, after the jury were sworn, it was learned that one of the Crown witnesses had disappeared and the prosecution could not proceed the judge discharged the jury and remanded the prisoner. It was held that the judge had a discretion to discharge the jury, and that the discharge under such circumstances was not equivalent to an acquittal, and that the prisoner might again be put on trial. *Jones v. R.* (1880), 3 Leg. News, 309 (Que.).

By sec. 929 (3) an omission to follow the directions of this section shall not affect the validity of the proceedings. And see secs. 1010 and 1011.

*Yukon*—As to the Yukon Territory the provisions of the Yukon Juries' Ordinance passed under the authority of 3 Edw. VII (Can.), c. 73, superseded sub-secs. 2 and 3 of sec. 667 of the 1892 Code now part of sec. 927, as to the procedure on impanelling a jury. *R. v. Brindamour*, 11 Can. Cr. Cas. 315.

#### Calling the jurors who have stood by.

**928.** If, by challenges and directions to stand by, the panel is exhausted without leaving a sufficient number to form a jury. those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shows cause why they should not be sworn: Provided that if before any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such jurors shall be sworn, challenged or ordered to stand by, as the case may be, before the jurors originally ordered to stand by are again called.

*Origin*—Sec. 667, Code of 1892.

*Irregularities in procedure*—By sec. 929 (3) an omission to follow the "directions" of this section shall not affect the validity of the proceedings. And see secs. 1010 and 1011 and note to sec. 929.

*Crown may not peremptorily challenge a juror who has been stood aside*—After the list of jurors has been called and gone through, a number having been directed at the instance of the Crown to stand aside, and a complete jury not obtained, although the Crown may not have exhausted its number of peremptory challenges, it cannot challenge peremptorily on the names of those stood aside being called again following the first calling over of the panel. If it does so, the jury is improperly constituted and a substantial wrong done to accused entitling him to a new trial. *R. v. Churton* [1919] 1 W.W.R. 774 (B.C.).

**Who shall be the jury.—Return of names to the box.**

**929.** The twelve men who in manner aforesaid are ultimately drawn and sworn shall be the jury to try the issues on the indictment, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury give in their verdict or until they are discharged; and then the names shall be returned to the box, there to be kept with the other names remaining at that time undrawn, and so *toties quoties* as long as any issue remains to be tried.

2. If the prosecutor and accused do not object thereto, the court may try any issue with the same jury that has previously tried or been drawn to try any other issue, without their names being returned to the box and redrawn, or if the parties, or either of them, object to some one or more of the jurors forming such jury, or the court excuses any one or more of them, then the court may order such persons to withdraw, and may direct the requisite number of names to make up a complete jury to be drawn, and the persons whose names are so drawn shall be sworn.

3. An omission to follow the directions of this or the two last preceding sections shall not affect the validity of the proceedings.

*Origin*—Sec. 667, Code of 1892.

*Omission to follow directions in impanelling the jury*—See secs. 929 (3), 1010 and 1011; and notes to secs. 921, 928. But if the jury is not properly constituted, a substantial wrong is occasioned to the accused, and sec. 923 (3) is applicable only in so far as secs. 927-929 are directory. *R. v. Churton* [1919] 1 W.W.R. 774, 780, per Galliher, J.A.

**Ground of challenge.—Names not on panel.—Tried upon *votr dire*.**

**930.** If the ground of challenge is that the jurors' names do not appear on the panel, the issue shall be tried by the court

on the *voir dire* by the inspection of the panel, and such other evidence as the court thinks fit to receive.

*Origin*—Sec. 668, Code of 1892; R.S.C. 1886, ch. 174, secs. 163 and 164.

*Juror's name appearing on the panel*—This ground of challenge is that referred to in sec. 935, clause (a) and is subject to the proviso there mentioned.

*Qualification of jurors*—Code secs. 921, 927, 929, 935, 1010, 1011, 1019.

### **Trial of challenge upon other grounds.—Triers.**

**931.** If the ground of challenge be other than as last aforesaid, the two jurors last sworn, or if no jurors have then been sworn, then two persons present whom the court may appoint for that purpose shall be sworn to try whether the juror objected to stands indifferent between the King and the accused, or has been convicted as hereinafter specified or is an alien, as the case may be.

2. If the court or the triers find against the challenge, the juror shall be sworn.

3. If they find for the challenge he shall not be sworn.

4. If, after what the court considers a reasonable time, the triers are unable to agree, the court may discharge them from giving a verdict, and may direct other persons to be sworn in their place.

*Origin*—Sec. 668, Code of 1892.

*Oath of triers*—Where the issue is whether the juror stands indifferent or not (sec. 935 (b)), the triers are sworn as follows:—

"You shall well and truly try whether A.B., one of the jurors, stands indifferently to try the prisoner at the bar and a true verdict give according to the evidence.—So help you God."

*Challenge of second juror*—On the selection of the second juror, the first juror is not necessarily one of the triers. *R. v. Mathurin*, 12 Que. K.B. 494, 8 Can. Cr. Cas. 1. And it has been doubted whether he may be one, although such was the former practice, because of the use of the word "jurors" (in the plural) in the phrase "or if no jurors have then been sworn" (see 931, sub-sec. (1)). *R. v. Mathurin*, *supra*.

*Juror not impartial*—Code sec. 935 (b).

*Juror convicted of serious offence*—Code sec. 935 (c).

*Juror an alien*—Code sec. 935 (d).

**Peremptory challenges by accused.**

**932.** Every one indicted for treason or for any offence punishable with death is entitled to challenge twenty jurors peremptorily.

2. Every one indicted for any offence other than treason, or an offence punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve jurors peremptorily.

3. Every one indicted for any other offence is entitled to challenge four jurors peremptorily.

*Origin*—Sec. 668, Code of 1892; R.S.C. 1886, ch. 174, secs. 163, 164.

*Peremptory challenges for the defence*—Challenges to the polls are either *peremptory*, or *for cause*. Peremptory challenges are those which are made without any reason assigned and which the court is bound to allow to the number here limited.

The challenge must be before the juryman is sworn, and he cannot be challenged afterwards except by consent. *R. v. Mellor* (1858), 27 L.J.M.C. 121, 1 Dears. & B. 468; *R. v. Frost*, 9 C. & P. 129; *R. v. Coulter* (1863), 13 U.C.C.P. 299, 301. This rule will apply although the ground for challenge was not known at the time. *R. v. Earl* (1894), 10 Man. R. 307.

The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby. *R. v. Frost* (1839), 9 C. & P. 129, 137.

The withdrawal of an unqualified or disqualified person who has been sworn as a juror, at the request of the prisoner and by the consent of the Crown, before the whole jury is completed and sworn does not reopen the right of challenge as to those previously sworn nor make it necessary that such jurors should be re-sworn. *R. v. Coulter* (1863), 13 U.C.C.P. 299.

As between different prisoners whichever begins to challenge must finish all his challenges before the other begins. *Ibid.*, p. 49; Co. Lit. 158a. A prisoner is entitled to challenge for cause before he has made all or any of his peremptory challenges. *Whelan v. The Queen* (1868), 28 U.C.Q.B. 2.

If the prisoner whose challenge of a juror for favour has been disallowed, chooses then to challenge the juror peremptorily, he waives the benefit of any exception to the disallowance of his challenge for favour. *Whelan v. The Queen*, 28 U.C.Q.B., at p. 55; *Freeman v. People* (1847). 4 Denio, N.Y., 61.

*Indictment joining counts for which the number of challenges are different*—The number of peremptory challenges in case one count comes within sub-sec. (2) and the other within sub-sec. (3) will be the greater number *i.e.*, twelve. *R. v. Turpin* (1904) 8 Can. Cr. Cas. 59 (N.S.).

*North-West Territories Act*—Where the N.W.T. Act, R.S.C., ch. 62, applies, the jury shall be composed of six jurors (sec. 40), and by sec. 45 of the same Act any one arraigned for treason or an offence punishable with death, or for an offence for which he may be sentenced to imprisonment for more than five years, may challenge peremptorily, and without cause, any number of jurors not exceeding six; and every peremptory challenge beyond that number shall be void.

*Yukon Territory*—See the special provisions of the Yukon Act, R.S.C., ch. 63, sec. 72.

**Peremptory challenges by Crown.—Standing aside.—Accused challenges first if required.**

**933.** The Crown shall have power to challenge four jurors peremptorily, and may direct any number of jurors not peremptorily challenged by the accused to stand by until all the jurors have been called who are available for the purpose of trying that indictment; provided that the Crown may not direct any number of jurors to stand by in excess of forty-eight, unless the judge presiding at the trial, upon special cause shown, so orders.

2. The accused may be called upon to declare whether he challenges any jurors peremptorily or otherwise, before the prosecutor is called upon to declare whether he requires such juror to stand by, or challenges him either for cause or peremptorily.

*Origin*—1917 Can., ch. 13; sec. 668, Code of 1892; R.S.C. 1886, ch. 174, secs. 163 and 164.

*Crown's directions to juror to "stand by"*—See secs. 927, 928.

*Alberta and Saskatchewan*—Sec. 9 of the Code declared that except in so far as they are inconsistent with the North-West Territories Act and amendments thereto as the same existed immediately before the first day of September, 1905, the provisions of the Code Act extend to and are in force in the Province of Saskatchewan and Alberta. So far as the Crown is concerned the number of peremptory challenges given by The North-West Territories Act, R.S.C. 1906, ch. 62, and by The Criminal Code are the same, namely, four; as to challenges for cause there is, naturally, no limit in either Act. The panel, that is the list of persons summoned as jurors, is prepared in accordance with provincial

legislation as a matter relating to the organization of courts. The number summoned may vary in different provinces. Under The North-West Territories Act a judge summons such number as he thinks fit. The list of persons so summoned is the panel. The procedure in the province of Alberta is, therefore, substantially the same as in the other provinces, and there is a right in the Crown of directing jurors to stand aside. *R. v. Murray and Mahoney*, 9 W.W.B. 804, 811, 25 Can. Cr. Cas. 214 (Alta.).

**No right to stand aside on private prosecution for defamatory libel.**

**934.** The right of the Crown to cause any juror to stand aside until the panel has been gone through shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel.

*Origin*—Sec. 669, Code of 1892; R.S.C. 1886, ch. 174, sec. 165.

*"By a private prosecutor"*—The "private prosecutor," as the term is here used, means the person who puts the criminal law in motion; and if there is a criminal proceeding to which the term private prosecutor is more applicable than another, it is in the case of a defamatory libel—a prosecution, as was said by Lord Campbell, uniformly instituted by the party injured. *R. v. Patteson* (1875), 36 U.C.Q.B. 129, at p. 141.

The fact that the Attorney-General or his representative conducts the prosecution in respect of a private defamatory libel does not make it a public proceeding or withdraw it from the operation of this section. *R. v. Patteson* (1875), 36 U.C.Q.B. 129, 143; *R. v. Marsden* (1829), 1 M. & M. 439; *R. v. Bell*, 1 M. & M. 440.

As to costs in defamatory libel cases, see sec. 1045; *R. v. Fournier*, 25 Que. K.B. 556, 25 Can. Cr. Cas. 430.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 955, 1045.

**Challenges for cause.**

**935.** Every prosecutor and every accused person is entitled to any number of challenges on the ground,—

- (a) that any juror's name does not appear in the panel:  
Provided that no misnomer or misdescription shall be a ground of challenge if it appears to the court that the description given in the panel sufficiently designates the person referred to; or,
- (b) that any juror is not indifferent between the King and the accused; or,

(c) that any juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labour or exceeding twelve months; or,

(d) that any juror is an alien.

2. No other ground of challenge for cause than those mentioned in this section shall be allowed.

*Origin*—Sec. 668, Code of 1892; R.S.C. 1886, ch. 174, secs. 163 and 164.

*Sub-sec. (a)—Challenge because jurors' names not on panel*—This ground of challenge is triable by the court. Sec. 930.

*Juror claiming he is disqualified*—Sec. 935 provides for challenges by the prosecutor and by the accused, but it seems that a juror may himself claim, at the time that a challenge would be in order, that he is disqualified and may then be examined upon oath as to the disqualification. 4 Hargr. St. Tr. 740.

*Sub-sec. (b)—Challenge for favour; juror "not indifferent"*—If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial. *R. v. Harris* (1898), 2 Can. Cr. Cas. 75.

The ordinary course of proceeding when the prisoner challenges for cause is that the juror is tried for cause at once; but he may be required to stand aside for a time, and the cause be tried at a later stage, if it be more convenient as a matter of practice and procedure that it should be so, or the challenge for cause may be postponed until the peremptory challenges have been exhausted. After challenging for cause and failing to support his challenge, the prisoner may desire to exclude that juror in case he might be influenced against the prisoner by reason of the challenge for cause, and if he had been compelled to exhaust the whole of his peremptory challenges before that, he would then be unable to exclude the juror he had challenged for cause, whom he might have excluded if his peremptory challenges had not been completed. *R. v. Smith* (1876), 38 U.C.Q.B. 218 (Ont.); *Whelan v. The Queen*, 28 U.C.Q.B. 132 (Ont.).

It is a good ground of challenge of a petit juror that he was on the grand jury by which the indictment was found, the reason being that he may have been one of the twelve who found the indictment. *R. v. Dowey* (1869), 1 P.F.I. 291.

The judge may in his discretion for sufficient cause further postpone the time of assigning cause of challenge either for the Crown or the prisoner, but not as a matter of right on a mere request without sufficient cause. *Mansell v. R.* (1857), 8 E. & B. 54, 111.

In Canada there is no preliminary right of counsel to interrogate

the juror when called up, in order to found a challenge for cause or to refrain from challenging him on being satisfied by his answers. The burden of proof of a challenge for cause is on the person who makes it. *R. v. Savage*, 1 Mood. C.C. 51. It is said that the challenged juror may himself be examined by the triers on the *voir dire* as to his qualification to be upon the panel or the "leaning of his affection"; *R. v. Dowling*, 7 St. Tr. N.S. 381; *R. v. Cook*, 22 Can. Cr. Cas. 241 (N.S.); but not as to his conviction (sec. 935 (o)) for some offence forming an absolute ground of challenge. *R. v. Edmonds*, 4 B. & Ald. 471; *R. v. Martin*, 6 St. Tr. N.S. 925; *R. v. Stewart*, 1 Cox C.C. 174. And it is a matter of doubt whether, if objection be taken, he is to be interrogated as to any matter going to his own discredit; Archbold's *Crim. Pldg.* 22nd ed., 185; *R. v. Stewart*, supra; *R. v. Cuffy* (1848) 7 St. Tr. N.S. 467.

The finding of the triers that the proposed juror is "indifferent" is conclusive; his capacity as a juror is not to be subject to attack afterwards merely because of proof that he had made statements which tended to show bias. *R. v. Carlin*, 12 Que. K.B. 368, affirmed, *R. v. Carlin*, 12 Que. K.B. 483.

*Sub-sec. (c)—Juror's conviction for serious offence as cause of challenge*—See sec. 931 as to the mode of trying the challenge.

*Alienage as ground of challenge*—The fact is to be tried by triers under sec. 931. The juror may be examined before them on the *voir dire* as to this ground. *R. v. Dowling*, 7 St. Tr. N.S. 381.

*Under N.W.T. Act and Yukon Act*—On a trial before a jury of six the challenges for cause shall be the same as are provided for in the Criminal Code. Yukon Act, R.S.C., ch. 63, sec. 72; N.W.T. Act, R.S.C. 1906, ch. 62, sec. 45.

*Challenge to the array*—Code sec. 925.

*New trial if challenge improperly disallowed*—On an appeal under secs. 1013-1015, if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial must be granted. Sec. 1019.

#### **Requiring challenge in writing.—Form.—Denial.**

**936.** If a challenge on any of the grounds aforesaid is made, the court may, in its discretion, require the party challenging to put his challenge in writing.

2. The challenge may be in form 70, or to the like effect.

3. The other party may deny that the ground of challenge is true.

*Origin*—Sec. 668, Code of 1892; R.S.C. 1886, ch. 174, secs. 163, 164.

*Form of challenge to poll*—Code form 70, following sec. 1152.



**Peremptory challenge in case of mixed jury.**

**937.** Whenever a person accused of an offence for which he would be entitled to twenty or twelve peremptory challenges as hereinbefore provided, elects to be tried by a jury composed one-half of persons skilled in the language of the defence, under secs. 923 or 924, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one-half of such number from among the English speaking jurors, and one-half from among the French speaking jurors.

*Origin*—Sec. 670, Code of 1892; R.S.C. 1886, ch. 174, secs. 166, 167.

**Accused persons joining or severing in their challenges.**

**938.** If several accused persons are jointly indicted and it is proposed to try them together, they or any of them may either join in their challenges, in which case the persons who so join shall have only as many challenges as a single person would be entitled to, or each may make his challenges in the same manner as if he were intended to be tried alone.

*Origin*—Sec. 671, Code of 1892.

*Persons jointly indicted may sever their challenges*—Under these provisions each defendant has a right to the full number of his peremptory challenges; but a corresponding privilege is not given to the Crown, and therefore the Crown is restricted, in the case of the trial of several defendants jointly, to the number of peremptory challenges allowed to it in the case of the indictment of a single person. But if the joint defendants refuse to join in their challenges, the Crown has the right to try them separately, and then the Crown has its four peremptory challenges at the trial of each defendant. *R. v. Lalonde* (1898), 2 Can. Cr. Cas. 188 (Que.).

**Panel exhausted, further jurors summoned.—Names added to the panel.**

**939.** Whenever after the proceedings hereinbefore provided for the panel has been exhausted, and a complete jury cannot be had by reason thereof, then, upon request made on behalf of the Crown, the court may order the sheriff or other proper officer forthwith to summon such number of persons, whether qualified jurors or not, as the court deems necessary and directs in order

to make a full jury; and such jurors may, if necessary, be summoned by word of mouth.

2. The names of the persons so summoned shall be added to the general panel, for the purposes of the trial, and the same proceedings shall be taken as to calling and challenging such persons and as to directing them to stand by as are hereinbefore provided for with respect to the persons named in the original panel.

*Origin*—Sec. 672, Code of 1892; R.S.C. 1886, ch. 174, sec. 168.

*Ordering a "tales"*—See *R. v. Churton* [1919] 1 W.W.R. 774 (B.C.); *R. v. Cropper*, 2 Mood. C.C. 18.

### *Arraignment and Trial.*

#### **Coroner's Inquisition.**

**940.** No one shall be tried upon any coroner's inquisition.

*Origin*—Sec. 642, Code of 1892.

*Depositions before coroner*—See secs. 667, 695.

*Where N.W.T. Act applies*—Similar provisions as to coroners and inquests are contained in secs. 60-66 of the N.W.T. Act, R.S.C., ch. 62, and that statute also provides that the Indian Commissioner, the stipendiaries, the commissioner and assistant commissioner of the R.N.W. Mounted Police, and such other persons as the commissioner of the North-West Territories from time to time appoints, shall be coroners in and for the Territories.

#### **Bringing prisoner up for arraignment.**

**941.** If any person against whom any indictment is found is at the time confined for some other cause in the prison belonging to the jurisdiction of the court by which he is to be tried, the court may by order in writing, without a writ of habeas corpus, direct the warden or gaoler of the prison or sheriff or other person having the custody of the prisoner to bring up the body of such person as often as may be required for the purposes of the trial, and such warden, gaoler, sheriff or other person shall obey such order.

*Origin*—Sec. 652, Code of 1892; R.S.C. 1886, ch. 174, sec. 180.

**Full answer and defence.—Counsel.**

**942.** Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law.

*Origin*—Sec. 659, Code of 1892; R.S.C. 1886, ch. 174, sec. 178; 6-7 Wm. IV, Imp., ch. 114 (1836).

"*Full answer and defence*"—This phrase appears in Code secs. 715, 786, and 942, dealing respectively with summary conviction matters, summary trials and trials on indictment.

The words "full answer and defence" mean that the accused can invoke every means both in law and in fact to meet the charge; the word "answer" being specially applicable to a defence on the facts and the word "defence" applying both to matters of testimony and matters of law. *R. v. Romer*, 23 Can. Cr. Cas. 235 (Que.).

A person upon trial for a crime has a right to hear all the evidence adduced against him and to insist, as a matter of right, that the formalities of the law as to criminal trials are complied with; and when formal proceedings are in strict law required, *ex. gr.*, an arraignment upon a specific charge made known to the prisoner at the hearing before a magistrate, the absence of the required proceedings is a ground for setting aside the conviction without regard to the question whether or not any substantial injustice had resulted to the accused. *R. v. Roach* (1914) 23 Can. Cr. Cas. 28, 6 O.W.N. 632; *Martin v. Mackonachie*, 3 Q.B.D. 730, 770.

*Calling witnesses for the defence*—Code sec. 944 (2).

Even during the final address for the prosecution the court may permit fresh evidence to be called for the defence. *R. v. Morrison*, (1911) 75 J.P. 272, 22 Cox 214.

*Statutory limitation of number of expert witnesses*—See Canada Evidence Act, sec. 7.

*Right of accused to testify in his own defence*—See the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 4 (Appendix to this volume).

There is a conflict of judicial opinion as to whether the right to testify on his own behalf which the accused now has under the Canada Evidence Act, abrogates the right which he formerly had of making an unsworn statement. The right to make an unsworn statement is denied in Manitoba. *R. v. Kelly*, [1917] 1 W.W.R. 46, 27 Man. B. 105, 27 Can. Cr. Cas. 94, and in *R. v. Krafchenko*, (1914) 6 W.W.R. 836, 24 Man. B. 652, 22 Can. Cr. Cas. 277.

In British Columbia it is held that a prisoner at his trial has the option of making a statement not under oath, or of giving evidence under oath. *R. v. Aho*, 11 B.C.R. 114, 8 Can. Cr. Cas. 453.

Down until 1837, prisoners on trial in cases of felony were not allowed either to give evidence on their own behalf or (except in cases of treason) be defended by counsel, although they were allowed counsel

to cross-examine witnesses. While the laws of evidence prevented the accused from giving evidence on his own behalf under oath, it was manifest that a great injustice might often be done unless the story of the accused was allowed to get before the jury in some form. To meet that difficulty, judges adopted the practice of permitting the prisoner to make an unsworn statement from the dock and to address the jury on his own behalf. Mathers, C.J.K.B. in *R. v. Krafchenko*, *supra*.

*Competency of consort of accused as witness*—See Canada Evidence Act, sec. 4.

*Right of defence counsel to "sum up" the evidence*—Code sec. 944; *R. v. Cook*, 48 N.S.R. 150.

The defendant may be allowed to reserve to himself the right to address the jury and to examine and cross-examine witnesses, and to have his counsel argue any points of law that arise in the course of the trial and to suggest questions to him for the cross-examination of witnesses; *R. v. Parkins*, Ry. & M. 166; but the defendant will not be allowed to have counsel to examine and cross-examine the witnesses, and to reserve to himself the right of addressing the jury. *R. v. White* (1811), 3 Camp. 98.

*Accused to have benefit of doubt*—The prosecution must sustain the burden of proving affirmatively, either by direct evidence or fair inference, a case which excludes any reasonable hypothesis upon which the accused may be innocent. *R. v. Jennings* (1916) 10 W.W.R. 1049, 1051, 26 Can. Cr. Cas. 270, 34 W.L.R. 1058 (Alta.); *R. v. Schama*, 84 L.J.K.B. 396; *R. v. Schurman* (1914) 7 W.W.R. 680, 7 Sask. L.R. 269, 30 W.L.R. 56; *R. v. Krafchenko* (1914) 6 W.W.R. 836, 24 Man. R. 652; *R. v. Shortall*, 12 O.W.N. 94, 28 Can. Cr. Cas. 98.

Alderson, B., in the case of *R. v. Hodges*, 2 Lewin C.C. 228, told the jury that the case was made up of circumstances entirely, and that, before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person."

This passage from Alderson, B., has passed into almost invariable use, and it now constitutes one of the rules of evidence: 1 Taylor on Evidence, sec. 69; *R. v. Cook*, 23 Can. Cr. Cas. 50 (N.S.).

Wills, on Circumstantial Evidence, 262, says: In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

It is error to direct the jury that they cannot doubt that certain inferences are to be drawn from circumstantial evidence on points material to the issue. *R. v. Collins*, (1907) 38 N.B.R. 218, 12 Can. Cr. Cas. 402.

In the consideration of circumstantial evidence the inculpatory facts

must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, in order to justify the inference that he is guilty. *R. v. Jenkins*, 14 Can. Cr. Cas. 221, 14 B.C.R. 61.

*Character evidence for the defence*—The accused may call witnesses to speak generally as to his character. The evidence, however, of such witnesses must be confined to the general reputation of the accused for good character, and evidence of particular cases of praiseworthy conduct in the accused is not properly admissible. The evidence of general good character cannot avail the accused against evidence of the fact, but where some reasonable doubt exists as to his guilt, it may tend to strengthen a presumption of innocence; and where intention is a principal element in the offence, or where only presumptive proof is adduced, evidence as to character, bearing on the charge, may be highly important, and serve to explain the conduct of the accused.

*Mistake of counsel*—If a mistake is made by counsel, such as failure to take an objection, that does not relieve the judge in a criminal case from the duty to see that proper evidence only is before the jury: *R. v. Gibson* (1887), 18 Q.B.D. 537; *R. v. Saunders*, [1899] 1 Q.B. 490; *R. v. Petris* (1890), 20 O.R. 317; *R. v. Brooks*, 11 Can. Cr. Cas. 188 at 192, 11 O.L.R. 525, 7 O.W.R. 533.

*Trial after extradition*—If an extradited prisoner intends to object that the indictment is for a different charge than that on which he was extradited, it is for him to prove the extradition warrant and so place on the record the fact of the variance, so that a court of appeal may take cognizance of it. *R. v. McNamara* (1914) 22 Can. Cr. Cas. 351, 19 B.C.R. 175, 27 W.L.R. 33.

*Joint indictments*—Where several persons are jointly indicted the order in which each of them shall enter upon his defence is generally subject to the discretion of the trial judge. *R. v. Barsalou* (No. 3), 4 Can. Cr. Cas. 446 (Que.). Where there is a difference in degree of criminality with respect to the charge made against several persons jointly indicted, they should be called upon for their defence the greater before the less according to the seriousness of the charge against each as disclosed both by the indictment and the evidence for the prosecution, *ex gr.*, the principal before the accessory, and the thief before the receiver. *R. v. Barsalou*, *supra*.

Where there appears no such difference in degree of criminality in respect of several persons jointly indicted, the order of defence is the order in which their names appear in the indictment. *R. v. Barber*, 1 C. & K. 434; *R. v. Meadows*, 2 Jurist N.S. 718. On a joint indictment for one offence, when the evidence for the one would enure to the benefit of the other, the right to a general reply is with the prosecution, though only one defendant called witnesses in defence. *R. v. Connolly* (1894), 1 Can. Cr. Cas. 468, 25 Ont. R. 151; *R. v. Hayes* (1838), 2 M. & R. 155; *R. v. Jordan* (1839), 9 C. & P. 118. As to separate trial, see note to sec. 856.

**Presence of the accused at trial.—Permission to be out of court.**

**943.** Every accused person shall be entitled to be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.

2. The court may permit the accused to be out of court during the whole or any part of any trial on such terms as it thinks proper.

*Origin*—Sec. 660, Code of 1892.

*Granting permission to be out of court*—Sub-sec. (2) applies as well to trials in the county court judge's criminal court (under Code Part XVIII) as to trials with a jury. *R. v. McDougall*, 8 O.L.R. 30, 3 O.W.R. 750.

**Prosecutor's right to sum up.—Accused may open defence and call witnesses.—Summing up.—Crown's right of reply.**

**944.** If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if he does not thereupon announce his intention to adduce evidence, the counsel for the prosecution may address the jury by way of summing up.

2. Upon every trial for an indictable offence, the counsel for the accused, or the accused if he is not defended by counsel, shall be allowed, if he thinks fit, to open the case for the defence, and after the conclusion of such opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

3. If no witnesses are examined for the defence the counsel for the accused, or the accused in case he is not defended by counsel, shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney General or Solicitor General, or to any counsel acting on behalf of either of them.

*Origin*—Sec. 661, Code of 1892.

*Duty of a prosecuting counsel*—The position of counsel prosecuting for the Crown in a criminal case is not that of an ordinary counsel in

a civil case; he is acting in a quasi-judicial capacity and ought to regard himself as part of the court; he is to conduct the case at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury, and nothing more. *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404 at 413 (Alta.); *R. v. Berens*, 4 F. & F. 842, Warburton's Leading Cases, 237.

Counsel for the prosecution are to regard themselves as ministers of justice and not to "struggle for a conviction" as in a case at *nisi prius*, nor to be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority, and to "contest for skill and pre-eminence." *R. v. Murray and Mahoney*, *supra*; *R. v. Puddick*, 4 F. & F. 497.

If the Crown does not intend to call at the trial a witness whom it called on the preliminary inquiry, such witness should be made available to the defence unless his evidence is unquestionably immaterial. *R. v. McClain*, (1915) 23 Can. Cr. Cas. 488 (Alta.).

*Prosecuting counsel opening case*—Counsel for the Crown in a criminal prosecution may not, in opening the case to the jury, disclose the facts relied upon as constituting a confession by the accused until the court has decided that the evidence is admissible. *R. v. Willis*, (1913) 4 W.W.R. 761, 21 Can. Cr. Cas. 64, 23 Man. R. 77, 23 W.L.R. 702; *R. v. Yousry*, 11 Cr. App. B. 13. Counsel should not suggest to the jury by questions put in cross-examination of a witness, the contents of a writing which if produced he could not put in evidence. *R. v. Yousry*, *supra*.

*Oath or affirmation in lieu of oath of witness*—See Canada Evidence Act, secs. 13, 14 and 15.

*Corroboration required by statute in certain cases*—See Code sec. 1002.

*Evidence of child not under oath*—See Canada Evidence Act, sec. 16, and as to certain offences, Code sec. 1003.

*Counsel opening defence*—In 1881, a resolution was come to by the English judges as follows:—"In the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions on the authority of the prisoner, but which they do not propose to prove in evidence."

*Cross-examination as to previous conviction*—See Canada Evidence Act, sec. 12.

*Cross-examining witness as to previous statement*—See Canada Evidence Act, secs. 10 and 11.

*Cross-examination of witness as to bias*—Pollock, C.B., said, in *Attorney-General v. Hitchcock* (1847), 1 Ex. 91:

"A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper and character of the witness *not* with respect to his credit but with reference to his feelings towards one party or the other. In *Thomas v. David* (1836), 7 C. & P. 350, on the witness being asked whether she was not connected in a particular way with one of the parties, and having denied it, the learned judge permitted evidence to be given to show that the connection which she swore had not existed, did in reality subsist. The object in doing so was, not to prove or disprove any part of her testimony, but the evidence was received on the same ground as it was in the case of *Ex parte Yewin* (1811), 2 Camp. 638 (note) where Mr. Justice Lawrence permitted evidence to be given to contradict a witness as to his having used expressions importing revenge. It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind. . . . But those cases where you may show the condition of a witness or his connection with either of the parties are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue."

The quotation above given was approved and followed in *R. v. Finnessey*, 10 Can. Cr. Cas. 347, 11 O.L.R. 338.

*Contradiction of own witness if adverse*—See Canada Evidence Act, sec. 9.

*Defence counsel may sum up the evidence*—The prisoner's counsel at the close of the testimony may "sum up the evidence," (sec. 944), but it is in the judge's discretion whether counsel will be permitted in his address to the jury to read to them extracts from legal text-books or law reports. *R. v. Cook*, 23 Can. Cr. Cas. 50, 18 D.L.R. 706 (N.S.).

*Crown's right of reply*—Where the defence calls no evidence the Attorney-General may sum up, if he chooses, before the address of prisoner's counsel and reply afterwards; *R. v. Cook*, 22 Can. Cr. Cas. 241 (N.S.); but he is not bound to address the jury before the prisoner's counsel does so. *R. v. Keirstead* (1918) 42 D.L.R. 193, 200 (N.B.); *R. v. Toakley*, 10 Cox C.C. 406.

The right of reply preserved to the Attorney-General is similar to the right of reply exercisable in England by the Attorney-General as a prerogative right of the Crown. *R. v. Martin*, 9 Can. Cr. Cas. 371; *R. v. Keirstead* (1918) 42 D.L.R. 193 (N.B.); *R. v. King*, 6 Terr. L.R. 139, 9 Can. Cr. Cas. 426.

The Crown counsel should not attempt to controvert the ruling of the court in admitting certain testimony by telling the jury that it



should not have been admitted. *R. v. Webb*, (1914) 6 W.W.R. 358, 24 Man. R. 437, 22 Can. Cr. Cas. 424, 27 W.L.R. 313.

*Waiving Crown's right to reply*—Where the defence calls no witnesses, the order of addresses to the jury is first the prosecution, second, the defence, and lastly, a right of reply to counsel representing the Attorney-General where the Crown is prosecuting; but the latter privilege is commonly waived, leaving the prisoner with the last word to the jury when he calls no witnesses; *R. v. Cook*, 22 Can. Cr. Cas. 241; or calls witnesses only to prove his good character. *R. v. Dowse*. 4 F. & F. 492.

**Continuous trial.—Adjournment.—Keeping the jury together.—  
Direction of court.**

**945.** The trial shall proceed continuously subject to the power of the court to adjourn it.

2. The court may adjourn the trial from day to day, and if in its opinion the ends of justice so require, to any other day in the same sittings.

3. Upon every adjournment of a trial under this section, or under any other section, the court may, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial.

4. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death.

5. In other cases, if no such direction is given, the jury shall be permitted to separate.

6. No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary.

*Origin*—55-56 Vict., Can., ch. 40, sec. 1; sec. 673, Code of 1892.

*Separation in a capital case*—If the jury in a capital case has illegally been allowed to separate and they are discharged, the same jurymen, or some of them, are liable to be drawn on the second jury and such is not a ground of error, at least where there is no challenge. *R. v. Luparello*, (1915) 8 W.W.R. 89, 25 Man. R. 233, 24 Can. Cr. Cas. 24.

The objection should be raised before verdict. *R. v. Peter*, (1869) 1 B.C.R. pt. 1, p. 2.

*Separation in non-capital cases*—Only in case substantial prejudice has resulted, will the temporary absence of a juror for a few minutes

during the trial of a non-capital case, be a ground for reversing the verdict. *R. v. MacLean*, 39 N.S.R. 147, 1 E.L.R. 334, 11 Can. Cr. Cas. 283; *R. v. McClung*, (1891) 1 Terr. L.R. 379.

*Jury permitted to separate on adjournment*—The corresponding English statute, the Juries Detention Act, 1897, Imp., ch. 20, came up for consideration in *R. v. Twiss*, (1919) 83 L.J.K.B. 20, before the court of Criminal Appeal. Mr. Justice Darling said the tendency of the legislature had been to trust jurymen more and to relax the old rule with regard to them, and it could not be supposed that the legislature had not foreseen that jurymen would speak to outsiders about the case. While it is advisable that jurymen should not discuss the trial with any but their fellow jurors, and in particular should not discuss the case with any of the witnesses, the question on appeal is whether there may have been an injustice done to the accused. If nothing occurred to prejudice a fair trial, the verdict will stand. *R. v. Twiss*, *supra*.

*Adjournment of court and jury to another place by consent*—With the consent of both the prosecution and defence counsel, the court and jury may adjourn to a private house to take the evidence of a witness who is incapacitated from attending elsewhere to give his testimony. *R. v. Rogers*, 36 N.B.R. 1, 6 Can. Cr. Cas. 419.

#### **Jurors may have fire and light and refreshments.**

**946.** Jurors, after having been sworn, shall be allowed at any time before giving their verdict the use of fire and light when out of court, and shall also be allowed reasonable refreshment.

*Origin*—Sec. 674, Code of 1892; 53 Viet., Can., ch. 57, sec. 21.

*Jury to be supplied with refreshments*—Jurors while deliberating are to be allowed "reasonable refreshment"; and a jury ought always to be treated as needing food at usual times just as much as the officers of the court. *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, 405 (Alta.). But where the jury were kept without food from 2 to 10 p.m., at which time refreshments were served, and they brought in a verdict at 11 p.m., the verdict was upheld, as it did not appear that there had been any substantial wrong. *R. v. Murray and Mahoney*, [1917] 1 W.W.R. 404 (Alta.). The court there held that the possibility of prejudice to the accused (sec. 1019) was not serious enough to consider. If there has been a failure to provide the jury with refreshments or the use of fire and light, and the trial judge learns of this before verdict, he should decide whether or not there has been a mistrial, and if of opinion that there had, he should then discharge the jury and direct a trial *de novo*. *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, at 407, 10 Alta. L.R. 275, 27 Can. Cr. Cas. 247.

**Libel for publishing extract from or abstract of paper published by legislative body.**

**947.** In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter, which has been published by order or under the authority of the Senate, House of Commons or any legislative council, legislative assembly or house of assembly, such paper may be given in evidence, and it may be shown that such extract or abstract was published in good faith and without ill-will to the person defamed, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant.

*Origin*—Sec. 705, Code of 1892; R.S.C. 1886, ch. 163, sec. 8.

*Libel in parliamentary papers*—Code sec. 321.

**Evidence in case of polygamy.**

**948.** In the case of any indictment under sec. 310 (b), (c) and (d), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated.

*Origin*—Sec. 706, Code of 1892; 53 Vict., Can., ch. 37, sec. 11.

*Polygamous cohabitation*—Code sec. 310, sub-secs. (b), (c) and (d).

**Full offence charged.—Attempt proved.**

**949.** When the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly.

*Origin*—Sec. 711, Code of 1892; R.S.C. 1886, ch. 174, sec. 183; 14-15 Vict., Imp., ch. 100, sec. 9.

*Convicting for attempt on charge of full offence*—It is open to the jury to believe any part of any evidence and disbelieve any other part, and the evidence may be such that the jury trying a charge for a completed offence can find an intent, and with that intent an act done looking to the commission of the offence and that the act failed of effect; in that case a verdict may be rendered for the attempt. *B. v. McCarthy*, 41 O.L.R. 153. But if there was no reasonable evidence of

any intention to commit the crime and the case on the particular facts was either the commission of the crime charged or nothing, a verdict for an attempt only is not warranted. *R. v. Menary*, 23 O.L.R. 323, 18 Can. Cr. Cas. 237; *R. v. Hamilton*, 4 Can. Cr. Cas. 251 (Ont.); *R. v. Morgan* (No. 2) 5 Can. Cr. Cas. 272, 3 O.L.R. 356.

A man can be guilty of attempting to do what is in fact impossible. Code sec. 72; *Welch v. Russell* (1918) 87 L.J.K.B. 1038, 1039; *R. v. Ring*, (1892) 61 L.J.M.C. 116; *R. v. Williams* [1893] 1 Q.B. 320. See as to attempts generally, Code sec. 72; *R. v. Linneker*, [1906] 2 K.B. 99, 21 Cox C.C. 196.

It may be a misdirection under some circumstances not to distinguish to the jury an attempt from an intention or a threat. *R. v. Landow*, (1913) 8 Cr. App. R. 218; *R. v. Robinson*, (1915) 11 Cr. App. R. 124; *R. v. Eagleton*, 1 Dears. C.C. 515, 24 L.J.M.C. 158.

**Attempt charged.—Full offence proved.—*Res judicata*.**

**950.** When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence.

2. After a conviction for such attempt the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit.

*Origin*—Sec. 712, Code of 1892; R.S.C. 1886, ch. 174, sec. 184.

*Theft attempt is proved by evidence of full offence*—Where a prisoner is indicted for an attempt to steal, and the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the court discharges the jury and directs that the prisoner be indicted for the complete offence. *R. v. Taylor*, 4 Que. Q.B. 226, (1895) 5 Can. Cr. Cas. 89. *R. v. Hamilton* (1897) 4 Can. Cr. Cas. 251; *R. v. McCarthy*, 41 O.L.R. 153, 29 Can. Cr. Cas. 448.

**Offence charged.—Part only proved.—Conviction for manslaughter on charge of murder.**

**951.** Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although

the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

2. On a count charging murder, if the evidence proves manslaughter but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

*Origin*—Sec. 713, Code of 1892; R.S.C. 1886, ch. 174, sec. 191.

*Every count divisible*—A "count" includes any information, indictment, pleading or record, and therefore sec. 951 is held to apply to a summary trial under Part XVI. *R. v. Coolen*, 8 Can. Cr. Cas. 157, 36 N.S.R. 510; *R. v. McEwan*, 7 Man. R. 477, 13 Can. Cr. Cas. 346.

*Conviction for an included lesser offence which is proved*—Under the present sec. 951 of the Code on a charge of robbery with violence and wounding there is nothing to prevent the jury, if they acquit of the robbery, from finding a verdict of common assault under sec. 291 of the Code, or of unlawful wounding or inflicting grievous bodily harm under sec. 274, for the prisoners are charged not only with an assault *simpliciter* in connection with the robbery "by means of violence then and there used by them against the person of the said T. M.," but the indictment concludes with the words: "and that at the time they so robbed the said T. M. as aforesaid they did wound the said T. M." *R. v. Edmonstone*, 13 Can. Cr. Cas. 125, 15 O.L.R. 325. *Osler, J.A.*, said in that case: If the judge allows the indictment to go generally to the jury it is not competent for him to withdraw from their consideration a verdict for any lesser included offence. *R. v. Scherf*, 13 B.C.R. 407, 13 Can. Cr. Cas. 382.

Sec. 951 has been relied upon to support a conviction on summary trial for assault occasioning actual bodily harm on a charge of occasioning grievous bodily harm by an assault. *R. v. Adonchuk* [1919] 1 W.W.R. 987 (Alta.); compare *R. v. Sharpe*, 20 Man. R. 555, 18 W.L.R. 55, 18 Can. Cr. Cas. 132; *R. v. Prokopate*, 6 W.W.R. 405, 7 Sask. L.R. 95; *R. v. Law*, 9 W.W.R. 1075 (Alta.).

Where a crime of less degree than that charged in the indictment and for which lesser crime a verdict might be given under Code sec. 951, is presented on the evidence, the jury must be instructed regarding such lesser crime as well as the greater crime stated in the indictment. *R. v. Daley*, 16 Can. Cr. Cas. 168, 39 N.B.R. 411.

It is within the province of the jury to believe, if it sees fit to do so, a part only of a witness' testimony and to disbelieve the remainder of the same witness' testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shows a lesser offence. *R. v. Hamilton*, 4 Can. Cr. Cas. 251 (Ont.); *R. v. McCarthy*, 41 O.L.R. 153, 29 Can. Cr. Cas. 448, 13 O.W.N. 210.

Where, on a trial for murder, the evidence was that the deceased had been killed by a gunshot wound inflicted through the discharge of a gun in the hands of the accused, and the defence was that the gun had been discharged accidentally, and no case of culpable homicide of less degree than murder was presented on the evidence, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter but that their verdict should be either for acquittal or one of guilty of murder. *Gilbert v. The King*, 38 S.C.R. 284, 12 Can. Cr. Cas. 127. To same effect, see *R. v. Barrett*, (1908) 14 Can. Cr. Cas. 464 (Sask.). It does not follow that because a lesser offence is included in the greater offence charged, that the judge must direct them on such lesser offence; he should do so where the interests of justice are not met without such direction. *R. v. Parrott* (1913) 8 Cr. App. R. 186, 193.

At common law a defendant might be convicted of a less aggravated felony or misdemeanour on an indictment charging a felony or misdemeanour of greater aggravation, provided that the indictment contained words apt to include both offences. *R. v. O'Brien*, 27 Times L.R. 204; Archbold Cr. Pldg., 24th ed., 228.

**On indictment for murder, conviction may be of concealment of birth.**

**952.** If any person tried for the murder of any child is acquitted thereof, the jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition of such child or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as it might have passed if such person had been convicted upon an indictment for the concealment of birth.

*Origin*—Sec. 714, Code of 1892; R.S.C. 1886, ch. 174, sec. 188; 24-25 Viet., Imp., ch. 100, sec. 60.

*Concealment of birth*—See sec. 272.

**Charge for cattle stealing.—Conviction for fraudulently dealing with cattle.**

**953.** When an offence under sec. 369 is charged and not proved, but the evidence establishes an offence under sec. 392, the accused may be convicted of such latter offence and punished accordingly.

*Origin*—Sec. 714A, Code of 1892; 1 Edw. VII, Can., ch. 42, sec. 2.

*Cattle stealing*—See sec. 369.

*Fraudulently taking cattle or defacing brands*—See sec. 392.

**Trial of joint receivers.**

**954.** If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property.

*Origin*—Sec. 715, Code of 1892; R.S.C. 1886, ch. 174, sec. 200.

*Receiving stolen property*—See secs. 399-403, 849, 954, 993, 994.

**Trial for coinage offences.—General resemblance sufficient.**

**955.** Upon the trial of any person accused of any offence respecting the currency or coin, or against the provisions of Part IX relating to coin, no difference in the date or year, or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed for the purpose of counterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall, in any case, be sufficient to prove such general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it.

*Origin*—Sec. 718, Code of 1892; R.S.C. 1886, ch. 174, sec. 205.

*Offence respecting the currency*—See the Currency Act, 9-10 Edw. VII, Can., ch. 14, and the Dominion Notes Act, R.S.C. 1906, ch. 27, 1908, Can., ch. 23, 1914 Can. (2nd session) 4, 1915 Can., ch. 4.

*Ordering false or counterfeit coin to be destroyed*—See sec. 957, and the Currency Act, Can., 1910, ch. 14.

*Evidence of coin being false or counterfeit*—See also sec. 980.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

*Bank note and coinage offences generally*—See secs. 2 (8), 468, 546-910-913, 934, 947, 956, 1045.

*Forgery of government notes*—See secs. 335 (h), 335 (i), 466-468, 471.

**Verdict in cases of libel.—Jury may find special verdict.—Arrest of judgment.**

**956.** On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do.

2. The defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as heretofore.

*Origin*—Sec. 719, Code of 1892; R.S.C. 1886, ch. 174, sec. 152; 7-8 Edw. VII, Can., ch. 18, sec. 12; 32 Geo. III, Imp., ch. 60.

*"May give a general verdict"*—It is for the jury to say whether under the facts proved there is libel and whether the defendant published it. *R. v. Dougall* (1874) 18 L.C. Jur. 85.

*"May find a special verdict"*—This is in accordance with the common law under which a jury in any criminal case had the right to find a special verdict. *R. v. Staines*, L.B. 15 Times L.R. 25, 52 J.P. 358, 60 L.T. 261; *R. v. Dudley*, 54 L.J.M.C. 32, 14 Q.B.D. 273.

*Defamatory libel generally*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045.

*Arrest of judgment*—See sec. 1007.

**Ordering counterfeit coin to be destroyed.**

**957.** If any false or counterfeit coin is produced on any trial for an offence against the provisions of Part IX relating to coin, the court shall order the same to be cut to pieces in open court, or in the presence of a justice, and then to be delivered to or for the lawful owner thereof, if such owner claims the same.



*Origin*—Sec. 721, Code of 1892; R.S.C. 1886, ch. 174, sec. 209.

*Proving coin to be counterfeit*—See secs. 955, 980.

*Justification of person to whom tendered in cutting a counterfeit or diminished coin*—See the Currency Act, 1910, Can., ch. 14.

**View.—Control of jury.**

**958.** On the trial of any person for an offence against this Act, the court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the person by whom, the place, thing or person shall be shown to such jurors, and may for that purpose adjourn the trial, and the costs occasioned thereby shall be in the discretion of the court.

2. When such view is ordered, the court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings.

*Origin*—Sec. 722, Code of 1892; R.S.C. 1886, ch. 174, sec. 171; 15-16 Vict., Imp., ch. 76, sec. 114.

*View by jury*—It is in the discretion of the court to allow a view or not; and in an English case it was held that there was no irregularity in allowing the jury to have a view of the premises where the offence was alleged to have been committed, even after the judge had summed up the case. *Reg. v. Martin*, L.R. 1 C.C.R. 378, 12 Cox C.C. 204, 41 L.J.M.C. 113. The defendant's counsel must have the opportunity of attending. *R. v. Petrie* (1890) 20 Ont. R. 317, 324. Sec. 958 applies only to views by a jury, and it is questionable whether a county judge's criminal court trying a case without a jury can take a view except by consent. *R. v. Petrie*, supra; *R. v. Redman*, 1 Kenyon, 384; *R. v. Whalley*, 2 Cox 231, 2 C. & K. 376. A magistrate holding a summary trial under Part XVI for an indictable offence has no power to take a view, at least without the consent of both the prosecutor and the accused. *R. v. Crawford*, (1912) 3 W.W.R. 731, 21 Can. Cr. Cas. 70, 18 B.C.R. 20. A justice hearing a summary conviction matter is probably under the same disability. *Re Sing Kee*, 8 B.C.R. 20, 5 Can. Cr. Cas. 86.

**Jury considering verdict.**

**959.** If the jury retire to consider their verdict they shall be kept under the charge of an officer of the court in some private

place, and no person other than the officer of the court who has charge of them shall be permitted to speak or to communicate in any way with any of the jury without the leave of the court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings.

3. If such disobedience is discovered before the verdict of the jury is returned the court, if it is of opinion that such disobedience might lead to a miscarriage of justice, may discharge the jury and direct a new jury to be sworn or empanelled during the sitting of the court, or postpone the trial on such terms as justice may require.

*Origin*—Sec. 727, Code of 1892.

*Non-communication with jury while deliberating*—In *R. v. Ketteridge*, [1915] 1 K.B. 467, 84 L.J.K.B. 352, 11 Cr. App. R. 54, a juror had separated himself from his colleagues and left the building where the trial was being held, and had to be found and brought back before the jury could find a verdict. It was held that the whole proceedings should be begun afresh with a new jury. *R. v. Ketteridge*, *supra*, explained in *R. v. Twiss* (1919) 88 L.J.K.B. 20. Under sub-sec. (3) of sec. 959, such a course is necessary only if the court is of opinion that disobedience of the statutory direction might lead to "a miscarriage of justice."

No communication whatever may be made to a jury deliberating on its verdict except on the request or by the permission of the judge; and where the clerk of assize on being sent to find if the jury had agreed, was asked questions relating to the case by the jurymen, and discussed it with them, the conviction was quashed, where the appellate court was unable to find that, but for the discussion and advice given by the clerk of assize, the jury would have come to an unanimous conclusion. *R. v. Willmont*, (1914) 10 Cr. App. R. 173; and see *Goby v. Wetherill* [1915] 2 K.B. 674; *B. v. Barnes*, (1907) 42 N.S.R. 55.

The illegal presence of a stranger in the jury room for a considerable time during the jury's deliberations may be a ground for setting aside the verdict and ordering a new trial if prejudice is likely to have resulted therefrom. *Goby v. Wetherill* [1915] 2 K.B. 674; 84 L.J.K.B. 1455; 31 Times L.R. 402, cited in *Veronneau v. The King*, 54 S.C.R. 7; and see Code sec. 1019. But a note sent by the jury to the judge may be answered without infringing the rule, if the answer is not in the nature of instructions. *E. v. Batterman* (1915) 34 O.L.R. 225, 24 Can. Cr. Cas. 351.

Where the judge on request of the jury for further instructions went to the jury-room with the prisoner and the sheriff and gave further instructions in the absence of the Crown counsel, the verdict was upheld.

*Greer v. The Queen* (1892) 2 B.C.R. 112. It is not expedient for the judge to communicate with the jury except in open court. *Greer v. The Queen*, *supra*.

As to communication with a jury when permitted to separate, see sec. 945.

*Reasonable doubt*—As said by Coleridge, J., in *R. v. Flood* (1914) 10 Cr. App. R. 227: "A jury must be sure beyond reasonable doubt, and they ought to be unanimous and clear in their belief in the identity of the man charged, before convicting. A compromise verdict is a very undesirable thing in any circumstances. In a criminal case involving the liberty of the subject, it is not only undesirable, it is wrong."

An accused person is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and the presumption of innocence, therefore, cannot be shifted at the point where the evidence merely tends or inclines in the direction of guilt. *R. v. Schurman*, 7 W.W.R. 680, 23 Can. Cr. Cas. 365. In *Reg. v. White*, 4 F. & F. 383, at 384, Martin, B., is reported to have instructed the jury: "that, in order to enable them to return a verdict against the prisoner, they must be satisfied, beyond any reasonable doubt, of his guilt; and this as a conviction created in their minds, not merely as a matter of probability; and if it was only an impression of probability, their duty was to acquit."

This case, though decided in 1865, has always been regarded as laying down the rule correctly. *R. v. Schurman*, 23 Can. Cr. Cas. 365, 19 D.L.R. 800, 30 W.L.R. 56, 7 W.W.R. 680, 7 Sask. L.R. 269; *R. v. Krafchenko*, 6 W.W.R. 836, 24 Man. R. 652, 22 Can. Cr. Cas. 277.

Taylor on Evidence, 10th ed., lays down the rule as follows (p. 113):—"One of the most important of disputable legal presumptions is that of innocence. This, in legal phraseology, 'gives the benefit of a doubt to the accused,' and is so cogent, that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burden of proof, may constitute sufficient ground for a verdict. To affix on any person the stigma of crime requires, however, a higher degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt."

Mathers, C.J., in the case of *R. v. Krafchenko*, (1914) 6 W.W.R. 836, 22 Can. Cr. Cas. 277, at 296, 24 Man. R. 652, said:—"I have told you that you should not convict if you have a reasonable doubt of the prisoner's guilt. By the term reasonable doubt I do not mean a possible doubt, but an actual and substantial doubt. A juror may not create materials of doubt by resorting to trivial suppositions and remote conjectures as to a possible state of facts different from that

established by the evidence. If, after a fair and impartial consideration of all the evidence in the case both for the Crown and for the defence, you have an abiding conviction of the guilt of the defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond reasonable doubt; but if the evidence has left you in that condition of mind that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge, then you have a reasonable doubt." See also *ex parte* Feinberg, 4 Can. Cr. Cas. 270 (Que.); *R. v. Riendeau*, 3 Can. Cr. Cas. 293, 14 Que. K.B. 87; *R. v. Fouquet*, 14 Que. K.B. 97, 10 Can. Cr. Cas. 265.

It is not necessary that each fact essential to a crime should be proven by direct evidence; it is sufficient if such fact can properly be inferred to exist from all the circumstances of the case. *R. v. Davidson*, [1917] 2 W.W.R. 160, 169, 11 Alta. L.R. 9, 28 Can. Cr. Cas. 44; *R. v. James*, 9 W.W.R. 235, 32 W.L.R. 528, 9 Alta. L.R. 66; 25 Can. Cr. Cas. 23.

A jury cannot properly find an accused person guilty unless the evidence is such as to establish his guilt with moral certainty or beyond a reasonable doubt or such as to exclude any other reasonable hypothesis than that of his guilt. *R. v. O'Neil*, (1916) 9 W.W.R. 1321, 1352, 25 Can. Cr. Cas. 323, 9 Alta. L.R. 365, per Beck, J.; *R. v. Styce*, 20 N.L.L.R. 744; *R. v. Schama* (1914) 11 Cr. App. B. 45, 84 L.J.K.B. 396; *R. v. Badash*, (1918) 87 L.J.K.B. 732.

*Polling the jury*—The judge may send the jury back for further deliberation when, upon being polled, one of them said, "not guilty," dissenting from the verdict of "guilty," as announced by the foreman. *R. v. Burdell*, 10 Can. Cr. Cas. 365, 11 O.L.R. 440, 7 O.W.R. 164. When the jury is polled any juror may dissent from the verdict as announced, and where one or more of the jurors dissent therefrom there can be no valid verdict. *R. v. Burdell*, *supra*.

The rule is that until their verdict has been recorded, or they have been discharged as unable to agree, their connection with the case has not come to an end. *R. v. Burdell*, *supra*.

If no request was made to poll the jury and the verdict was duly assented to and recorded, the court will not receive the affidavit of a juror to impeach the same on the ground that he in fact dissented, but had assumed that ten carried the verdict as in civil cases in the same jurisdiction and therefore raised no protest. *R. v. Mullen*, 5 O.L.R. 373, 6 Can. Cr. Cas. 363.

*Reconsidering the verdict before verdict recorded*—A judge is not bound (unless the jury insist on having it recorded) to receive the first verdict which the jury give provided there is any ambiguity, but may direct them to reconsider it; and the verdict which the jury ultimately return is the verdict to be recorded. *R. v. Crisp*, (1912) 7 Cr. App. R.

173, qualifying the statement of the law given in Archbold's *Crim. Pleading*, 24th ed., 234; *R. v. Burdell*, 11 O.L.R. 440, 10 Can. Cr. Cas. 365; *R. v. Meany*, (1862) 9 Cox C.C. 231, 32 L.J.M.C. 24; *R. v. Yeadon*, (1861) 9 Cox C.C. 91, 31 L.J.M.C. 70, L. & C. 81. But where the verdict is free from ambiguity it should be accepted. *R. v. Gray*, (1891) 17 Cox C.C. 299; *R. v. Wasyl Kapij*, (1905) 15 Man. R. 110, 1 W.L.R. 130. Where the verdict on a charge of an attempt to commit suicide was "guilty, but of unconscious mind," Channell, J., thought that the jury intended to acquit and "the jury might possibly have insisted on its being taken as a verdict of not guilty." *R. v. Crisp* (1912) 7 Cr. App. R. 173. It is said that a jury may correct their verdict, or that any of them may withhold assent and express dissent therefrom at any time before it is finally entered and confirmed. *R. v. Ford*, (1853) 3 U.C.C.P. 217 (Ont.); *R. v. Rice* (1902) 5 Can. Cr. Cas. 509 (Ont.); and the judge presiding over a criminal court cannot be too cautious in being assured that, when a result so serious to the party accused as a verdict of guilty is arrived at, all the jury understand the effect and concur in the decision: and if at any moment, before the recording anything occurs to excite the judge's suspicion on this subject, he should carefully assure himself that there is no misapprehension in the matter. *R. v. Ford*, (1853) 3 U.C.C.P. 209, 217.

Where part of the verdict on a forgery charge was not clear as it found the accused guilty of participating in the forgery and its proceeds, but not of forging or uttering, the trial judge properly directed the jury to reconsider their verdict, and a general verdict of guilty thereupon returned on all counts was upheld. *R. v. Hutchinson*, (1911) 7 Cr. App. R. 19.

Upon the trial of an indictment for wounding with intent to disable, a verdict of "guilty without malicious intent" is equivalent to a verdict of acquittal, although the jury were instructed that if intent to disable were negatived they might still convict of the simple offence of wounding. Such verdict is to be construed as a finding that the act of the accused which resulted in wounding the complainant was done without malice. *Slaughenwhite v. The King*, 35 S.C.B. 607, 9 Can. Cr. Cas. 173.

*Verdict on various counts for same act*—When the same act is differently charged in various counts, the court may construe a verdict of guilty upon all as if it was limited to the least offence alleged. *R. v. Johnston*, 9 Cr. App. R. 262; *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.B. 220, 27 Can. Cr. Cas. 282; *R. v. Norman*, [1915] 1 K.B. 341; *R. v. Lockett* [1914] 2 K.B. 720.

*Prisoner acquitted on one indictment but held on further charge*—

When a prisoner has been acquitted the judge has no right to deal with his previous convictions by announcing them to the jury he is discharging, particularly where there is another charge to be tried. *R. v. Smith* (No. 2) 87 L.J.K.B. 676.

**Discretion to discharge a jury on disagreement.**

**960.** If the court is satisfied that the jury are unable to agree upon their verdict, and that further detention would be useless, it may in its discretion discharge them and direct a new jury to be empanelled during the sittings of the court, or may postpone the trial on such terms as justice may require.

2. It shall not be lawful for any court to review the exercise of this discretion.

*Origin*—Sec. 728, Code of 1892.

*Discharge of jury before verdict*—The discharge of the jury before they have given their verdict operates as if there had been no trial at all. *R. v. Richardson*, [1913] 1 K.B. 395, 8 Cr. App. R. 159, 162. It has been doubted whether it is essential that the accused shall be present when the jury is discharged. *R. v. Richardson*, *supra*.

*"Direct a new jury to be impanelled"*—A new jury is to be impanelled for the trial of the charge, but it is not necessary that a second *venire* should issue. *R. v. Gaffin*, 8 Can. Cr. Cas. 194 (N.S.). On a second trial at the same sittings on a disagreement of the first jury, it is unnecessary to again read the indictment to the accused or to ask him again to plead to it. *R. v. Gaffin*, *supra*.

**Verdict, etc., validated.**

**961.** The taking of the verdict of the jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday or on any other holiday.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3; sec. 729, Code of 1892.

*Execution of warrants on Sunday or statutory holiday*—Code sec. 661.

**Stay by Attorney General after indictment.**

**962.** The Attorney General may, at any time after an indictment has been found against any person for any offence and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.

2. The Attorney General may delegate such power in any particular court to any counsel nominated by him.

*Origin*—Sec. 732, Code of 1892.

*"After an indictment has been found"*—In Alberta and Saskatchewan where there is no grand jury system, the formal charge brought

under sec. 873A is to be considered an indictment. Code sec. 2, subsec. (16). But until the formal charge is laid, there is no indictment against which to enter a stay under sec. 962. *R. v. Weiss* (1915) 7 W.W.R. 1160, 23 Can. Cr. Cas. 460 (Sask.).

*Recording a stay of proceedings*—This section provides a procedure which is substantially the same as that formerly known as *nolle prosequi*. It may be taken in lieu of an application by the Crown to discharge the recognizances of the prosecutor and witnesses. *R. v. Treakley* (1852), 6 Cox C.C. 75.

The Attorney-General may stay the proceedings *ex parte* and without calling on the prosecutor to show cause why he should not do so. *R. v. Allen* (1862), 1 B. & S. 850. A stay is proper where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence; 1 W. Bl. 545; or if it be clear that an indictment is not sustainable against the defendant. 1 Chitty Cr. Law, 479. It was also commonly granted in cases of misdemeanour where a civil action was depending for the same cause. *R. v. Fielding* (1759), 2 Burr. 719; *Jones v. Clay* (1798), 1 B. & P. 191. The party accused will remain liable to be again indicted upon the charge. *Archbold Cr. Pl.* (1900), 127; *R. v. Spence* (1919) 16 O.W.N. 9.

A *nolle prosequi* may be entered by the Crown in a libel prosecution instituted by a private prosecutor. *R. v. Blackley*, 13 Que. K.B. 472, 8 Can. Cr. Cas. 405.

*Nolle prosequi in Ontario*—Sec. 904, dealing specially with delays in prosecutions instituted by the Attorney-General of Ontario gives a right in that province to the defendant to bring on the trial “unless a *nolle prosequi* is entered to such prosecution.”

**Where previous offence charged.—Arraignment on subsequent offence.—Trial as to previous offence.**

**963.** Upon any indictment for committing any offence after a previous conviction or convictions, the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the jury finds him guilty, or if, on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged in the indictment.

2. If he answers that he was so previously convicted, the court may proceed to sentence him accordingly, but if he denies that

he was so previously convicted, or stands mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last mentioned inquiry.

*Origin*—Sec. 676, Code of 1892; Larceny Act, 1861, Imp., 24-25 Vict., ch. 96, sec. 116; Prevention of Crimes Act, 1871, Imp., 34-35 Vict., ch. 112, sec. 9.

*Provision as to character evidence where previous conviction charged*—Code sec. 964.

*Subsequent offence to be first determined*—Secs. 851 and 963 of the Code provide for the form of indictment and procedure in the case of a person charged with an offence for which a greater punishment may be inflicted by reason of such previous conviction. The indictment must state that the offender was at a certain time and place convicted of an indictable offence or offences (sec. 851). Under sec. 963 the defendant shall be arraigned in the first instance upon so much only of the indictment as relates to the subsequent offence, and if he pleads not guilty the trial proceeds upon the subsequent offence, and, if convicted, the defendant then is asked if he was previously convicted, and if he does not admit it the jury shall then be charged to inquire as to such previous conviction. Archbold, Criminal Pleading, 24th ed., 564, 1066, 1081; R. v. Allen, Russ. and Ry. 512; R. v. Willis, L.R. 1 C.C. 363; R. v. Thomas, L.R. 2 C.C.R. 141; R. v. Martin, 1 C.C.R. 214.

When a prisoner is convicted, on a summary trial before a police magistrate, of theft, he cannot be sentenced to the added penalty under sub-sec. 2 of sec. 386 of the Code, for theft after a previous conviction, although he had been previously convicted of theft, unless such previous conviction was charged in the information by analogy to sec. 851 and proved in accordance with sec. 963; and, where in such a case a greater punishment was inflicted than could be imposed without regard to sec. 386 (2), the Court of Appeal, upon an application under sub-sec. 2 of sec. 1016 of the Code, will set aside the sentence and pass what it considers a proper sentence. R. v. Edwards, 17 Man. R. 288, 13 Can. Cr. Cas. 202.

Sections 851 and 963 of the Criminal Code as to the procedure in case of a charge for a second or subsequent offence involving an increased penalty, apply only to indictable offences. R. v. Oruikshanks (1914), 6 W.W.R. 524, 23 Can. Cr. Cas. 23, 7 Alta. L.R. 92, 27 W.L.R. 759.

Part XV of the Criminal Code (summary convictions) contains no provision requiring the magistrate on the trial of a charge for a second



offence involving a greater punishment than for a first, to proceed first as to the later offence charged, and not to ask the defendant whether he had been previously convicted for the like offence until after conviction for the alleged second offence. *R. v. Cruikshanks*, supra.

*Cross-examination of accused as to prior convictions if he gives testimony*—It was held in *R. v. D'Aoust* (1902), 3 O.L.R. 653, 5 Can. Cr. Cas. 407, that an accused person examined as a witness on his own behalf may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character has been adduced for the defence; it being held that the question is relevant to the issue as affecting the credibility of the accused as a witness.

The right, and if such it can be called, the privilege of the accused now is to tender himself as a witness. When he does so he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness as regards liability to and extent of cross-examination. *R. v. D'Aoust*, supra.

*Correcting improper reference to a previous conviction*—Lord Alverstone, C.J., in delivering the judgment of the court consisting of five judges, in *R. v. Bridgewater* [1905] 1 K.B. 131, said: "It must not be thought that because counsel for a prisoner allows a question as to a previous conviction to be put without objection he can afterwards set aside the conviction on the ground of the inadmissibility of such a question. He cannot stand aside and allow an improper question to be put and afterwards rely upon that question as a ground for quashing the conviction. In this case and under the circumstances, if the learned recorder had told the jury that they were to disregard the prisoner's answer as to his having been previously convicted, this court would not, I think, have been inclined to interfere."

The latter dictum was expressly concurred in in *Rex v. Hudson*, [1912] 2 K.B. 464, 7 Cr. App. R. 256, by Lord Alverstone and four other judges.

But it may not be sufficient always for the judge to correct an improper admission of evidence by his direction to the jury. In *Rex v. Rose* (1898), 18 Cox 717, in which an involuntary confession had been received which did go to the jury, the conviction was set aside. Lord Russell, C.J., in delivering the judgment of the court at 718, said:—"A question of some delicacy then arises as to the course which the magistrates ought to have adopted. It is clear that the evidence ought not to be admitted, but ought the court to tell the jury to disregard it, or ought the court to discharge the jury and try the case again?"

The question is only raised, but not answered, in *Rex v. Rose*, supra. The safe course is adopted by some judges of offering to discharge the

jury, which offer frequently results in the prisoner's counsel waiving that right and accepting in lieu a proper direction to the jury on the point. But as is pointed out by Harvey, C.J., in his opinion in *R. v. Hurd*, (1913) 4 W.W.R. 185, 21 Can. Cr. Cas. 98 at 104, there are cases when such a course would not fully protect the prisoner (*e.g.*, where an involuntary confession of guilt has been received) for a jury of laymen might find difficulty in fully accepting the refinements which have resulted in the exclusion of confessions under some circumstances and might find it hard to persuade themselves that a man who had confessed his guilt under conditions which it would appear to them would justify them in thinking he was telling the truth, was in fact not guilty.

*Added punishment on second or subsequent offence*—As to coinage offences, see sec. 568; as to theft after previous conviction, sec. 386 (2); as to offences against property rights generally, under Part VII, see sec. 465; and in cases where not otherwise provided for, see sec. 1053.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 851, 963, 982, 1053, 1081.

**Where previous offence charged.—Evidence of character.**

**964.** If upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty is returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

*Origin*—Sec. 676, Code of 1892.

*Subsequent offence*—The words "any such subsequent offence" refers to the next previous sec. 963 which relates to an indictment "for committing any offence after a previous conviction." Compare sec. 1053, as to punishment of indictable offences, "committed after a previous conviction."

*Evidence of character*—Evidence of character can only be as to general reputation. *R. v. Rowton* (1865), 10 Cox C.C. 25; *R. v. Triganzie* (1888), 15 Ont. R. 294; *R. v. Long*, 11 Que. K.B. 328.

Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the

question of character of which they have knowledge. *R. v. Barsalou* (No. 2) (1901), 4 Can. Cr. Cas. 347 (Que.); *R. v. D'Aoust* (1902) 3 O.L.R. 653, 1 O.W.R. 344, 5 Can. Cr. Cas. 407.

**Practice as to jury trials continued except as altered.**

**965.** Nothing in this Act shall alter, abridge or affect any power or authority which any court or judge has hitherto had, or any existing practice or form in regard to trials by jury, jury-process, juries or jurors, except in cases where such power or authority, practice or form is expressly altered by or is inconsistent with the provisions of this Act.

*Origin*—Sec. 675, Code of 1892; R.S.C. 1886, ch. 174, sec. 170.

*Administering oath to witness*—A witness who assents to the terms of the oath administered to him with the customary formula calling upon the Deity is bound by his oath although all usual formalities were not observed in its administration. *Curry v. The King*, 48 S.C.R. 532, 22 Can. Cr. Cas. 191; *R. v. Curry*, 47 N.S.B. 176, 21 Can. Cr. Cas. 273, 13 E.L.R. 11; *R. v. Shajoo Ram*, (1914) 8 W.W.R. 613, 23 Can. Cr. Cas. 334, 30 W.L.R. 65.

It is for the witness to declare what religious ceremony of taking the oath is binding on his conscience. If attention is not called to the matter until after he has taken the oath in court in the customary form, he may still be asked whether he considers the oath he has taken to be binding on his conscience. If he answers in the affirmative, he should not be further asked whether any other mode of swearing would be more binding upon his conscience than the one which has been used. *R. v. Lee Tuck* (1912) 2 W.W.R. 605, 613, 19 Can. Cr. Cas. 471, 21 W.L.R. 669 (Alta.); *The Queen's case*, 2 Br. & B. 284, 22 R.R. 662. Before he is sworn, the witness may be examined by the judge, not by the clerk of the court, as to the form of oath which is binding upon his conscience. *R. v. Lee Tuck* (1912) 2 W.W.R. 605, 614. If without such examination and without laying any foundation for practically forcing the witness to take an oath in a form at variance with his declared religion, the witness is sworn in a different mode although conformable with the mode of swearing pagan witnesses of his country of origin, such is an arbitrary deprivation of the right of the witness to swear in accordance with his declaration of religious belief and its result is that the witness has not been properly sworn and cannot be convicted of perjury thereon. *R. v. Lee Tuck* (1912) 2 W.W.R. 605, 614 (Alta.).

If however the judge taking the testimony finds it necessary to discover certain facts in order to determine what form of oath is to be administered, his finding in regard to those facts will not be enquired into by the jury on the subsequent trial of the witness for perjury. *R. v. Lee Tuck* (1912) 2 W.W.R. 605, 606.

**Judicial discretion**—In disposing of matters arising at a trial a very great deal is, of necessity, committed to the discretion of the trial judge, and courts of appeal are very loath to interfere with the exercise of such discretion. *R. v. Crippen* (1911) 1 K.B. 149, at p. 157, 80 L.J.K.B. 290; *R. v. Mulvihill*, (1914) 5 W.W.R. 1229, 1235, 19 B.C.R. 197, 22 Can. Cr. Cas. 354.

The following examples of absolute discretion are mentioned in *R. v. Mulvihill* (1914) 5 W.W.R. 1229, 1238 (per Martin, J.A.):—(1) The right of a judge to relax the general rule of evidence and allow the Crown to give further evidence after the close of the prisoner's case: *R. v. Wong On* (1904) 10 B.C.R. 555; also to allow leading questions: *Lauder v. Lauder* (1855) 5 Ir. C.L. 29, at p. 38, approved in *Ex parte Bottomley* [1909] 2 K.B. 14, at p. 21, 78 L.J.K.B. 547; and see also *Ohlsen v. Terrero* (1874) L.R. 10, Ch. 127, 44 L.J. Ch. 155; and *cf.* *R. v. Crippen* (1911) 1 K.B. 149, 80 L.J.K.B. 290, on another point of evidence. (2) The determination of the hostility of a witness (*i.e.*, "in case the witness shall in the opinion of the judge prove adverse, because the judge's discretion must be principally, if not wholly, guided by the witness' behaviour and language in the witness box"): *Rice v. Howard* (1886) 16 Q.B.D. 681, 55 L.J.Q.B. 311. (3) The granting of a view under sec. 958 of The Criminal Code. (4) The discharging of the jury after disagreement and postponing the trial "on such terms as justice may require" under sec. 960 Criminal Code, which discretion by s-s. 2 it is declared that "it shall not be lawful for any court to review," differing in this respect from the right on discharging the jury to postpone under the preceding s. 959, s-s. 3. (5) The discharging of the jury without giving a verdict because of the illness or drunkenness of one of them, or otherwise: *R. v. Charlesworth* (1861) 1 B. & S. 460, 31 L.J.M.C. 25, at p. 47; *R. v. Conway* (1845) 7 L.R.Ir. 149; *R. v. Lewis* (1909) 78 L.J.K.B. 722, 100 L.T. 976. (6) The keeping of the jury together under s. 945, s-s. 3. And (7) The admission of the unsworn evidence of children under s. 1003 Cr. Code and s. 16 of The Canada Evidence Act, whereby the matter rests "in the opinion of the Court" or justices, etc., which is the same expression as was held to confer an absolute discretion in the second illustration, *supra*; (but see *contra R. v. Armstrong*, (1907) 15 O.L.R. 47).

**Judge's power to himself call witnesses**—A judge has power to call and examine a witness who has not been called by either of the parties and if he does so neither party can cross-examine without the judge's leave. Such leave ought, however, to be granted if the evidence given is adverse to either party, but the cross-examination should be confined to the answers given and a general cross-examination should not be permitted. *R. v. Hagel* (1914) 6 W.W.R. 164, 24 Man. R. 19, 23 Can. Cr. Cas. 151, 154; 27 W.L.R. 271; *Roscoe, Crim. Evid.*, 13th ed., at p. 115.

**Oath to witness may be administered by the acting clerk**—It is quite sufficient if the witness be sworn by an acting clerk of the court under

the authority of the court. *R. v. Wilson*, (1913) 5 W.W.R. 620, 623 (Sask.); *R. v. Tew*, 24 L.J.M.C. 62.

*Mistrial by misconduct of juror*—Whenever, and so soon as it appears, that any juror is actuated by improper motives, then it is certain that justice cannot be done by such a tainted tribunal and it ought to be purged of that taint. It is impossible that a judge of fact or law can do that justice which he is sworn to do between the parties if he declares his bias or prejudice against one of them. Justice is not satisfied by a rebuke to the offender but prompt action must be taken to remove him from an office that he has shown himself unfit to fill, and it is the duty of the court of its own motion, upon the discovery of such gross impropriety, to protect its litigants from the baneful results of such a scandal, by then and there discharging the jury and summoning another, just as would have to be done in the case of a juror who was discovered to be insane or had received a bribe. The consequence would be a mistrial. (B.C.) *Airey v. Empire Stevedoring Co.* [1914] 20 B.C.R., 130; 6 W.W.R. 1465; 28 W.L.R. 956; *Lucas v. Ministerial Union* [1916] 23 B.C.R. 257, at p. 262; *Howard v. B.C. Electric Ry. Co.* [1918] 3 W.W.R. 409, 411.

*Impanelling new jury*—The illness of a juror or the illness of the prisoner will constitute a sufficient ground for discharging the jury. *Winsor v. R.*; L.R. 1 Q.B. 390. But if a jurymen has merely fainted because the court room is hot and close, it would be proper to wait a short time for his recovery so as to proceed with the same jurors; but if a juror be taken so ill that there is no likelihood of his continuing to discharge his duties without danger to his life, the jury should be discharged. *Ibid.*

Where, during the course of a trial, it was discovered that one of the jurors had come from a house infected with smallpox, the jury were discharged and a new jury impanelled. *R. v. Considine*, 8 Legal News, 307 (Que.).

A jury sworn and charged may be discharged at the desire of the accused and with the assent of the prosecution. *R. v. Charlesworth*, 2 F. & F. 326.

*Bail on delayed prosecution*—If a prisoner charged either with treason or with an offence which would formerly have been classified as felony, is not indicted at the first court of assize after his committal he is entitled in British Columbia to bail upon a writ of habeas corpus unless it appears to the court upon oath that the witnesses for the Crown could not be procured; and if not brought to trial at the second assize, he shall be discharged from his imprisonment. R.S.B.C. 1911, Vol. IV, ch. 2, sec. 7 (31 Car. II); *R. v. Dean* (1913) 3 W.W.R. 781. 21 Can. Cr. Cas. 310, 18 B.C.R. 18.

*Defence of Insanity.*

**Insanity of accused at time of offence.—Defence.—Special finding.  
—Retention in custody.**

**966.** Whenever evidence is given upon the trial of any person charged with an indictable offence, that such person was insane at the time of the commission of such offence, the jury, if they acquit such person, shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity.

2. If the jury finds that such person was insane at the time of committing such offence, the court before which such trial is had shall order such person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the lieutenant governor is known.

*Origin*—Sec. 736, Code of 1892, R.S.C. 1886, ch. 174, sec. 252; 14 and 15 Vict. (1851), ch. 83; Lunatics Act (Eng.) 1800; Lunatics Act (Eng.) 3 and 4 Vict., ch. 54; Trial of Lunatics Act 1883, Imp., ch. 38, sec. 2.

*Acquittal on account of insanity*—A “special verdict” under clauses somewhat similar to Code secs. 966-969 contained in the English Trial of Lunatics Act, 1883, that the accused did the act charged but was at the time insane so as not to be responsible for his actions, was held to be a verdict of acquittal as regards the crime, and, in consequence, the accused could not appeal to the Court of Criminal Appeal against the finding of insanity. *Felstead v. The King* [1914] A.C. 584, 10 Cr. App. B. 129, 83 L.J.K.B. 1132 (H.L.), affirming *R. v. Felstead*, 9 Cr. App. B. 228; *R. v. Machardy*, [1911] 2 K.B. 1144, 28 Times L.B. 2, 6 Cr. App. B. 272. The decision in *R. v. Ireland* [1910] 1 K.B. 654, 4 Cr. App. B. 74 was overruled by the *Felstead* case. The Criminal Appeal Act (Eng.) only gave a right of appeal to a “person convicted” on indictment. If he was a lunatic at the time the act was committed, he is “not a criminal and is not convicted of any offence.” Lord Reading, L.C.J., in *R. v. Felstead* (1914) 10 Cr. App. B. 129, at 137 (H.L.), and see *R. v. Oxford*, 9 C. & P. 550; 1 Hale’s Pleas of the Crown, 28. But as the Code gives a right of appeal to the prosecutor (secs. 1014, 1015) as well as to the accused, a case may be reserved at the instance of the Crown upon the question of law whether there was any evidence of insanity to support the acquittal on that ground. *R. v. Phinney*, (No. 1), 36 N.S.B. 264; *R. v. Phinney* (No. 2), 36 N.S.B. 288. If there is any evidence of insanity to go to the jury, the weight of such evidence is entirely for them and cannot be reviewed on appeal; *R. v.*

he volunteered his opinion to a question properly propounded by the Crown prosecutor in a further unsuccessful effort to show that he was qualified to express an opinion, will not make it obligatory that the jury should be discharged and a new jury called. *R. v. Grobb*, (1906) 17 Man. R. 191, 13 Can. Cr. Cas. 92.

*Formal proceedings*—See note to sec. 873.

*Defence of insanity*—Code sec. 19.

#### **Trying sanity although prosecution discontinued.**

**968.** If any person charged with an indictable offence is brought before any court before which such person might be tried for such offence to be discharged for want of prosecution, and such person appears to be insane, the court shall order a jury to be empanelled to try the sanity of such person, and if the jury so empanelled finds him insane, the court shall order such person to be kept in strict custody, in such place and in such manner as to the court seems fit, until the pleasure of the lieutenant governor is known.

*Origin*—Sec. 739, Code of 1892; R.S.C. 1886, ch. 174, sec. 256.

#### **Custody of insane persons.**

**969.** In all cases of insanity so found, the lieutenant governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit.

*Origin*—Sec. 740, Code of 1892; R.S.C. 1886, ch. 174, secs. 253, 257.

*Order of Lieutenant-Governor as to persons found insane*—Where persons are confined in a criminal insane asylum upon an order of the Lieutenant-Governor of the Province, made under sec. 969 of the Criminal Code they are in custody as criminals; otherwise the enactment would be *ultra vires*; civil rights, and the establishment, maintenance, and management of asylums, are exclusively provincial matters. Although in a sense acquitted by the juries by which they were tried, the acquittal was a part only of the verdicts; they were special verdicts under sec. 966 of the Criminal Code, the full import of which was that each had committed the crime with which he was charged, but was insane at the time, and on that ground only was acquitted. If they had been found not guilty of the commission of the crime, they would have been entitled to their discharge out of custody; the Criminal Code makes no provision for detention in such a case. *R. v. Trapnell*, 17 Can. Cr. Cas. 346, 349 (Ont.). Prisoners who are so insane as to be

incapable of conducting their defences, and also those who have become insane after sentence are likewise subject to the order of the Lieutenant-Governor of the Province. (Secs. 966, 967, 968, 970.)

The order of the Lieutenant-Governor may be made in respect of a prisoner found sane at the time of trial, but to have been insane at the time of the offence. *Re Duclos*, 8 Que. P.R. 372, 12 Can. Cr. Cas. 278; Code sec. 966 (2).

*Insane person arraigned for summary trial under absolute jurisdiction*—If there be sufficient reason to doubt whether an accused person is unable, on account of insanity, to conduct his defence, the question whether by reason of such insanity he is unfit to take his trial should first be tried. *R. v. Berry*, 1 Q.B.D. 447.

If the accused charged under Part XVI has, to the knowledge of the magistrate, been declared to be insane, by competent alienists, and proceedings are pending to commit him to an insane asylum, a conviction made by the magistrate will be set aside. *R. v. Leys* (1910) 17 Can. Cr. Cas. 198 (Ont.).

**Insanity of person imprisoned.—Return to imprisonment when sane.**

**970.** The lieutenant governor, upon such evidence of the insanity of any person imprisoned in any prison other than a penitentiary for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behaviour or to keep the peace, as the lieutenant governor considers sufficient, may order the removal of such insane person to a place of safe keeping; and such person shall remain there, or in such other place of safe keeping as the lieutenant governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the lieutenant governor, who may then order such insane person back to imprisonment, if then liable thereto, or otherwise to be discharged.

*Origin*—Sec. 741, Code of 1892; R.S.C. 1886, ch. 174, sec. 258.

#### *Witnesses and Attendance.*

##### **Attendance of witnesses.**

**971.** Every witness duly subpoenaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial.

*Origin*—Sec. 677, Code of 1892; R.S.C. 1886, ch. 174, sec. 210.

*Competency of witness*—See the Canada Evidence Act, R.S.C. 1906, ch. 145.



A witness is incompetent if, in the opinion of the court, he is prevented by disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth: Stephen, Dig. Ev., art. 107.

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or signs, or in any other manner in which he can make it intelligible, but such writing must be written and such signs made in open court. Evidence so given is deemed to be oral evidence: Stephen, Dig. Ev., art. 107, Can. Evid. Act, sec. 6.

*Preliminary question as to admissibility*—The admissibility of evidence is always a question of law, and is, therefore, for the judge. The weight or value of it, when admitted, is always a question of fact, and, therefore, for the jury. It is incumbent upon the judge to decide all preliminary questions which affect the admissibility of evidence; such, for example, as the sufficiency of proof to admit a document in evidence; the sufficiency of a search to let in secondary evidence; whether a document was properly stamped or not.

Where, however, the decision of the preliminary question of fact would decide the main issue, it seems that the judge should not decide the matter, but should admit the evidence provisionally, and leave the main question to the jury. *Stowe v. Querner*, L.B. 5 Ex., 155. That is, he simply passes upon its admissibility and leaves the rest to the jury. *R. v. Dixon* (No. 2) 29 N.S.B. 462, 3 Can. Cr. Cas. 220.

*Refreshing the memory*—A witness may not read his evidence or refer to notes of evidence already given by him, but he may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court consider it likely that the transaction was at the time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid if, when he read it, he knew it to be correct. Any writing so referred to must be produced and shown to the adverse party if he requires it, and that party may, if he pleases, cross-examine the witness upon it. But a witness who refreshes his memory by reference to a writing must always swear positively as to the fact, or that he has a perfect recollection that the fact was truly stated in the memorandum or entry at the time it was written. If on referring to a memorandum not made by himself he can neither recollect the fact nor recall his conviction as to the truth of the account or writing when the facts were fresh in his memory, so that he cannot speak as to the fact further than as finding it noted in a written entry, his testimony is objectionable, as hearsay.

*Privilege of witness*—A legal adviser is not permitted, during or after the termination of his employment as such, unless with his client's

express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client during, in the course of, and for the purpose of his employment, or to disclose any legal advice given by him to his client during, in the course of, and for the purpose of such employment. But the privilege is that of the client, not of the solicitor. *R. v. Prentice*, 7 W.W.R. 271, 23 Can. Cr. Cas. 436. The protection does not extend to: (1) Any such communication if made in furtherance of any criminal purpose; (2) Any fact with which the legal adviser became acquainted otherwise than in his character as such. See *Anderson v. Bank of British Columbia*, L.R. 2 Ch. 644; *R. v. Prentice*, 7 W.W.R. 271 (Alta.).

The expression "legal adviser" includes barristers and solicitors, their clerks, and interpreters between them and their clients; *Stephen, Dig. Ev.*, art. 115. Subject to any exemptions conferred by provincial law (see *Can. Evidence Act*, sec. 35) medical men and clergymen are not privileged from the disclosure of communications made to them in professional confidence, but it is not usual to press for the disclosures of communications made to clergymen.

In cases in which the Government is immediately concerned, no witness can be compelled to answer any question the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences. *Humphrey v. Archibald*, 21 Ont. R. 553, *R. v. Sproule*, 14 Ont. R. 375. It is, as a rule, for the court to decide, whether the permission of any question would or would not, under the circumstances of the particular case, be injurious to the administration of justice: *Stephen, Dig. Ev.*, art. 113; *Marks v. Beyfus*, 25 Q.B.D. 494.

A husband is not compellable to disclose any communication made by his wife to him during the marriage; and a wife is not compellable to disclose any communication made to her by her husband during the marriage. *Can. Evidence Act*, sec. 4, sub-sec. 3; but sec. 4 of that Act further provides that nothing therein shall affect a case where the wife or husband of a person charged may at common law be called as a witness without the consent of the accused, and as to certain offences, including neglect to provide necessaries (*Code sec. 244*), and abandonment of a child under two years of age (*Code sec. 245*), the wife or husband of the person charged is declared to be a "competent and compellable" witness for the prosecution.

*Cross-examination to disclose disputed points*].—Where it is intended to suggest that a witness is not speaking the truth on a particular point, his attention should be directed to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to

him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. *Browne v. Dunn*, [1894] 6 R. 67.

There are of course exceptional cases in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. *Ibid.*, at 79.

The right to re-examine follows necessarily upon cross-examination, even as to the matter elicited during the latter, which is both inadmissible and volunteered. Such matters should be expunged at the instance of the cross-examiner if it be desired to avoid re-examination. *R. v. Noel*, 6 O.L.R. 385, 7 Can. Cr. Cas. 309.

*Contradiction of witness on otherwise irrelevant matters showing bias*—The general rule is that a witness cannot be contradicted with regard to matters irrelevant to the issue, but to this there is an exception if the matter suggested by the question, though irrelevant, would tend to show that the witness was biased against the opposite party: *Phipson on Ev.*, 5th ed., pp. 477-8; *R. v. Prentice*, 7 W.W.R. 271, 23 Can. Cr. Cas. 436, at 445, 7 Alta. L.R. 479; *R. v. Finnessey*, 11 O.L.R. 338, 10 Can. Cr. Cas. 347; *Attorney-General v. Hitchcock*, 1 Exch. 91.

*Expert witnesses*—See Canada Evidence Act, R.S.C. 1906, sec. 7.

*Proof of documents*—See Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 7 *et seq.*

**Compelling attendance of witnesses.—Warrant on default.—Detention on warrant.—Disposing of charge of contempt.**

**972.** Upon proof to the satisfaction of the judge of the service of the subpoena upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpoena.

2. Such witness may be detained on such warrant before the judge or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance.

3. The judge may, in a summary manner, examine into and

dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labour, for a term not exceeding ninety days, or to both.

*Origin*—Sec. 678, Code of 1892; R.S.C. 1886, ch. 174, sec. 211.

*Witness on preliminary inquiry*—See secs. 671-677.

*Witness in summary conviction matter*—See secs. 711, 713.

*Witness on summary trial of indictable offence*—See secs. 788, 789.

*Witness on speedy trial under Part XVIII*—See secs. 841, 842.

#### **Warrant against witness in the first instance.**

**973.** Either before or during the sittings of any court of criminal jurisdiction, the court, or any judge thereof, or any judge of any superior or county court, if satisfied by evidence upon oath that any person within the province likely to give material evidence, either for the prosecution or for the accused, will not attend to give evidence at such sittings without being compelled so to do, may, by his warrant, cause such witness to be apprehended and forthwith brought before such court or judge, and such witness may be detained on such warrant before such court or judge or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the court or judge, may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence.

*Origin*—Sec. 678A, Code of 1892, as amended 1900.

#### **Witness in Canada but beyond jurisdiction of court.—Subpoena.**

**974.** If any witness in any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term. sessions or sittings of any court in any part of Canada, resides in any part of Canada, not within the ordinary jurisdiction of the court before which such criminal case is cognizable, such court may issue a writ of subpoena, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court.

*Origin*—Sec. 679, Code of 1892; R.S.C. 1886, ch. 174, sec. 212.

**Witness in Canada but beyond jurisdiction of court.—Proceedings when subpoena disobeyed.**

**975.** If such witness does not obey such writ of subpoena the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and times as are necessary, and upon default being made in such appearance may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court.

*Origin*—Sec. 679, Code of 1892; R.S.C. 1886, ch. 174, sec. 212.

**Criminal courts auxiliary to one another.—Proceedings against witnesses.**

**976.** The courts of the several provinces and the judges of the said courts respectively shall be auxiliary to one another for the purposes of this Act; and any judgment, decree or order made by the court issuing such writ of subpoena upon any proceeding against any witness for contempt or otherwise may be enforced or acted upon by any court in the province in which such witness resides in the same manner and as validly and effectually as if such judgment, order or decree had been made by such last mentioned court.

*Origin*—Sec. 679, Code of 1892; R.S.C. 1886, ch. 174, sec. 212.

**Procuring attendance of witness who is a prisoner.—Order.—Prisoner conveyed according to terms of order.**

**977.** When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend, or any judge of such court or of any superior court or county court, or any chairman of General Sessions, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden

or gaoler of the prison, or upon the sheriff or other person having the custody of such prisoner,—

(a) to deliver such prisoner to the person named in such order to receive him; or,

(b) to himself convey such prisoner to such place.

2. The warden, gaoler or other person aforesaid, having the custody of such prisoner, when so required by order as aforesaid, upon being paid his reasonable charges in that behalf, or the person to whom such prisoner is required to be delivered as aforesaid, shall, according to the exigency of the order, convey the prisoner to the place at which he is required to attend and there produce him, and then to receive and obey such further order as to the said court seems meet.

*Origin*—Sec. 680, Code of 1892, as amended 1900.

*Convict under death sentence*—The section places no limit on the words “any person confined in any prison,” and there is nothing in it that puts a person, confined under a death sentence, in a different position from that of any other person confined in prison. It gives power to the judge to cause a person under sentence of death to be brought to court as a witness.

Sec. 1064 does not interfere with the exercise of the powers given by sec. 977. The two sections must be read together, so as to give effect to both. *R. v. Kuzin* (1915) 24 Can. Cr. Cas. 66, 25 Man. R. 218, 8 W.W.R. 166.

### *Evidence on the Trial.*

#### **Admissions of fact on trial.**

**978.** Any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

*Origin*—Sec. 690, Code of 1892.

*Counsel's admission of any “fact” so as to dispense with proof*—Sec. 978 deals only with admissions of fact. *R. v. Brooks*, 11 O.L.R. 525, 11 Can. Cr. Cas. 188, 7 O.W.R. 533. But apart from this enactment there may be a waiver of more formal proof as by a consent of counsel to admit as evidence the depositions in a case against another person, at least where the offence would have been only a misdemeanour at common law. *R. v. Brooks*, *supra*; *R. v. St. Clair*, (1900) 27 A.R. 308, 3 Can. Cr. Cas. 551 (Ont.); *R. v. Daigle*, 23 Can. Cr. Cas. 92. There may be a valid consent to receive secondary evidence. *Whelan v. The Queen*, 28 U.C.Q.B. 2 (Ont.).

And generally a consent of counsel which affects procedure only will, in the absence of any special circumstances forbidding it, establish a legal waiver. *R. v. Janneau*, 12 Can. Cr. Cas. 360, 364 (Que.); *R. v. Gibson*, (1896) 29 N.S.R. 4, 3 Can. Cr. Cas. 451; *R. v. Hazen*, 20 A.R. 633.

*Special modes of proof; Identification of criminals*—By Order-in-Council of 21st July, 1908, in virtue of the provisions of the Identification of Criminals Act, R.S.C. 1906, ch. 149, the use of the system of identification known as the "finger prints," was sanctioned, and all the provisions of that Act were made applicable to the said system, 1917 Can. Stat. clxi (Orders-in-Council, 50 *Can. Gazette*, 3484).

By Order-in-Council of 20th March, 1911, the process or operation of photographing was sanctioned as an additional means of identification for the purposes of the Criminals Identification Act (Can. Stat. 1898, and R.S.C. 1906, ch. 149). Can. Stat. 1917, clxi (Orders-in-Council, 50 *Can. Gazette*, 3484).

#### **Certificate of former trial upon trial of indictment for perjury.**

**979.** A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same.

*Origin*—Sec. 691, Code of 1892; R.S.C. 1886, ch. 174, sec. 225; 32-33 Vict., Can., ch. 28, sec. 11; 14-15 Vict., Imp., ch. 100, sec. 22.

*Proof of perjury charge*—Code secs. 170-176.

#### **Evidence of coin being false or counterfeit.**

**980.** When, upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of His Majesty's mint, or other person employed in producing the lawful coin in His Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country,

not current in Canada, but it shall be sufficient to prove the same to be false or counterfeited by the evidence of any witness.

*Origin*—Sec. 692, Code of 1892; R.S.C. 1886, ch. 174, sec. 229.

*Offences relating to copper coins*—See secs. 2 (8), 546, 554-557, 559, 561-569, 623-626, 955, 980-981, 1041.

**Evidence on proceedings for advertising counterfeit money.**

**981.** On the trial of any person charged with any of the offences mentioned in sec. 569, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *prima facie* evidence of the fraudulent character of such scheme or device.

*Origin*—Sec. 693, Code of 1892.

**Proof of previous conviction.—Certificate.**

**982.** A certificate containing the substance and effect only, omitting the formal part, of any previous indictment and conviction for any indictable offence, or a copy of any summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same.

*Origin*—Sec. 694, Code of 1892; R.S.C. 1886, ch. 174, sec. 230.

*Application*—It has been doubted whether sec. 982 applies to any other than indictable offences. *R. v. Leach*, 17 O.L.R. 643, 14 Can. Cr. Cas. 375.

*Proceedings when previous conviction charged in indictment*—Code sec. 963.

*Proof of identity*—A certificate of the previous conviction in the same locality of a person of the same name and description has been held to be some evidence of identity. *R. v. Leach*, 17 O.L.R. 643, 14



O.L.B. 375; R. v. Batson, *ex parte* Dugan, 32 N.B.R. 98, 12 Can. Cr. Cas. 62 (N.B.); R. v. Clark, 9 Can. Cr. Cas. 925, 15 Ont. R. 49.

As to the Identification of Criminals Act, see note to sec. 978.

*Proving previous conviction made on a summary trial*—A copy of a conviction on summary trial under Part XVI by "a magistrate" as defined by Code sec. 771 is, by sec. 794, made sufficient evidence when proved to be a true copy (or when certified by the proper officer of the court, *ex. gr.* when a judge sits as a magistrate under sec. 771) to prove a conviction for the offence mentioned therein.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 694, 757 (3), 851, 963, 982, 1053, 1081.

#### **Evidence at trial for child murder.**

**983.** The trial of any woman charged with the murder of any issue of her body, male or female, which being born alive would, by law, be bastard, shall proceed and be governed by such and the like rules of evidence and presumption as are by law used and allowed to take place in respect to other trials for murder.

*Origin*—Sec. 697, Code of 1892.

#### **Proof of age of child in control of a society.—Entry or record.**

**984.** To prove the age of a boy, girl, child or young person for the purposes of secs. 211, 215, 242, 243, 245, 294, 301, 302, 315 and 316, any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed, shall be *prima facie* evidence of such age.

2. In the absence of other evidence, or by way of corroboration of other evidence, the judge, or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person.

*Origin*—Sec. 701A, Code of 1892.

*Sub-sec. (2)*—"In the absence of other evidence" as to age]—The proof, if any, of age is to be made in accordance with the requirements of provincial law. Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 35.

If a certificate of birth is put in, there should be positive identification with the person certified. *R. v. Rogers*, 10 Cr. App. R. 217.

Credit may be given the evidence of the child's mother even if she is unable to state the year of the child's birth. *R. v. Pieco* [1917] 1 W.W.R. 892 (Alta.); *R. v. Nicholls*, 10 Cox C.C. 475.

If a parent is not available as a witness, credit may be given the testimony of persons who had known the child from infancy or early childhood. *R. v. Spera*, (1915) 34 O.L.R. 530, 25 Can. Cr. Cas. 180; *R. v. Cox*, [1898] 1 Q.B. 179, 67 L.J.Q.B. 293, 18 Cox C.C. 672.

In *Martin Hargreaves Co. v. Wrigley*, 30 W.L.R. 92 (Sask.), it was decided that on a defence of infancy the defendant could not give evidence of the date of his birth. In that case the court followed *Haines v. Guthrie*, 13 Q.B.D. 818. And see *R. v. Hauberg*, 24 Can. Cr. Cas. 297, 8 S.L.R. 239; *R. v. Farrell*, 21 O.L.R. 540, 16 Can. Cr. Cas. 419.

*Illegal sale of tobacco to juveniles*—In prosecutions under the Canada Statute of 1908, entitled An Act to Restrain the Use of Tobacco by Young Persons, the provisions of sec. 984 of the Code are to apply (7-8 Edw. VII, ch. 73, sec. 7); and for the purposes of such Act any person who appears to the justice dealing with an information or complaint thereunder to be under the age of 16 years, shall be presumed to be under that age, unless it is shown by evidence that he is in fact over that age.

#### **Presence of gaming instruments proof of gambling character of house.**

**985.** When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any game of chance or any mixed game of chance and skill are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under sec. 228 or sec. 229, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied.

*Origin*—Sec. 702, Code of 1892; 63-64 Vict., Can., ch. 46; Can. Stat., 1918, ch. 16, sec. 4.

*Disorderly house cases*—See secs. 225-229, 986.

[§ 985.] CRIMINAL CODE (PART XIX)

"Common gaming house"]—See secs. 226, 228. Sec. 985 does not apply to the unlawful sale of lottery tickets under sec. 236. *R. v. Hong Guey*, 12 Can. Cr. Cas. 366 (B.C.).

"Common betting house"]—See secs. 227, 228.

"Opium Joint"]—See secs. 227A, 228.

Search order]—See secs. 641, 642.

Search warrants generally]—See secs. 629, 629A, 630, 631, 635.

**Evidence of disorderly house.**

**986.** In any prosecution under sec. 228 or under sec. 229 it shall be *prima facie* evidence that a house, room or place is a disorderly house if any constable or officer authorized to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same, or any part thereof; and if any house, room or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill or betting or for opium smoking or inhaling, or with any device for concealing, removing or destroying such means or contrivance it shall be *prima facie* evidence that such house, room or place is a common gaming house, common betting house or opium joint as the means or contrivance may indicate.

*Origin*—Sec. 703, Code of 1892; 63-64 Vict., Can., ch. 46, sec. 3; Can. Stat., 1913, ch. 13, sec. 29; Can. Stat., 1918, ch. 16, sec. 5.

*Officer "wilfully prevented, obstructed or delayed"*—The fact that the officer, on seeking admittance to the place suspected, finds the door locked, does not constitute a wilful prevention, obstruction or delay of his entrance sufficient to raise the *prima facie* presumption created by sec. 986; the presumption is created only when something active is done amounting to a wilful obstruction or prevention. *R. v. Jung Lee* (No 2) 22 Can. Cr. Cas. 64, 25 O.W.R. 63.

In order to invoke the first part of sec. 986 as to obstructing the entry of an officer, there would have to be evidence that the officer was "authorized to enter" and that at the moment of obstruction or delay there was knowledge that the person obstructed or delayed was an officer. *R. v. Hung Gee*, 4 W.W.R. 1128. As to the substantive offence of wilfully obstructing an officer entering any disorderly house when "duly authorized to enter," see sec. 230.

*House, etc., found fitted or provided*—There may be some doubt as to whether the second part of sec. 986 applies to a house, room, or place "found" with the contrivances referred to except upon the occasion of some constable or officer having authority to enter such as is

contemplated in the first part of the section. But an entry by a constable into a store at a time when the public generally were free to enter, appears to have been considered sufficient in *R. v. O'Meara*, 34 O.L.R. 467, 25 Can. Cr. Cas. 16, although he had no search order (sec. 641), or search warrant (secs. 629-630). See also *R. v. Jung Lee*, 22 Can. Cr. Cas. 64, 25 O.W.R. 63.

**Evidence of gaming in stocks or merchandise.**

**987.** Whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in sec. 231, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the *bona fide* intention to acquire or to sell such shares, goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged.

*Origin*—Sec. 704, Code of 1892.

**Evidence of stealing ores or minerals.**

**988.** In any prosecution, proceeding or trial for stealing ores or minerals the possession, contrary to the provisions of any law in that behalf, of any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operator, workman or labourer actively engaged in or on any mine, shall be *prima facie* evidence that the same has been stolen by him.

*Origin*—Sec. 707, Code of 1892, R.S.C. 1886, ch. 164, sec. 30.

**Evidence of property in cattle.—Possession of cattle with brand.—*Prima facie* evidence of theft.**

**989.** In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be *prima facie* evidence that such cattle are the property of the registered owner of such brand or mark.

2. When a person is charged with theft of cattle, or with an offence under paragraph (a) or paragraph (b) of sec. 392, respecting cattle, possession by such person or by others in his

employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner. shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval.

*Origin*—Compare sec. 707A, Code of 1892; 1 Edw. VII, Can., ch. 42, sec. 2; 63-64 Vict., Can., ch. 46.

*Registered cattle brands as evidence*—Code sec. 989, as to cattle brands, is intended specially for the protection of cattle owners in ranching districts where cattle run at large, and to prevent the appropriation and re-branding of stray cattle by other ranchers. Where the evidence shows that the accused stockman appropriated and re-branded with his own brand a stray three-year-old steer on which appeared the brand of another rancher, and turned the stray steer into his own herd on his home range, there is such proof of possession of the animal as throws upon the accused the onus under Code sec. 989 of proving on a charge of stealing the steer that the same came into his possession lawfully. *R. v. Dubois*, 15 Can. Cr. Cas. 485, 15 W.L.R. 238.

On the trial for the theft of certain cattle, the brands upon which had been obliterated, evidence that the brands upon other cattle had been similarly obliterated and that the prisoner had in his possession branding irons adapted to causing an obliteration of the character found, was admissible. *R. v. Collyns*, 3 Terr. L.R. 82, 4 Can. Cr. Cas. 572; and see *R. v. Forsythe*, 4 Terr. L.R. 398, 5 Can. Cr. Cas. 475.

*Theft of animals*—Code secs. 345, 350, 369, 370, 953.

*Fraudulently taking cattle found astray*—Code secs. 392, 953.

**Evidence of property in timber.—Timber making.—*Prima facie* evidence.**

**990.** In any prosecution, proceeding or trial for any offence under sec. 394, if any timber, mast, spar, saw-log, shingle bolt or other description of lumber is marked with a timber mark duly registered under the provisions of The Timber Marking Act, chapter 72 of the Revised Statutes, 1906, or The Forest Act of the Statutes of British Columbia of 1912, such mark shall be *prima facie* evidence that such timber, mast, spar, saw-log, shingle bolt or other description of lumber is the property of the registered owner of such timber mark.

2. Possession by the accused, or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log, shingle bolt or other description of lumber so marked shall, in all cases, throw upon him the burden of proving that such timber, mast, spar, saw-log, shingle bolt or other description of lumber came lawfully into his possession, or into the possession of such others in his employ or on his behalf.

*Origin*—Sec. 708, Code of 1892; R.S.C. 1886, ch. 174, sec. 228.

**Evidence of enlistment in cases as to public stores.—Presumption when accused a dealer in stores.**

**991.** In any prosecution, proceeding or trial under secs. 433 to 437 inclusive for offences relating to public stores, proof that any soldier, seaman or marine was actually doing duty in His Majesty's service shall be *prima facie* evidence that his enlistment, entry or enrolment has been regular.

2. If the person charged with the offence relating to public stores mentioned in sec. 435 was, at the time at which the offence is charged to have been committed, in His Majesty's service or employment, or a dealer in marine stores, or a dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in sec. 432 shall be presumed until the contrary is shown.

*Origin*—Sec. 709, Code of 1892.

*Offences relating to public stores*—See secs. 2 (28), 2 (34), 433-437, 636.

**Evidence in cases of fraudulent marks on merchandise.**

**992.** In any prosecution, proceeding or trial for any offence under Part VII relating to fraudulent marks on merchandise, if the evidence relates to imported goods, evidence of the port of shipment shall be *prima facie* evidence of the place or country in which the goods were made or produced.

*Origin*—Sec. 710, Code of 1892; 51 Vict., Can., ch. 41, sec. 13.

**Proceedings against receivers of stolen goods.—Possession of other stolen property.—Notice prior to trial.—Contents of notice.**

**993.** When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen, if not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession.

2. Such notice shall specify the nature or description of such other property, and the person from whom the same was stolen.

*Origin*—Sec. 716, Code of 1892; R.S.C. 1886, ch. 174, sec. 203; 34-35 Vict., Imp., ch. 112, sec. 19. Compare Larceny Act, 1916, Imp., 6-7 Geo. V, ch. 50, sec. 43.

*Receiving stolen goods; giving evidence of finding other stolen goods within the previous twelve months*—Sec. 399 deals with the offence of receiving, i.e., the punishment for (with guilty knowledge) receiving or retaining in his possession "anything obtained by any offence punishable on indictment." Sec. 993 is limited to the receiving or retaining of stolen goods or property and so seems to exclude the class of cases which are not made statutory theft although punishable in like manner as theft under various Code provisions.

It has been held under a similar clause in the English Larceny Act, 1916 (6-7 Geo. V, Imp., ch. 50, sec. 43, sub-sec. 1 (a)), that on giving evidence of the finding of other stolen property in possession within the limited time, all the facts may be brought out which would be relevant if such other property were the subject-matter of the charges being tried. *R. v. Smith*, (1918) 87 L.J.K.B. 1028. Such evidence was given also in *R. v. Girod*, 70 J.P. 514, 22 Times L.R. 720, without any question being raised.

If there is evidence that the property was stolen, it has to be tendered before the defence has to give an answer. *R. v. Ballard* (1916) 12 Cr. App. R. 1 at 5.

Sec. 993 does not apply to admit proof in respect of other property stolen within the twelve months and disposed of by the prisoner; it must be found in his possession at the time when he was found in possession of the property in respect of which the charge is laid; *R. v.*

Carter (1884), 12 Q.B.D. 522, 53 L.J.M.C. 96, 15 Cox C.C. 448; R. v. Drage (1878), 14 Cox 85; although other stolen property could be shown to have been disposed of by him within that period at half its value. R. v. Drage (1878), 14 Cox C.C. 85.

Apart from the provisions of this section other instances of receiving similar goods which had been stolen from the *same* party may be proved. R. v. Dunn (1826), 1 Mood. C.C. 146; R. v. Davis (1833), 6 C. & P. 177; R. v. Nicholls (1858), 1 F. & F. 51.

*Receiving stolen property*—See secs. 399-403, 849, 954, 993, 994.

**Receiving stolen goods.—Possession.—Guilty knowledge.—Previous conviction.—Notice prior to trial.**

**994.** When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, if not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction.

2. It shall not be necessary for the purpose of this section, to charge in the indictment the previous conviction of the person so accused.

*Origin*—Sec. 717, Code of 1892; R.S.C. 1886, ch. 174, sec. 204: Prevention of Crimes Act, 1871 Imp., 34-35 Vict., ch. 112, sec. 19; 32-33 Vict., Imp., ch. 99, sec. 11.

*Previous conviction of receiver as evidence*—Proof of a previous conviction in the terms of sec. 994 is not conclusive as evidence that the prisoner knew the goods had been stolen, but is merely a circumstance to be taken into consideration in conjunction with other evidence tending to prove guilty knowledge. R. v. Davis, (1870) L.R. 1 C.C.R. 272, 11 Cox C.C. 578.

*Receiving stolen property*—See secs. 399-403, 849, 954, 993, 994.



*Evidence taken apart from Trial.*

**Evidence of person dangerously ill may be taken under commission.**

**995.** Whenever it is made to appear at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of a judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand, appoint a commissioner to take in writing the statement on oath or affirmation of such person.

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the court at which such accused person is to be tried.

3. In every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division or city.

4. Such clerk of the peace or other officer shall preserve the same and file it of record, and upon the order of the court or a judge transmit the same to the proper officer of the court where the same shall be required to be used as evidence.

*Origin*].—Sec. 681, Code of 1892; R.S.C. 1886, ch. 174, sec. 220; 30-31 Vict., Imp., ch. 35, sec. 6.

*Failure to take exception before commissioner*].—It is the duty of the presiding judge at a criminal trial to allow only admissible evidence to go to the jury. Where evidence has been taken on commission before the trial the mere fact of an omission to object before the commissioner cannot impair this rule. *R. v. Hawkes* (1915) 9 W.W.R. 445, 25 Can. Cr. Cas. 29, 32 W.L.R. 720 (Alta.).

*Notice of reading depositions taken under sec. 995*—Code sec. 998. Unless written notice is given the deposition cannot be read at the trial. *R. v. Shurmer*, 5 L.J.M.C. 153; *R. v. Quigley*, 18 L.T.N.S. 211.

*Preliminary proofs to admit depositions at trial*—Code sec. 998.

**Presence of prisoner when taking deposition of person dangerously ill.**

**996.** Whenever a prisoner in actual custody is served with or receives notice of an intention to take the statement mentioned in the last preceding section the judge who has appointed the commissioner may, by an order in writing, direct the officer or other person having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statements; and such officer or other person shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed.

*Origin*—Sec. 682, Code of 1892; R.S.C. 1886, ch. 174, sec. 221.

**Evidence may be taken out of Canada under commission.—Rules and practice same as in other cases.**

**997.** Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of the court, the practice and procedure in connection with the appointment of commissioners, under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence, shall be as nearly as practicable the same as those which prevail in the respective courts in connection with like matters in civil causes.

3. The depositions taken by such commissioners may be used as evidence at the trial.

4. Subject to such rules of court or to the practice or procedure aforesaid, such depositions may, by the direction of the presiding judge, be read in evidence before the grand jury.

*Origin*—63-64 Vict., Can., ch. 46, sec. 3; 58-59 Vict., Can., ch. 40, sec. 1; sec. 683, Code of 1892; 53 Vict., Can., ch. 37, sec. 23.

*Commission to take evidence out of Canada*—A commission may be ordered to examine witnesses *ex juris* if the judge is satisfied: (1) That they reside out of Canada; (2) That they are able to give material information on behalf of the accused relating to the offence for which they have been committed for trial; (3) That it is highly improbable that any of them will voluntarily attend the trial to give evidence. *R. v. Roblin*, (1916) 26 Can. Cr. Cas. 222, 26 Man. R. 97.

The application of the procedure in civil cases by the second subsection does not confer a like right of appeal as in civil cases from the order appointing the commissioners. *R. v. Johnson*, (1892) 2 B.C.R. 87. Any evidence taken under commission may be objected to at the trial on the ground of the irregularity of the commissioners' appointment. *Ibid.*

*Foreign commission*—An order for a commission to take the evidence of any person residing out of Canada who is able to give material information relating to an indictable offence, or relating to any person accused thereof, may ordinarily be made any time after an information is laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given. Such order ought to provide that the commission be returned to the court out of which it issues, and ought not to limit the use of the evidence. *R. v. Chetwynd* (1891), 23 N.S.R. 332; *R. v. Gibson*, 16 Ont. R. 704; *R. v. Verral*, 17 P.R. 61, Ont. *R. v. Verral*, 16 P.R. 444 (Ont.).

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. *R. v. Nicol* (1898), 5 Can. Cr. Cas. 31 (B.C.).

An order for a commission to take evidence in a libel case should not be made before plea. *R. v. Nicol*, *supra*.

A foreign commission will not be denied the accused held on a serious charge if it seems probable that the refusal would deprive him of evidence to support the defence. *R. v. Rispa* (1915) 26 Can. Cr. Cas. 94, 9 O.W.N. 50.

Where the application is by the Crown to take *viva voce* testimony in the United States the Crown should bear the reasonable fees and expenses of counsel for the accused. *R. v. Guilmette* (1919) 30 Can. Cr. Cas. 276 (Que.). The payment may be recommended in the formal order,

and reservation made to make further order if the parties fail to agree on the amount. If the witness "resides out of Canada," sec. 997 applies so as to enable the court to order that his evidence be taken on commission in Canada while he is temporarily therein as well as to take the evidence out of Canada. *R. v. Baskett*, 6 Can. Cr. Cas. 61 (Ont.).

*Admission on Trial of Evidence Previously Taken.*

**Deposition of person dangerously ill**—Notice of intention to read and opportunity of cross-examination.

**998.** If the statement of a sick person has been taken by a commissioner as provided in sec. 995, and upon the trial of any offender for any offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement may, upon the production of the judge's order appointing the commissioner, be read in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person, whether prosecutor or accused, against whom it is proposed to be read in evidence, and that such person or his counsel or solicitor had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same.

*Origin*—Sec. 686, Code of 1892; R.S.C. 1886, ch. 174, sec. 220; 30-31 Vict., Imp., ch. 35, sec. 6.

*Written notice obligatory*—See note to sec. 995.

**Deposition on preliminary inquiry may be read in evidence in certain events.**

**999.** If upon the trial of an accused person such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge, or whose deposition has been theretofore taken in the investigation of the charge against such accused person, is dead, or so ill as not to be able to travel, or is absent from Canada, or if such person refuses to be sworn

or to give evidence, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had a full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same.

*Origin*—3-4 Geo. V, Can., ch. 13, sec. 30; 63-64 Vict., Can., ch. 46, sec. 3; sec. 687, Code of 1892; 32-33 Vict., Can., ch. 30, sec. 30; Indictable Offences Act, 1848, Imp., 11-12 Vict., ch. 42, sec. 17.

*Application*—So far as sec. 999 makes express provision for receiving depositions in evidence, it supersedes the common law. *R. v. Snelgrove*, 12 Can. Cr. Cas. 189.

*Evidence given at any former trial on the same charge*—This evidently refers to cases in which a new trial has been ordered. See under secs. 1018, 1021, 1022.

*Deposition therefore taken in the investigation of the charge*—A deposition taken before a justice having authority to hold a preliminary enquiry, but because of whose illness or absence the enquiry had to be taken *de novo* before another justice, will be included. *R. v. De Vidal*, 9 Cox C.C. 4.

The prior deposition must have been taken in the investigation of the "charge against such accused person." It would seem that sec. 999 does not apply at all to depositions at coroners' inquests; *R. v. Laurin*, (No. 3), 5 Can. Cr. Cas. 548 (Que.); *R. v. Graham*, 2 Can. Cr. Cas. 388; the coroner not being a "judge or justice" (sec. 999) even if the circumstances are such that it could be said that the coroner's inquest was an investigation of a charge against the accused (sec. 999).

A coroner's court is, however, a criminal court and a court of record. *R. v. Hendershott*, 26 Ont. R. 678; *R. v. Hammond*, 29 Ont. R. 211; *R. v. Williams*, 28 Ont. R. 583; *Davidson v. Garrett*, 5 Can. Cr. Cas. 200. And the deposition of any witness at the coroner's inquest may be used in cross-examination of that witness on the trial. *R. v. Laurin* (No. 3), 5 Can. Cr. Cas. 548 (Que.); *R. v. Ciarlo*, 1 Can. Cr. Cas. 157 (Que.); *R. v. Hammond*, 1 Can. Cr. Cas. 373.

*Witness so ill as not to be able to travel*—The question as to whether or not the witness is unable to travel must in the main be left to the judgment and discretion of the trial judge. *R. v. Wellings* (1878), 47 L.J.M.C. 100, L.R. 3 Q.B.D. 42; *R. v. Stephenson* (1862), 31 L.J.M.C. 145; L. & C. 167.

Old age or extreme nervousness of the witness will not be enough to admit the prior deposition without proof of illness. *R. v. Farrell*, 43 L.J.M.C. 94, L.R. 2 C.C.R. 116; *R. v. Thompson*, 13 Cox C.C. 181.

Preferably the evidence of illness should be given by a medical man, but other evidence may be accepted as its equivalent, where it could not be expected that medical testimony would be available. *R. v. Welton*, 9 Cox C.C. 296, 27 J.P. 24; *R. v. Ulmer*, 4 Cox C.C. 442; *R. v. Bull*, 12 Cox C.C. 31; *R. v. Wicker*, 18 Jur. 252.

*Proof that witness is absent from Canada*—The proof of absence of a witness from Canada, so as to let in his depositions taken on the preliminary enquiry is a matter of reasonable inference, determined by the probabilities of the case, and where the more probable conclusion is, in the opinion of the trial judge, that the witness is absent from Canada, and there is anything in the proof before him pointing to it, the court of appeal will not interfere with his finding on that collateral issue. *R. v. Angelo* (1914), 5 W.W.R. 1303, 19 B.C.R. 261, 22 Can. Cr. Cas. 304, 27 W.L.R. 108; *R. v. Forsythe*, 4 Terr. L.R. 398, 5 Can. Cr. Cas. 475; *R. v. Pescaro*, 1 B.C.R. pt. 2, p. 144; *R. v. Frank* (1913), 22 Can. Cr. Cas. 100 (Que.); *R. v. Snelgrove*, 39 N.S.R. 400, 12 Can. Cr. Cas. 189; *R. v. Morgan* (1893), 2 B.C. R. 329; *R. v. Nelson*, 1 Ont. R. 500. But if there was a total absence of evidence or manifestly not sufficient evidence from which to infer that the witness was away, the court of appeal might interfere if of opinion that there had been a miscarriage of justice. *R. v. Angelo* (1914), 5 W.W.R. 1303, 1313 (per McPhillips, J. A.). If the depositions were wrongly admitted and might have influenced the verdict, the principle defined in *R. v. Allen* (1911), 41 S.C.R. 331, would apply. *R. v. Angelo*, supra, at 1312. And see Cr. Code sec. 1019.

It is not necessary that a witness should swear positively to such absence. To require positive proof would almost nullify this portion of sec. 999 of the Code. *R. v. Deloe*, 11 Can. Cr. Cas. 224 (N.S.). In *R. v. Trefry*, 8 Can. Cr. Cas. 297, the facts did not appear to justify a reasonable inference of continued absence in a foreign country, as the absentee, a doctor, might have changed his mind and returned to Canada in the interval of time before the date of the trial. In *R. v. Deloe*, 11 Can. Cr. Cas. 224, the absent witness was an ordinary sailor who had shipped for a long voyage out from Canada, and who was not free to change his mind. In the latter case Judge Wallace, of Halifax, said: "I do not consider that the decision in the case of *R. v. McCullough*, 8 Can. Cr. Cas. 278, means that the Crown must show that the absence must be 'permanent' in the ordinary sense of that word, but that the Crown must show an absence to continue longer than merely a few days, or, in other words, such a period of absence as would involve an obstruction of justice if the trial were delayed until the expiration of the absence."

*Deposition "purporting to be signed"*—In order that sec. 999 should apply to make admissible at the trial a deposition taken at the

preliminary inquiry of a witness, since deceased, the fact that the justice signed the deposition must appear from the document itself and cannot be proven by extrinsic evidence. At a preliminary inquiry adjournments were made from time to time, and the justice, after entering the adjournments as they respectively occurred, signed his name to each adjournment entry. Except for a general heading to each day's proceedings, there was no caption to any deposition, and there were no signatures by the justice other than those mentioned. It was held that the deposition should be read together as one continuous document, but that what appeared on the document was not sufficient to enable the court to say that the deposition "purported to be signed" by the justice, and it was, therefore, inadmissible as evidence at the trial, and a conviction based thereon was quashed. *Bex v. Thompson*, 7 Terr. L.R. 188.

There is nothing said in sec. 999 as to the time when the evidence is to be signed by the judge, and there is no reason why it may not be signed at any time before it is admitted in evidence; it need not be signed at the time when or immediately after it is taken. *R. v. Baugh* (1917), 38 O.L.R. 559.

It was held in *R. v. Hamilton* (1898), 12 Man. R. 354, 2 Can. Cr. Cas. 390, that the deposition of a deceased witness may be used in evidence apart from sec. 999, although it does not "purport to be signed by the justices by or before whom the same purports to have been taken"; but, where it is not admissible by virtue of sec. 999, it must be affirmatively shown that all the formalities required to be observed in taking depositions have been complied with.

*Full opportunity to cross-examine*—The expressions "entitled to cross-examine" and "full opportunity to cross-examine," as used in secs. 682 and 999, imply for the accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of the witness, and to mark his expression and demeanor while testifying. *R. v. Lepine* (1900), 4 Can. Cr. Cas. 145 (Que.). When depositions in a preliminary enquiry, to which the accused was not a party, and, consequently, taken in his absence, are read to the same witness in a case against the accused, and the witness, after being sworn in the presence of the accused, either affirms that his former deposition contains the truth, or makes corrections, as the case may be, and then affirms its truth as corrected, the prosecutor, being then given permission to ask further questions, and the accused to cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by law; *R. v. Lepine*, *supra*; where there has been no consent to that mode of procedure. See note to sec. 978.

Unless there has been a full opportunity to cross-examine, the deposition is not admissible. *R. v. Mitchell* (1892), 56 J.P. 218, 17 Cox C.C. 503; *R. v. Prestridge* (1881), 72 L.T.N. 93.

*Waiver of formalities in proving deposition*—It is not competent for a prisoner, at whose request evidence has been admitted, especially

where that evidence would have been properly received if an affidavit had been filed proving that the witnesses were absent or unable to attend, afterwards to obtain a new trial upon the ground that the evidence was improperly admitted. *R. v. Hogue*, 39 O.L.R. 427, 28 Can. Cr. Cas. 419.

Where on a preliminary inquiry before a magistrate the witnesses were sworn by him and were then taken into another room and their evidence in chief taken by a stenographer and not in the presence of a magistrate, such depositions are illegally taken, although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate. *R. v. Trayner* (1901), 10 Que. Q.B. 63, 4 Can. Cr. Cas. 410; *R. v. Watts*, 33 L.J.M.C. 63. The objection to the irregularity is not waived by the cross-examination of the witnesses on the prisoner's behalf on their return to the magistrate's presence, if the objection is taken by the prisoner's counsel before he proceeds to cross-examine. *R. v. Traynor*, *supra*.

Failure of counsel for the accused to attend on an adjourned enquiry to continue the cross-examination of the accused, which has been interrupted by the adjournment of a previous hearing, is not a waiver of the right to continue the cross-examination when the witness may be available if the witness was not in fact present at the adjourned hearing. *R. v. Trevane* (1902), 4 O.L.R. 475, 6 Can. Cr. Cas. 124. The magistrate should not, under such circumstances, obtain the signature of the absent witness to the incomplete examination, in the absence of the accused; and, if he does so, such deposition is not admissible at the subsequent trial on proof that the witness is too ill to attend. *R. v. Trevane*, *supra*; *R. v. Mitchell* (1892), 56 J.P. 218, 17 Cox C.C. 503; *R. v. Prestridge*, 72 L.T.N. 93.

#### **Depositions may be used in trial for other offences.**

**1000.** Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken.

*Origin*—Sec. 688, Code of 1892.

#### **Statement by accused.**

**1001.** The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him without further proof thereof, unless



it is proved that the justice purporting to have signed the same did not in fact sign the same.

*Origin*—Sec. 689, Code of 1892; R.S.C. 1886, ch. 174, sec. 223; 32-33 Vict., Can., ch. 30, sec. 33; Indictable Offences Act, 1848, Imp. sec. 18.

*Defendant's statement not under oath*—The statement of the accused (not under oath) taken on the Code statutory form 20 under Code sec. 684, upon the preliminary enquiry, is that to which reference is here made. When the statement purports to be signed by the magistrate, and also by the accused if he will (Code form 20), and is regular on its face, it may be given in evidence without further proof. *R. v. Walebek*, 4 W.W.R. 501, 507, 21 Can. Cr. Cas. 130, 23 W.L.R. 931 (Sask.). If the defendant did not understand what he signed or the warning given, it is open to him to establish that fact, and the significance of the statement would be correspondingly weakened. *R. v. Walebek* (1913), 4 W.W.R. 501, 507, 21 Can. Cr. Cas. 130 (Sask.), per Brown, J.

The statement may be taken through an interpreter where the accused is a foreigner who does not understand English. *R. v. Walebek* (1913), 4 W.W.R. 501, 21 Can. Cr. Cas. 130, 23 W.L.R. 931 (Sask.).

Although the magistrate's record of proceedings does not show on its face that a statement made by the accused to him in answer to the charge was made after due caution in accordance with sec. 684, the fact that it was so made may be proved at the trial and the statement may then be put in evidence by the prosecution. *R. v. Kalabeen* (1867), 1 B.C.R., pt. 1, p. 1.

It seems that under the English practice the trial judge may order the statement to be read as part of the case for the Crown on the application of the defence when the defence is calling no witnesses, and so preserve the right of counsel for the accused to address the jury last (Code 944 (3)), subject to the right of reply of the Attorney-General or counsel on his behalf under Code sec. 944. Article in 42 S.J. 681.

*Formalities of taking statement of accused under Form 20*—See Code 684.

*Accused may obtain copy of his statement before the committing magistrate*—See sec. 691.

### *Corroboration.*

**Corroboration necessary in certain cases.**

**1002.** No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evi-

dence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:—

- (a) Treason, Part II, sec. 74;
- (b) Perjury, Part IV, sec. 174;
- (c) Offences under Part V, secs. 211 to 220 inclusive.
- (d) Procuring feigned marriage, Part VI, sec. 309;
- (e) Forgery, Part VII, secs. 468 to 470 inclusive.

*Origin*—Sec. 684, Code of 1892, as amended by Code Amendment Act, 1893, 56 Vict., Can., ch. 32, sec. 1; 32-33 Vict., Can., ch. 19, sec. 54.

*For specified offences no conviction "upon the evidence of one witness unless such witness is corroborated," etc.*—The wording of sec. 1002 is inartistic in saying that no person shall be convicted upon the evidence of one witness, *unless* such witness is corroborated, etc. The usual corroboration is the evidence of another witness, though not necessarily so as it may consist of documentary evidence. But judicial interpretation has not restricted the application of the section to cases where the prosecution depended upon oral testimony given by one person. It is held rather to mean that at least some material particular must be proved by evidence in addition to the testimony of any one witness relied upon to make out the Crown's case. It is enough if there be other testimony to facts from which the tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged. *R. v. Burr*, 13 O.L.R. 485, 12 Can. Cr. Cas. 103.

Apart from the Code, facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated. *Wilcox v. Gotfrey*, 26 L.T.N.S. 481; *R. v. Rabinovitch*, 23 Can. Cr. Cas. 496 (Man.); *Green v. McLeod*, 23 A.R. (Ont.) 676.

The English Perjury Act, 1911 (1 and 2 Geo. V, ch. 6) uses the words "A person shall not be liable to be convicted *solely* upon the evidence of one witness as to the falsity of any statement alleged to be false." This is held to mean that there can be no conviction on the evidence of one witness alone; there must be one witness and something else in addition. Reading, L.C.J., in *R. v. Threlfall* (1914), 10 Cr. App. R. 112. Furthermore, the jury is entitled to treat a letter written by the accused which is consistent either with the guilt or the innocence of the accused, according to the meaning which may be taken therefrom in conjunction with surrounding circumstances as in fact corroborative if the jury could draw the inference from it that it pointed to his guilt. *R. v. Threlfall* (1914), 10 Cr. App. R. 112; *R. v. Everest* (1909), 73 J.P. 269; 2 Cr. App. R. 130; *R. v. Wilson* (1911), 6 Cr. App. R. 125.

*Corroboration in some material particular implicating the accused*—Where corroboration of a witness is required at common law it is not requisite that it shall directly implicate the accused. Section 1002 imposes an additional condition as to the effect of such evidence which must be complied with. See *Rex v. Willis*, 12 Cr. App. R. 16; *R. v. Pieco* [1917] 1 W.W.R. 892, 27 Can. Cr. Cas. 435.

Evidence in corroboration must be such that it confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test is the same as that applicable under the rule of practice at common law in dealing with the evidence of an accomplice. *R. v. Baskerville*, 86 L.J.K.B. 28, [1916] 2 K.B. 658, 25 Cox C.C. 524, 12 Cr. App. R. 81; *R. v. Grosberger* (1909), 152 Cent. Cr. Court 261, 267.

The weight or value of such corroboration as may have been given is for the jury, and the case should not be withdrawn from them unless the judge is satisfied that it is absolutely beyond the bounds of possibility to find corroboration. *R. v. Wiltshire* (1910), 152 Cent. Cr. Court Sess. papers 543, 546.

The corroboration required by sec. 1002 of the Code may result from any evidence which tends to give certainty to the contention in support of which it is advanced. *Peterson v. The King*, [1917] 3 W.W.R. 345, 55 S.C.R. 115, 28 Can. Cr. Cas. 332; affirming *R. v. Peterson*, [1917] 1 W.W.R. 600, 27 Can. Cr. Cas. 3 (Sask.); *R. v. Scheller* (1914), 6 W.W.R. 261, 27 W.L.R. 621, 7 Sask. L.R. 239, 24 Can. Cr. Cas. 1.

Full corroboration is not required by sec. 1002; *R. v. Bannerman*, 43 U.C.Q.B. 547 (Ont.); *R. v. Farrell*, 1 Terr. L.R. 166. The complainant only needs to be "corroborated in some material particulars by evidence implicating the accused." *R. v. Daun*, 11 Can. Cr. Cas. 244. It has been laid down that where there are several issues and the statute requires "corroboration by some material evidence," it does not mean corroboration on each issue. *Parker v. Parker* (1881), 32 U.C. C.P. 113. What is required is corroboration in some material respect that will fortify and strengthen the credibility of the main witness, and justify the evidence being accepted and acted upon, if it is believed and is sufficient. *R. v. Daun*, 12 O.L.R. 227; *R. v. Wyse*, 2 Terr. L.R. 103; *R. v. Vahey*, 2 Can. Cr. Cas. 259 (Ont.). The corroboration required is not unlike that required in the case of accomplices. *R. v. Daun*, 11 Can. Cr. Cas. 244, 12 O.L.R. 227. It is not necessary that there should be corroborative evidence as to the very fact; it is enough that there shall be such as shall confirm the jury in the belief that the witness is speaking the truth. *R. v. Boyes*, 1 B. & S. 311, 320.

Where there is a question as to the date of the offence it may frequently happen that the corroboration would be applicable as to one date only, and would disappear if the jury accepted the other date. *R. v. Wann* (1912), 7 Cr. App. R. 135.

*Proof of opportunity not corroborative by itself*—Some extreme cases under which some remote acts have been held to be corroborative are to be found in decisions under the English Bastardy laws, but it has recently been affirmed that corroboration upon a bastardy charge is not to be predicated upon mere opportunity. *Burbury v. Jackson* [1916] W.N. 348, 80 J.P. 455, [1917] 1 K.B. 16.

The much-quoted case of *Cole v. Manning*, 2 Q.B.D. 611, must be read with the limitations imposed by later decisions. See *Harvey v. Anning* (1903), 87 L.T.R. 687; *re Finch*, 23 Ch. D. 267; *Radford v. Macdonald*, 18 A.R. 167 (Ont.).

It has been held in Scotland in a bastardy case that proof of opportunity of intercourse may be corroborative evidence if of such a character as to establish suspicion. *Dawson v. McKenzie* (1908), S.R. 648. But when reliance is placed upon proof of opportunity, that proof must be supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken of the opportunity. *Ridley v. Whipp* (1916), 23 Argus L.R. (Austr.) 129, 131, 22 C.L.R. 381.

*Ruling at close of prosecutor's case*—Where there is question whether or not the statutory corroboration has been supplied by the evidence for the prosecution and the trial judge rules that it has, the defence has then to decide whether to rest the case and question the trial judge's decision by a reserved case to test the point; or whether to enter into the defence and call witnesses. If the defence chooses the latter course, and if corroborative evidence sufficient to satisfy the provisions of the Code appeared in the evidence adduced for the defence, the accused could not upon a reserved case any longer take advantage of the absence of corroborative evidence at the close of the prosecution. *R. v. Wakelyn* (1913), 4 W.W.R. 170, 21 Can. Cr. Cas. 111, 23 W.L.R. 807 (Alta.); *R. v. Girvin*, 45 S.C.R. 167; *R. v. Fraser*, 7 Cr. App. R. 99.

*Corroborative circumstances disclosed in testimony of accused given on his own behalf*—If the accused gives evidence on his own behalf, that evidence may be looked at for the statutory corroboration. *R. v. Wakelyn* (1913) 4 W.W.R. 170, 23 W.L.R. 807, 21 Can. Cr. Cas. 111 (Alta.); *R. v. Fontaine*, 23 Can. Cr. Cas. 159 (Ont.); *R. v. Scheller* (1914) 6 W.W.R. 261, 263, 23 Can. Cr. Cas. 1 (Sask.); *R. v. Nash* (1914) 6 W.W.R. 1390, 23 Can. Cr. Cas. 38, 7 Alta. L.R. 449, 28 W.L.R. 960.

The corroboration in the testimony of the accused himself may consist of a circumstance admitted by the accused to which he offered an explanation of an exculpatory character, but which was of an implicating character were the testimony of the prosecutrix believed, if the court is of opinion that the explanation offered by the accused was an unreasonable one. *R. v. Fontaine*, (1914) 23 Can. Cr. Cas. 159.

*Instruction of jury as to what evidence is of a corroborative character if believed*—Where corroborative evidence is required by the Code,

it is the duty of the trial judge to instruct the jury as to what part of the evidence, if any, bears that character, if believed, and if he mis-instructs them, the matter can be reviewed on a reserved case. *R. v. McClain*, 7 W.W.R. 1134 (Alta.); *R. v. Bechtel* (1912) 2 W.W.R. 624, 21 Can. Cr. Cas. 40.

So also where there is no jury, if the judge has obviously treated as the corroborative evidence required by the Code, something which is not such, it would probably be fatal to the conviction. *R. v. McClain*, 7 W.W.R. 1134, 1137 (Alta.); per Stuart, J.

*Conviction without corroborative evidence will be set aside where Code requires corroboration*—If there is not the corroboration which sec. 1002 requires, a conviction will be quashed in a case to which that section applies. *R. v. Magnolo*, 22 B.C.R. 359, 26 Can. Cr. Cas. 419; and see *R. v. Cohen* (1914) 10 Cr. App. R. 91, 101; *R. v. Akerley* (1918) N.B.R., 30 Can. Cr. Cas. 343.

*No statutory provision as to corroborating the testimony of an accomplice; practice as to accomplice evidence*—A jury not only may, but ought, to be told that while they ought not to convict on the uncorroborated testimony of an accomplice they are strictly in law at liberty to do so if they see fit. *R. v. McClain*, 7 W.W.R. 1134, 1137 (Alta.); *R. v. Bechtel*, (1912) 2 W.W.R. 624, 21 Can. Cr. Cas. 40 (Alta.); *R. v. Akerley* (1918) 30 S.C.R. 343 (N.B.).

As to an accomplice the custom is to advise the jury that they should not find a verdict on an accomplice's evidence without corroboration in some particular material to the issue. *R. v. Baskerville*, [1916] 2 K.B. 658, 13 Cr. App. R. 81. So upon a charge of receiving stolen property, Bray, J., said, the doctrine (as to accomplices) would be done away with, if all that is required is to prove that the goods had in fact been stolen. *R. v. Crane*, (1912) 7 Cr. App. R. 113; and see *R. v. Wilson*, (1911) 6 Cr. App. R. 125; *R. v. Dimes* (1911) 7 Cr. App. R. 43.

The corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the accomplice-witness to have told the truth in matters unconnected with the guilt of the accused. *R. v. Baskerville* [1916] 2 K.B. 658, 12 Cr. App. R. 81; 86 L.J.K.B. 28; *R. v. Dumont*, (1918) 54 Que. S.C. 9, 29 Can. Cr. Cas. 442; *R. v. Quinn*, (1918) 43 O.L.R. 385.

On a trial by a judge without a jury a conviction upon the evidence of an accomplice will not be set aside for want of its corroboration. *R. v. Frank*, 16 Can. Cr. Cas. 237, 21 O.L.R. 196.

There is no error in law in receiving the evidence of a confessed accomplice who had pleaded guilty and was awaiting sentence. He is a competent witness and his competency is not affected by the fact that sentence had not been passed. *R. v. McClain*, 7 W.W.R. 1134 (Alta.). There may, however, be circumstances in which the judge will prefer to pass sentence first so as to remove the inducement which the witness

might feel in giving evidence in favour of the Crown in anticipation that the Crown would be lenient with him when moving for sentence in his case. *R. v. McClain*, *supra*, at 1138, citing *Winsor v. The Queen*, L.R. 1 Q.B. 289, 35 L.J.M.C. 161, and *R. v. Payne*, L.R. 1 C.C.R. 349. 354.

*Who is an accomplice*—An accomplice is one who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. *R. v. Ah Jim* (1905) 10 Can. Cr. Cas. 126.

The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offence for which the accused is being tried. *R. v. Ratz* (1913) 4 W.W.R. 1231, 21 Can. Cr. Cas. 343, 24 W.L.R. 908 (Sask.). An accessory before the fact is an "accomplice" within the rule requiring that the jury be warned against accepting his uncorroborated evidence. *R. v. Ratz*, 4 W.W.R. 1231; and see *R. v. Tate*, [1908] 2 K.B. 680, 77 L.J.K.B. 1043.

Where on the trial of a charge of larceny the only evidence against the defendant is that of the person who receives the stolen property, and there is a suspicion that he knew that the property was stolen, his evidence must not be left to the jury as that of an untainted witness, but they should be warned that if they think that he was an accomplice there ought to be corroboration of his story. *R. v. Jennings* (1912) 7 Cr. App. R. 242.

*Spies or informers distinguished from accomplices*—The detective or spy is in law wholly different from the accomplice. The rule that the evidence of an "approver" or accomplice requires corroboration is a rule of practice, not of law (except in certain cases where the statute is express). The rule does not apply to persons who have joined in or even provoked the crime as agents of the police or of the authorities, as ordinary spies or informers: *R. v. McCranor*, (1918) 15 O.W.N. 260; *Wigmore on Evidence*, vol. 3, sec. 2060 (*b*); *R. v. Mullins* (1848), 3 Cox C.C. 526, 7 St. Tr. N.S. 1110; *Regina v. Dowling* (1848), 3 Cox C.C. 509, 516; *Rex v. Despard* (1803), 28 How. St. Tr. 346, 489; *R. v. Bickley* (1909) 78 J.P. 289, 53 Sol. J. 402.

Where because of zeal or other reasons an officer of the law has been led to make false statements to induce the commission of an offence in order that he may be able to prosecute the offender, his testimony must be weighed in the light of the possibility that the same motives may have a tendency to induce him to colour his testimony in order to secure a conviction. *Amsden v. Rogers*, (1916) 10 W.W.R. 1337, 9 Sask. L.R. 323, 26 Can. Cr. Cas. 389, 34 W.L.R. 1174.

*Jury disregarding warning as to corroboration of an accomplice*—If, notwithstanding the caution as to an accomplice's testimony, the jury convict, without corroboration, the verdict will stand. *R. v. Betchel* (1912) 2 W.W.R. 624, 21 Can. Cr. Cas. 40 (Alta.); *R. v. Frank* (1910) 16 Can. Cr. Cas. 237, 21 O.L.R. 196, 16 O.W.R. 50; *R. v. McNulty* (1910) 22 O.L.R. 350, 17 O.W.R. 611, 17 Can. Cr. Cas. 26; *R. v. McCranor*, (1918)

15 O.W.N. 260, 261; *R. v. Cohen* (1914) 10 Cr. App. R. 91, 101; *R. v. Stubbs* (1835) 25 L.J.M.C. 16, Dears. C.C. 555, 7 Cox C.C. 48; *R. v. Boyes*, 1 B. & S. 311, 9 Cox C.C. 32; *re Meunier* [1894] 2 Q.B. 415, 18 Cox C.C. 15; *R. v. Reynolds* (1908) 1 Sask. L.R. 480, 15 Can. Cr. Cas. 209, 9 W.L.R. 299; *R. v. Dumont*, (1918) 54 Que. S.C. 9, 29 Can. Cr. Cas. 442.

*Evidence of wife of accomplice*—A strong caution should be addressed to the jury as to the reception of the evidence of the wife of an accomplice to corroborate his statement. *R. v. Payne*, (1913) 8 Cr. App. R. 171, 29 Times L.R. 25.

On the trial of an indictment one of several accomplices in the crime charged was called as a witness against the accused. His evidence was corroborated by that of the wife of another accomplice who was not called. The wife was herself innocent of any connection with the crime. Under those circumstances it was held that the jury were entitled to rely upon her evidence as good corroboration, and that the mere fact that she was the wife of an accomplice, and that her evidence was not itself corroborated by an independent witness, did not disentitle it to credit. *R. v. Willis* [1916] 1 K.B. 933, 85 L.J.K.B. 1129, 12 Cr. App. R. 44. The decision in *R. v. Neale* (1835) 7 C. & P. 168, is no longer to be considered authoritative. *R. v. Willis*, *supra*; *R. v. Payne*, *supra*.

*Corroboration of confession*—A confession properly proved in law needs no corroboration to found a conviction, although in practice there is invariably some corroboration. *R. v. Sykes*, 8 Cr. App. R. 283.

*Corroboration on perjury charge*—See secs. 170-174.

*Corroboration in seduction cases*—Code secs. 211-220.

*Corroboration in offence of "procuring"*—Code secs. 216-218.

*False marriages*—Code sec. 309.

*Forgery offences*—Code secs. 466 (definition), 468-470.

**Evidence of child not under oath received in certain cases.—Corroboration.—If false perjury.**

**1003.** Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under sec. 292 for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of

sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

*Original*—Sec. 685, Code of 1892; 53 Vict., Can., ch. 37, sec. 13.

*Corroboration of child's testimony not under oath*—It ought to be pointed out to the jury that they must not act on the evidence of the child alone, but that "there must be corroboration of it before they are entitled to regard the child's evidence at all." Per Isaacs, L.C.J., in *R. v. Murray* (1913) 9 Can. Cr. Cas. 248. The jury should be directed not to convict upon evidence given under sec. 1003, unless it is corroborated as required by sub-sec. (2). *R. v. Davies*, 85 L.J.K.B. 208, 11 Cr. App. R. 272, 25 Cox C.C. 225. Corroboration may be found in the conduct of the prisoner when accused of the offence. *R. v. Stevens* (1913) 9 Cr. App. R. 132.

That the child identified the accused after the offence may be shown by other witnesses although the child in giving unsworn testimony had not been asked about the previous identification. *R. v. Christie* [1914] A.C. 545.

The Annual Report of the Supt. of Neglected Children, Alta., 1917, page 62, says, as to the difficulty in cases where evidence must be given by children: "A child may give a very straight story, but under tense excitement and a cross-examination may fall down completely. The benefit of a doubt must be given to the accused, and because a child's evidence can be so shaken, many a guilty man goes free. From a layman's point of view, it would seem that some better way could be adopted for eliciting evidence from children. If the court itself were to ask all the questions at the suggestion of the attorneys interested in the case in an effort simply to get at the truth, greater justice would be done."

*Corroboration of child's unsworn testimony by another child's unsworn testimony*—The question whether the evidence not given on oath of one child of tender years may be corroborated by the evidence not given on oath of another child of tender years is not yet authoritatively settled.

In Alberta the decision in *R. v. Whistnant* (1912) 3 W.W.R. 486, 22 W.L.R. 762, 20 Can. Cr. Cas. 322, denies that such evidence is corroborative; and that decision was approved in *R. v. McNulty* (1914) 19 B.C.R. 109, 6 W.W.R. 315, 22 Can. Cr. Cas. 347, 27 W.L.R. 464, ex-



plaining a prior decision in *E. v. Iman Din*, 15 B.C.R. 476, 18 Can. Cr. Cas. 82. But see, *contra*, *R. v. Shorten* [1918] 3 W.W.R. 5 (Sask.). An appeal in the latter case to the Supreme Court of Canada upon another question was dismissed but there being no dissent below on this point, the appellate court had not to consider it. *R. v. Shorten*, [1918] 3 W.W.R. 10, 57 S.C.R. 118. Similarly in *E. v. Fontaine*, (1914) 23 Can. Cr. Cas. 159, the Appellate Division in Ontario found it unnecessary to consider that question because of other testimony being held sufficient to satisfy the Code provision.

*Sub-sec. (2)*—*Some "other material evidence in support thereof implicating the accused"*—In most cases the rule is that where there is a substantial corroboration of the evidence of an interested party, it confirms not only the statements which are expressly supported by the corroborating evidence, but all statements made: see *Minister of Stamps v. Townsend*, [1909] A.C. 633. That principle would be applicable to the corroboration spoken of in sec. 16 of the Evidence Act, R.S.C. 1906, ch. 145, but falls short of the "other" material evidence required by sec. 1003 (2) Crim. Code. *E. v. McGivney* (1914) 22 Can. Cr. Cas. 222 224 (B.C.); per *Irving, J.A.*; *R. v. De Wolfe*, (1904) 9 Can. Cr. Cas. 38 (N.S.); *R. v. Iman Din*, (1910) 15 B.C.R. 476, 18 Can. Cr. Cas. 82.

*Weight of testimony of young child given on oath; rule as to corroboration*—That the child had been instructed on the nature of an oath only a few days before the trial will not prevent her evidence on oath being received where the judge finds her competent to be sworn. *E. v. Armstrong*, 15 O.L.R. 47, 12 Can. Cr. Cas. 544. Even where no statutory corroboration is provided for, as to the particular offence, it is the custom of judges to warn juries not to convict a prisoner on the uncorroborated evidence of a child, although given under oath, except after the jury has weighed such evidence with extreme care. *R. v. Dossi* (1918) 87 L.J.K.B. 1024, 1026; *R. v. Graham* (1910) 4 Cr. App. R. 218; *R. v. Pitts* (1912) 8 Cr. App. R. 126; *R. v. Cratchley*, (1913) 9 Cr. App. R. 232.

*Question of corroboration generally*—See note to sec. 1002.

*Juvenile Courts*—Where Juvenile courts have been established under the Juvenile Delinquents Act, Can., 1908, ch. 40, as amended by 1912, ch. 30, and 1914, ch. 39, its provisions will control as to trials of children under sixteen years of age.

### *Sentence, Arrest of Judgment and Appeal.*

#### **Accused found guilty.—Showing cause against sentence.**

**1004.** If the jury find the accused guilty, or if the accused pleads guilty, the judge presiding at the trial shall ask him whether he has anything to say why sentence should not be

passed upon him according to law: Provided that the omission so to ask shall have no effect on the validity of the proceedings.

*Origin*—Sec. 733, Code of 1892.

*Counsel's address asking clemency*—It is at this stage of the proceedings that counsel for the prisoner addresses the court, to ask clemency for him and to advance such facts as might induce the trial judge to exercise any discretion he may have to impose a lighter sentence than the maximum, or to grant the prisoner a conditional release on "suspended sentence" under Code sec. 1081 if the case is one which comes within the terms of the latter section. The question put by the judge before sentence is not, however, directed to appeals for clemency but to legal objections against any judgment being given upon the verdict. Matters in mitigation of the offence itself should be brought out in the evidence for the defence, but other matters, such as the effect on the family of the accused, or the condition of health of the accused himself, may influence the court in determining the extent of the imprisonment to be awarded. If the question of bad health is likely to be controverted by the Crown, it is advisable to have present the physician whose certificate is relied upon as showing the impaired health of the accused, to answer any questions the judge may choose to put in verifying or testing the physician's conclusions in that regard.

*Social standing as affecting sentence*—Mr. Justice Channell, speaking for the Court of Criminal Appeal in *R. v. Cargill* (1913) 8 Cr. App. R. 224 at 231, said: "It is very desirable, if possible, to pass a sentence on a man in a good position exactly the same as on a man in a different position; it is true the sentence is harder, but the offence is correspondingly greater; the man ought to know better, and the way of meeting that is to give exactly the same sentence; the sentence is worse, but by reason of the prisoner's position the offence is worse."

*Disposing of other admitted offences at time of sentence*—The judge, in sentencing a prisoner for an offence, is entitled to, and it is desirable that he should take into consideration any other charge of the same character which the prisoner admits, even though the prisoner may not have been committed for trial on such other charge. Where the other offence is not admitted by the prisoner, the judge ought not to take it into consideration. In cases where the other offence of the same character is admitted, and there has been a committal in respect of it, the judge should be satisfied that the prosecution consent to it being taken into consideration, and even then he ought not, as a matter of course, to take it into consideration. If there has been a committal in another county, or in respect of a different class of offence, and the prosecution does not consent, the other offence ought not to be taken into consideration; and, even where the prosecution consent, such other offence, although of the same class, if there has been a committal in

respect of it in another county, should be left to be dealt with in the other county. *Rex v. McLean*, [1911] 1 K.B. 332, 27 Times L.R. 138.

Leave may be given to the Crown after verdict to adduce evidence of previous convictions of the accused for the information of the court in determining the punishment. *R. v. Bowluk*, 24 Can. Cr. Cas. 127, 8 W.W.R. 995; *R. v. Bonnevie*, 10 Can. Cr. Cas. 376.

It was said in a Manitoba case that when a previous conviction is not charged in the indictment or information, neither a judge nor a magistrate has any right to ask a prisoner, after conviction, whether he had been previously convicted or not, either with the view of ascertaining whether the prisoner is liable to any increased punishment in such case, or with the view of determining what the proper sentence within the ordinary maximum provided by the statute in the particular case, should be. If a more onerous penalty is provided by statute in case there has been a previous conviction, it is to be applied only where the previous conviction has been charged in the indictment or information; for example, the additional punishment for theft after a previous conviction for theft. Code sec. 386 (2); *Rex v. Edwards*, 17 Man. L.R. 288, 13 Can. Cr. Cas. 202.

The habit of acting on statements as to prior convictions shown in the police calendar, but not strictly proved or admitted, in deciding upon the punishment, was deprecated in *R. v. Metcalfe*, 25 T.L.R. 512. *R. v. Everitt*, 8 Cr. App. R. 156, and *R. v. Palmer*, 8 Cr. App. R. 245; so also as to statements made by a police officer as to offences supposed to have been committed by the prisoner, but not admitted by him where there had been no prosecution for them. *R. v. Brooks*, 8 Cr. App. R. 111, 29 Times L.R. 152; *R. v. Everitt*, 8 Cr. App. R. 156.

*Evidence of motive after plea of guilty*—When a prisoner pleads guilty the judge may, before passing sentence, in order to form an opinion as to the degree of culpability, hear evidence as to the motive which induced the prisoner to commit the offence; but where the offence is, by statute, punishable by a more severe sentence if accompanied by circumstances of aggravation, such circumstances may be taken into account in passing sentence only if they have been charged in the indictment and been proved to the satisfaction of the jury or admitted by a plea of guilty. *R. v. Bright*, [1916] 2 K.B. 441, 12 Cr. App. R. 69, 115 L.T. 488.

*Character evidence given by police as affecting sentence*—Police officers in giving evidence of a prisoner's character after conviction, must distinguish carefully between information within their own knowledge and information supplied to them, and between statements of fact and statements of opinion. *R. v. Stratton*, 10 Cr. App. R. 35.

For the purpose of sentence, previous acquittals should be wholly disregarded. *R. v. Josephson*, 10 Cr. App. R. 8.

*Awarding costs of prosecution on conviction*—On conviction for any indictable offence, the court may add to the sentence an order that the

person convicted shall pay the costs or expenses incurred if the court sees fit to do so, including an allowance for loss of time. Sec. 1044, which see as to payment from official fund in certain cases pending realization from accused.

*Presence of accused at time of sentence*—The rule at common law is that when any corporal punishment is to be inflicted the defendant must be personally before the court at the time of pronouncing the sentence. 25 Am. & Eng. Encyc., 2nd ed., 296; *Rex v. Harris*, 1 Ld. Raym. 267; *Reg. v. Templeman*, 1 Salk. 56. When a fine only is to be imposed it is discretionary with the court to require the presence of the defendant when sentence is rendered. *Reg. v. Templeman*, 1 Salk. 56; *Duke's case*, 1 Salk. 400; *Rex v. Hann*, 3 Burr. 1786; *Reg. v. Kinglake*, 18 W.R. 806.

*Maximum and minimum terms and cumulative punishments*—See secs. 1054, 1055.

*Commencement of sentence*—The Penitentiaries Act, R.S.C. 1906, ch. 147, provides that every one who is sentenced to imprisonment in a penitentiary shall be subject to the provisions of the statutes relating to such penitentiary, and to all rules and regulations lawfully made with respect thereto. Also that the term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence; but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced. (Sec. 43.)

A similar provision as to the commencement of sentence is made as regards sentences to prisons and reformatories by the Prisons Act, R.S.C. 1906, ch. 148, sec. 3.

Where the different counts in an indictment refer to and charge what is really the same offence the practice is either to render sentence on each count to run concurrently (*Archbold's Crim. Pldg.*, 13th ed., 62), or to render a single sentence upon all the counts for the entire offence. *Ryalls v. Reg.*, 11 Q.B. 795, 3 Cox C.C. 254; *O'Brien v. Reg.*, 2 Cox C.C. 122; and see *Kelly v. The King*, [1917] 1 W.W.R. 463, 54 S.C.B. 220, 27 Can. Cr. Cas. 282; *R. v. Kelly*, [1917] 1 W.W.R. 46, 27 Can. Cr. Cas. 94; *R. v. Norman* [1915] 1 K.B. 341; *R. v. Lockett*, [1914] 2 K.B. 720, 83 L.J.K.B. 1193.

*Certified copy of sentence to penitentiary a sufficient warrant*—The penitentiary warden is to receive the convict without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried, and certified by a judge or by the clerk or acting clerk of such court. Penitentiaries Act, R.S.C. 1906, ch. 47, sec. 44.

The certified copy of sentence is sufficient warrant for the imprisonment of a convict in the penitentiary, and it is not necessary that it should contain every essential averment of a formal conviction. Where the venue is mentioned in the margin of a commitment, in the case of an offence which does not require local description, it is not necessary

that the warrant should describe the place where the offence was committed. A warrant of commitment to a penitentiary need not state the time from which the term of imprisonment shall begin to run, as under the Penitentiaries Act terms of imprisonment commence on and from the day of the passing of the sentence. *Ex parte Smitheman* (*Smitheman v. The King*) 35 Can. S.C.R. 189, 490, 9 Can. Cr. Cas. 10, 17.

If the certificate of sentence to imprisonment in a penitentiary is irregular for omission of the date of sentence, leave may be given on a habeas corpus motion to return an amended certificate correcting the omission. *R. v. Wright*, 10 Can. Cr. Cas. 461.

*Punishments and disabilities*—See sec. 1027 *et seq.*

*Remission in part for good conduct in penitentiary*—See Penitentiaries Act, R.S.C. 1906, ch. 147, sec. 64.

A convict in a penitentiary may provisionally earn a remission of part of his sentence by good conduct duly certified in pursuance of the Penitentiary Regulations of November, 1898; but remissions so earned are subject to forfeiture under such rules and this without any hearing in the nature of a trial or any right of the convict to be heard. *R. v. Huckle*, 23 Can. Cr. Cas. 73, 6 O.W.N. 661.

*Prima facie* the warden and officers of a penitentiary are to determine questions of remission of part of sentence under the Penitentiary Regulations of November, 1898, for good conduct of the convict while in the prison, and also questions of the forfeiture of remissions earned, subject to review and sanction by the Minister of Justice under such regulations; it is not open to the court on habeas corpus to enquire into the validity of a direction contained in a report duly approved by the Minister forfeiting on the ground of misconduct the periods of remission previously earned by the convict. *Ibid.*

*Proving previous convictions after verdict and before sentence*—

After conviction, and on the accused coming up for sentence, the Crown may put in certified copies of previous convictions against the accused and proof of identity in each case with a view to asking a severe sentence. *R. v. Rowluk*, 8 W.W.R. 995, 24 Can. Cr. Cas. 127 (*Man.*).

#### Sentence justified by any count.

**1005.** If one sentence is passed upon any verdict of guilty on more counts of an indictment than one, the sentence shall be good if any of such counts would have justified it.

*Origin*—Sec. 626, Code of 1892.

#### Where sentence carried out when venue changed.

**1006.** When any sentence is passed upon any person after a trial had under an order for changing the place of trial, the court may in its discretion, either direct the sentence to be

carried out at the place where the trial was had or order the person sentenced to be removed to the place where his trial would have been had but for such order, so that the sentence may be there carried out.

*Origin*—Sec. 733-4, Code of 1892; R.S.C. 1886, ch. 174, sec. 246.

**Motion in arrest of judgment.—Sentence during sitting of court.—  
Recognizance to appear for sentence.**

**1007.** The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence.

2. The court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the court of appeal as hereinafter provided.

3. If the court decides in favour of the accused, he shall be discharged from that indictment.

4. If no such motion is made, or if the court decides against the accused upon such motion, the court may sentence the accused during the sittings of the court, or the court may in its discretion discharge him on his own recognizance, or on that of such sureties as the court thinks fit, or both, to appear and receive judgment at some future court or when called upon.

5. If sentence is not passed during the sittings, the judge of any superior court before which the person so convicted afterwards appears or is brought, or if he was convicted before a court of general or quarter sessions, the court of general or quarter sessions at a subsequent sittings may pass sentence upon him or direct him to be discharged.

\* *Origin*—Sec. 733, Code of 1892.

*Motion in arrest of judgment*—Subject to the limitations of Code secs. 898 and 1010, the accused may, under sec. 1007, sub-sec. (1), before sentence, move in arrest of judgment, on the ground that the indictment does not, after amendment, if any, state any indictable offence. There seems to be another ground for arrest of judgment still open to the accused under uncommon circumstances, not affected by secs. 898 or 1010, namely that after indictment found and before judgment pronounced, the statute on which the indictment is framed had been repealed. *Bowen-Rowlands on Indictments*, p. 161; *R. v. St. Mawgan*, 8 A. & E. 496, 7 L.J.M.C. 98; *R. v. Denton*, 18 Q.B. 761, 21 L.J.M.C. 20. The question of the court's jurisdiction is not properly raised by a

motion in arrest of judgment. *R. v. Hogle* (1896) 5 Can. Cr. Cas. 53. 5 Que. Q.B. 59. See Code sec. 1015 as to appeal.

Sec. 942 declares the right of the accused to make full answer and defence after the close of the case for the prosecution. The jury having found the facts against him by a verdict of guilty, he may still apply to the court to withhold sentence, i.e., in arrest of judgment, on the ground that the indictment does not state any indictable offence (Cr. Code sec. 1007), notwithstanding the objection taken before plea and notwithstanding any amendment made under Cr. Code sec. 898. In practice a formal defect apparent on the indictment is amended on the motion to quash or the filing of a demurrer. As to the scope of the statutory power of the court to amend the indictment, see note to sec. 898. A distinction is to be made between a count which imperfectly states the offence, and which is in that sense a defective count, and a count in which there is a total omission of a necessary averment. In the former case the defect is generally curable by amendment, and objection must be taken by demurrer or motion to quash; Code sec. 898; and the court may amend the defect apparent on the face of the indictment. Sec. 898. Failure to demur or to move to quash will prevent the accused from afterwards moving in arrest of judgment for such apparent defect which, had it been raised by demurrer or motion to quash, might have been amended by the court.

If, on the other hand, the indictment did not charge an offence at all, it would not be amendable; *R. v. Flynn*, (1878) 18 N.B.R. 321; *R. v. Bainbridge* (1918) 42 O.L.R. 203; *R. v. Jackson* (1917) 40 O.L.R. 173; and see *R. v. Quinn* (1918) 43 O.L.R. 385.

The verdict would not cure a total omission of an averment essential to disclose a crime as distinguished from its being essential to give particulars of the crime. See *R. v. Silverlock*, [1894] 2 Q.B. 766, 772, 63 L.J.M.C. 233; *Heymann v. The Queen*, L.R. 8 Q.B. 102, 12 Cox C.C. 383; *R. v. Aspinall*, 2 Q.B.D. 48, 58, 13 Cox C.C. 563, 46 L.J.M.C. 145, 149, affirming *R. v. Aspinall*, 1 Q.B.D. 730; *R. v. Lynch* [1900] 1 K.B. 144, 72 L.J.K.B. 167; *E. v. Schaefer*, (1918) 28 Que. K.B. 35, 31 Can. Cr. Cas. 22.

In cases in which the defect would not be cured by verdict, the accused might still move in arrest of judgment or take an appeal (sec. 1013 *et seq.*) in the manner which is now substituted for the former procedure on a writ of error (sec. 1014). *Heymann v. The Queen*, L.R. 8 Q.B.D. 102; *R. v. Goldsmith*, L.B. 2 C.C.R. 74, 42 L.J.M.C. 94. But it may be that such cases are not within the scope of sec. 1007 as regards arrest of judgment, and that the motion in arrest of judgment upon a non-amendable indictment is founded on the common law rather than upon sec. 1007. See opinion of Clute, J., in *R. v. Quinn*, (1918) 43 O.L.R. 385, 390; *R. v. Carr*, (1872) 26 L.C. Jur. 61 (Que.); *R. v. Deery*, (1874) 26 L.C. Jur. 129 (Que.); *R. v. Flynn* (1878) 18 N.B.R. 321.

Referring to sub-sec. 1 of sec. 1007, *Idington, J.*, in *Ead v. The*

King (1908), 13 Can. Cr. Cas. 348, at 365, 40 Can. S.C.R. 272, said: "This is not as clear as one would wish. Is it only in the case of an amended indictment that the motion lies? The very comprehensive language of section 898 shows how very limited a field is left for motions in arrest of judgment. It is quite possible that after a prisoner had pleaded instead of demurring, that the indictment might erroneously be amended by a trial judge in such a way as to render it bad in law. If he should, over-confident of his own judgment, make a mistake in refusing to allow a demurrer to an amended indictment, the only recourse the prisoner would have as of right, save objecting to the amendment and noting of it, would be this motion to arrest judgment."

*New indictment may follow an arrest of judgment*—If judgment is arrested upon an insufficient indictment, the accused may be again indicted. Vaux's case, 4 Co. B. 44a, 45b; 4 Blackstone's Com. 375.

*Prosecutor's appeal if judgment arrested*—If the court arrests the judgment and refuses to pass any sentence, the prosecutor may, without any preliminary motion for leave to appeal, move the court of appeal (sec. 2, sub-sec. (7) ) to pass a proper sentence. Sec. 1016, sub-sec. (2).

*What objections must be taken before plea*—See sec. 898.

*Sentence deferred to another sittings of court*—If the trial judge is prevented by illness from attending the sittings to which sentence had been deferred, the judge assigned to take his place may pass the sentence. R. v. Bourret (1914) 24 Can. Cr. Cas. 65.

*Arrest of judgment in defamatory libel*—See sec. 956 (2).

*Review of verdict and sentence*—The accused has a limited right of appeal on questions of law (Code sec. 1013) and may apply to the trial judge for a reserved case (Code sec. 1014) for the opinion of the Court of Appeal. If a reserved case is refused he may move for leave to appeal on the questions of law desired to be raised (Cr. Code secs. 1015-1017). If leave is granted, the Court of Appeal directs the trial judge to "state" a case, and the case so "stated" is brought up in much the same manner as a case "reserved" by the trial judge. The motion for leave to appeal is sometimes called an appeal from the refusal to reserve a case; though sub-sec. 2 uses the words "move the court of appeal for leave to appeal." This appeal, whether by case reserved or case stated, has an important qualification as regards objections to the admission or rejection of evidence and to objections that the jury was misdirected or that "something not according to law was done at the trial," and that is, that no conviction shall be set aside or new trial directed unless the appellate court is of opinion that some "substantial wrong or miscarriage" was occasioned at the trial. Code sec. 1019. It is specially provided, however, that the improper disallowance of a defendant's challenge of a juror shall entitle him to a new trial apart from this limitation as to substantial wrong. To attack the verdict on the ground that it is against the weight of evidence requires the concurrence of the trial judge. If the trial judge thinks the verdict



against the accused is perverse, he may give him leave to apply to the Court of Appeal for a new trial on the ground that "the verdict was against the weight of evidence," and the court of appeal may then direct a new trial "if it thinks fit." Code sec. 1021. Again, there is always the remedy of an application to the Crown for a remission or commutation of the sentence. For offences against the Criminal Code or other federal laws, the application will be made to the Department of the Minister of Justice, Ottawa, and the Minister has a statutory power under Code sec. 1022 to direct a new trial in certain contingencies.

The unanimous opinion of the Court of Appeal on a reserved or stated case is final, subject to a possible prerogative appeal to the Judicial Committee of the Privy Council (see note to sec. 1025), but if there is a dissent in the Court of Appeal and one or more judges answer in favour of the accused some of the questions submitted, so that the court cannot be said to be "unanimous in affirming the conviction," a further appeal will lie from the affirmance ordered by a majority in the Provincial Court of Appeal to the Supreme Court of Canada, sitting at Ottawa. See note to Code sec. 1024.

*Punishment only after being duly convicted*—See Code sec. 1027.

*Discretion as to penalty*—See Code secs. 1028 and 1029, 1035, 1044, 1048-1057.

**Woman sentenced to death while pregnant.—Inquiry as to pregnancy.**

**1008.** If sentence of death is passed upon any woman she may move in arrest of execution on the ground that she is pregnant.

2. If such a motion is made the court shall direct one or more registered medical practitioners to be sworn to examine the woman in some private place, either together or successively, and to inquire whether she is with child of a quick child or not.

3. If upon the report of any of them it appears to the court that she is so with child, execution shall be arrested until she is delivered of a child, or until it is no longer possible in the course of nature that she should be so delivered.

*Origin*—Sec. 730, Code of 1892.

*Female convict quick with child*—See 1 Chitty's Cr. Law, 759.

**Jury de ventre inspiciendo.**

**1009.** No jury *de ventre inspiciendo* shall be empanelled or sworn.

*Origin*—Sec. 731, Code of 1892.

*Jury of matrons abolished*—Sec. 1008 indicates the substituted practice.

**Judgment not to be stayed or reversed on certain grounds.—Indictment sufficient after verdict notwithstanding certain objections.**

**1010.** Judgment, after verdict upon an indictment for any offence against this Act, shall not be stayed or reversed,—

- (a) for want of a *similiter*;
- (b) by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion;
- (c) for any misnomer or misdescription of the officer returning such process, or of any of the jurors; or,
- (d) because any person has served upon the jury who was not returned as a juror by the sheriff or other officer.

2. Where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they are disjunctively stated or appear to include more than one offence, or otherwise.

*Origin*—7 Geo. IV, Imp., ch. 64, sec. 21, and see 14 and 15 Vict. (Imp.), ch. 100; 4-5 Vict. (Can.), ch. 24, sec. 47; C.S. Can. (1859), ch. 99, sec. 85; B.S.C. 1886, ch. 174, sec. 246; Code of 1892, sec. 734.

*Similiter*—The English Criminal Law Act of 1826 provided that the want of a *similiter* should not be a cause for reversal or stay of judgment. But even prior to that statute the objection that there was no joinder of issue for want of a *similiter* was not allowed in capital cases. *R. v. Oneby*, 2 Str. 766, 755; 1 Chitty's Crim. Law (1826 ed.) 481. And in misdemeanours the court would order the *similiter* to be interlined on the record. *R. v. Yousry*, [1914] W.N. 388 (n).

*Irregularities in forming the jury*—Sec. 1011 prevents certain objections to the regularity of the proceedings in selecting the jurors or preparing the jurors' book from being raised for the first time after verdict and judgment although the manner of selection involves an omission to observe statutory directions in the preparation of the jurors' book, the selecting of jury lists, the drafting of panels from the jury lists, and although the omission to observe the directions of the provincial law concerning juries may have been one in respect of the qualification of jurors. Sec. 1011 goes only to delinquencies or mistakes of the officials. See *R. v. Brown and Diggs*, 19 Can. Cr. Cas. 237, 45 N.S.R. 473, and under prior law, *R. v. Feore*, (1877) 3 Que. L.R. 219.

While sec. 1010 applies only to objections after verdict, it remains a disputed point whether sec. 1011 is similarly limited. In the majority opinion in *R. v. Morrow*, 24 Can. Cr. Cas. 310, 320, it is intimated that it is not so limited, stress being laid upon the words "shall be allowed for error upon any appeal" as indicating an objection before trial which would have to go on the record to be effective under the former writ of error. Sec. 1019 is to be read along with sec. 1011 as to grounds of challenge "to the array" and if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial will be granted. Sec. 1019; *R. v. Morrow*, 24 Can. Cr. Cas. 310, 320.

It is provided in sec. 1010, sub-sec. (d), that the judgment will not be quashed "because any person has served upon the jury who was not returned as a juror by the sheriff or other officer." This provision means that the omission of the name of a person on the panel for the term would not nullify the verdict, but the article of the Code should be construed strictly and it does not dispense with the qualification of a juror who acts. It does not deprive the prisoner of the right to be tried by twelve jurors having the required qualification. Sec. 921 of the Criminal Code enacts that: "Every person qualified and summoned as a grand or petit juror according to the laws in force for the time being in any province of Canada shall be duly qualified to serve as such juror in criminal courts in that province." Sec. 1010 dispenses with the summons (as a pre-requisite) but not with the qualification. *Lacoste, C.J.*, in *R. v. McCraw*, 12 Can. Cr. Cas. 253, at 274, 16 Que. K.B. 193.

Mere irregularity in calling together the jury, such as mere misnomer of a jurymen, is not sufficient to avoid the proceedings. But where a man duly summoned and also qualified to serve, was personated by a man who was not qualified and was not summoned, it has recently been held in England that there is a mistrial, for the accused was deprived of his legal right of peremptory challenge in respect of twelve qualified persons and of his legal right of trial by qualified jurors. *R. v. Wakefield* (1918) 87 L.J.K.B. 319, explaining *R. v. Mellor*, 27 L.J.M.C. 121, 1 Dears. & B. 468; *R. v. Tremearne* (1826), 5 B. & C. 254. [Contra, *R. v. Battista*, 21 Can. Cr. Cas. 1 (Que.)]

But it may be that the objection must have been taken in some way before the verdict was rendered and sentence passed although a challenge of a juror may be an appropriate procedure only as regards persons on the jury list. *R. v. McCraw*, 12 Can. Cr. Cas. 253, 16 Que. K.B. 193, 204; *R. v. Battista*, 21 Can. Cr. Cas. 1 (Que.); *Brisebois v. The Queen*, (1888) 15 S.C.R. 421; *R. v. Morrow*, 24 Can. Cr. Cas. 310 (Que.). As was said in *R. v. Battista*, 21 Can. Cr. Cas. 1, at 5 (Que.); "once the verdict has been rendered all those who served on the jury without objection are deemed to have been competent to serve."

**Direction as to jury or jurors directory.**

**1011.** No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting of panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case.

*Origin*—Sec. 735, Code of 1892; R.S.C. 1886, ch. 174, sec. 247.

*Irregularities in jury lists or drafting of panels*—See note to sec. 1010.

**Appeal from conviction by judge of trade conspiracy.**

**1012.** An appeal upon all issues of law and fact shall lie from any conviction by the judge without the intervention of a jury for any offence mentioned in sec. 498 to the court of appeal in the province where such conviction is made; and the evidence taken upon the trial shall form part of the record in appeal, and, for that purpose, the court before which the case is tried shall take note of the evidence, and of all legal objections thereto.

*Origin*—52 Vict., Can., ch. 41, sec. 5.

*Appeal on both fact and law in trade combine case under sec. 498*—See notes to secs. 496-498, 581. The court of appeal is to decide whether the judgment appealed from should have been an acquittal of the accused instead of a conviction, or whether, on the other hand, the judgment against him can reasonably be supported. *R. v. Clarke* (No. 2), 1 Alta. L.R. 358, 14 Can. Cr. Cas. 57, 9 W.L.R. 243.

**Appeals generally.—When appeal shall lie.—Decision final when.—Appeal in case of dissent.**

**1013.** An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under sec. 777, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the court of appeal in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the court of appeal are unanimous in deciding an appeal brought before the said court their decision shall be final.

3. If any of the judges dissent from the opinion of the majority, an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

*Origin*—Sec. 742, Code of 1892.

*"To the court of appeal"*—See definition in sec. 2, sub-sec. (7).

*Finding of insanity*—The words "if convicted," used in sec. 1013 would appear to bar an appeal against the finding of insanity brought on behalf of a person acquitted on the ground of insanity when the act was committed. *Felstead v. The King* [1914] A.C. 534, 10 Cr. App. B. 129 (H.L.), affirming *R. v. Felstead*, 9 Cr. App. R. 228; *R. v. Machardy*, [1911] 2 K.B. 1144, 28 Times L.R. 2, 6 Cr. App. R. 272. *R. v. Ireland* [1910] 1 K.B. 654, 4 Cr. App. R. 74 was overruled in *Felstead's* case; *R. v. Larkins*, 27 Times L.R. 438; and see Code secs. 966-969.

*Appeals from summary trials under sec. 777*—See note to sec. 777.

*Judicial comity between the provinces*—Macdonald, C.J.A., of the British Columbia Court of Appeal, said, in *R. v. Sam Jon*, (1914) 24 Can. Cr. Cas. 334, 20 B.C.R. 549: "Unless I were convinced beyond reasonable doubt that a decision of a Court of Appeal in another Province was erroneous, I should follow it, not only from considerations of judicial comity, but as well to the end that uniformity of decision should prevail as far as possible in respect of laws which are common to all parts of Canada."

But a decision of the highest courts in England will be followed rather than a decision at variance with it in another province. *Berlin Hardware Co. v. Colonial Investment Co.* [1918] 1 W.W.R. 378, 11 Sask. L.R. 46. Compare *Pacific Lumber v. Imperial Timber*, [1917] 1 W.W.R. 507 (B.C.).

*Appeal from Court of Appeal to Supreme Court of Canada*—Code sec. 1024.

*Yukon Territory Appeals*—For the purpose of Part XIX of the Criminal Code the court of appeal from the verdict or judgment of the Territorial Court or a judge thereof, shall be the Supreme Court of Canada. The Yukon Act, B.S.C. ch. 63, sec. 102. For the purpose of Part XIX of the Criminal Code the court of appeal from the judgment of a police magistrate in a case where his jurisdiction is dependent upon the provision of the said Part with respect to police magistrates of cities and incorporated towns shall be the Territorial Court *en banc*. The judgment of the Territorial Court upon any such appeal from a police magistrate shall be final and conclusive if the judges of the court are unanimous therein; otherwise there shall be an appeal therefrom to the Supreme Court of Canada. Yukon Act, B.S.C., ch. 63, sec. 103.

**Writ of error abolished.—Reserving questions of law.**

• **1014.** No proceeding in error shall be taken in any criminal case.

2. The court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the judge, for the opinion of the court of appeal in manner hereinafter provided.

3. Either the prosecutor or the accused may during or after the trial, either orally or in writing, apply to the court, to reserve any such question as aforesaid, and the court if it refuses so to reserve it, shall nevertheless take a note of such objection.

4. After a question is reserved the trial shall proceed as in other cases.

5. If the result is a conviction, the court may in its discretion respite the execution of the sentence or postpone sentence till the question reserved has been decided, and shall in its discretion commit the person convicted to prison or admit him to bail with one or two sufficient sureties, in such sums as the court thinks fit, to surrender at such time as the court directs.

6. If the question is reserved, a case shall be stated for the opinion of the court of appeal.

*Origin*—8-9 Edw. VII, Can., ch. 9, sec. 2; sec. 743, Code of 1892.

*Limitations of the right of appeal*—The right to invoke the jurisdiction of the courts by way of appeal from a conviction after a trial at the assizes given by sec. 1014 of the Criminal Code is a strictly limited one. The Code does not contemplate that an accused person should be entitled as of right to claim redress by way of appeal in every case in which it alleged that the trial judge has made a mistake as, for instance, in respect of a question which is left to his discretion; the appeal given is by way of case stated and the case must present some question of law. In respect of cases not falling within sec. 1014 or sec. 1021 a right is given by sec. 1022 to apply to the Minister of Justice who has power to order a new trial. *Mulvihill v. The King*, 6 W.W.R. 462, 49 S.C.R. 587, 23 Can. Cr. Cas. 194 at 196, 18 D.L.R. 217; per Duff, J.; same case below, *R. v. Mulvihill*, 5 W.W.R. 1229, 19 B.C.R. 197, 22 Can. Cr. Cas. 354, 26 W.L.R. 955.

A reserved case is to be granted only upon questions which are relevant to the verdict or judgment. *R. v. Walkem*, (1908) 14 B.C.R.

1, 14 Can. Cr. Cas. 122; *R. v. Lawt*, 47 N.S.R. 495, 22 Can. Cr. Cas. 212; *R. v. Fong Soon* [1919] 1 W.W.R. 486 (B.C.). Such a question may arise even upon a plea of guilty. *R. v. Plummer*, [1902] K.B. 339; *R. v. Brown*, 24 Q.B.D. 352, 59 L.J.M.C. 47, 16 Cox C.C. 715.

It has been doubted whether the remedy by case reserved under sec. 1014 and that by application for a new trial under sec. 1021 should both be open to the accused at the same time. *R. v. McIntyre*, 31 N.S.R. 422; *R. v. MacCaffery*, 33 N.S.R. 232, 4 Can. Cr. Cas. 193.

If the accused is not satisfied with the case reserved, it is his right to apply to have some other question reserved; and, in the event of refusal, it is his right to move for leave to appeal (sec. 1015), and "on any appeal," the Court of Appeal would have power to require the evidence, or any part of it, to be sent to it. *R. v. Beboning*, 13 Can. Cr. Cas. 405, 412.

Appeals from justices on cases stated in summary conviction matters go to the tribunal defined by sec. 705, though it may in some provinces consist of the same court. See secs. 705 and 761, and as to appeals both on the law and the facts in summary conviction cases, see Code secs. 749-760.

*"Either the prosecutor or the accused" may apply*—Where the trial judge has erred in withdrawing the case from the jury and directing a verdict of not guilty, a new trial may be ordered on a case reserved on the Crown's application. *R. v. Duggan*, 16 Man. R. 441, 12 Can. Cr. Cas. 147.

The prosecution may appeal if the judge trying a case under the "speedy trials" clauses erroneously declines to receive material evidence. *R. v. Judge (M.)*, (1915) 24 Que. K.B. 115, 24 Can. Cr. Cas. 354.

An informant, although bound over to prefer the indictment for an offence against public order cannot appeal on the dismissal of the case at the trial where the proceedings on the indictment were conducted by the Crown prosecutor; the informant is not the "prosecutor" within sec. 1014, and has no *locus standi* to appeal at least when not authorized to represent the Crown. *R. v. Fraser*, 30 O.L.R. 598, 23 Can. Cr. Cas. 140.

*Application during or after the trial*—Prior to 1909, sub-sec. (3) did not contain the words "or after." The amendment of that year, 8-9 Edw. VII, ch. 9, sec. 2, supersedes the decisions in *Ead v. The King* (1908) 40 S.C.R. 272, 13 Can. Cr. Cas. 348; *R. v. Pertella* (1908) 14 Can. Cr. Cas. 208, 14 B.C.R. 43, and *R. v. Toto*, 18 Can. Cr. Cas. 410 (Terr.), on the interpretation of the former sub-section. But even before the amendment the trial judge might, after the date of the judgment, reserve a case of his own motion. *R. v. Paquin*, 2 Can. Cr. Cas. 134 (Que.); *R. v. McGuire*, 36 N.B.R. 609, 9 Can. Cr. Cas. 554.

*"Any question of law"*—The power is to reserve any question of law arising on the trial; this means that some particular question or

questions of law must be stated. It is not a proper form of question to submit in book form before the court of appeal a record of the proceedings and evidence and to ask a general question whether or not there is anything in it which entitles the accused to have the verdict against him reversed or a new trial ordered. *R. v. Moke*, [1917] 3 W.W.R. 575, 584, 28 Can. Cr. Cas. 296 (Alta.); and see *R. v. Fong Soon* [1919] 1 W.W.R. 486 (B.C.).

It is not proper to state a reserved case questioning the weight of evidence or the jury's verdict when there is evidence to submit to the jury. Whether there is any evidence at all to submit to the jury is a question of law for the judge to determine, but as to the sufficiency of the evidence when there is evidence to submit it is for the jury to find. *R. v. Brindamour*, 11 Can. Cr. Cas. 315; *R. v. Lloyd*, 19 O.R. 352; *R. v. Winslow*, 3 Can. Cr. Cas. 215; *R. v. McIntyre*, 3 Can. Crim. Cas. 413; *R. v. Letang*, 2 Can. Cr. Cas. 505; *R. v. McCaffery*, 4 Can. Cr. Cas. 193 (N.S.).

If the trial judge has no doubt that there was evidence to go to the jury he should not reserve a case asking whether there was sufficient evidence to sustain the conviction, but should leave the accused to his remedy of an application to the court of appeal for leave. *R. v. Brindamour*, 11 Can. Cr. Cas. 315; *R. v. Letang*, 2 Can. Cr. Cas. 505; *R. v. Batterman*, (1915) 34 O.L.R. 225, 24 Can. Cr. Cas. 351.

The appellate court cannot interfere merely on the ground that a conviction is against the weight of evidence; *R. v. Bowman*, 3 Can. Crim. Cas. 410. But if there is no evidence to bring the charge within the terms of the Code, the conviction is contrary to law, and cannot be sustained. *R. v. Wilkes*, 11 Can. Cr. Cas. 226 at 229, 7 O.W.R. 854.

Where the question is not merely as to the sufficiency of evidence but of no evidence, it is a question of law which may be raised by an appeal. *R. v. Lai Ping*, (1904) 11 B.C.R. 102; *R. v. DeMeesquito* (1915) 9 W.W.R. 113, 117; *R. v. White* (1914) 24 Can. Cr. Cas. 74.

The Crown will not be given leave to appeal as on a question of law when the case was dismissed for insufficiency of the evidence adduced to prove an essential ingredient of the offence. *R. v. Jacobs*, (1917) 26 Que. K.B. 382, 30 Can. Cr. Cas. 80; *R. v. White*, (1914) 24 Can. Cr. Cas. 74, 21 Rev. Leg. 23 (Que.).

But the lack of legal evidence to support a conviction raises a question of law on which the person convicted may appeal. *R. v. Howe*, (1913) 42 N.S.R. 378, 24 Can. Cr. Cas. 215; *R. v. Winslow*, 12 Man. R. 649, 3 Can. Cr. Cas. 215, *R. v. McIntyre*, 31 N.S.R. 422, 3 Can. Cr. Cas. 413. The question of law on a trial without a jury is not whether the judge came to a proper conclusion on the evidence, but whether there was any evidence upon which the accused could properly be convicted. *R. v. McBrady* (1919) 15 O.W.N. 369; *R. v. Green*, (1918) 29 Can. Cr. Cas. 425 (Alta.).



A direction to the jury that there was competent evidence raises a question of law as to the competency. *Rivet v. The King*, 24 Que. K.B. 559, 25 Can. Cr. Cas. 235, 27 D.L.R. 695.

As to the regularity of a magistrate's inquiry, after conviction, into previous convictions against the accused upon a question of suspended sentence under Code sec. 1081, doubt was expressed in *R. v. Bonnevie*, 10 Can. Cr. Cas. 376, 38 N.S.R. 560, whether such was a proper subject for a reserved case.

Where a reserved case is improperly framed, so as to ask a mixed question of law and fact, it should be remitted for correction. *R. v. Wakelyn*, (1913) 4 W.W.R. 170, 21 Can. Cr. Cas. 111, 23 W.L.R. 807.

In *R. v. Barnes*, 42 N.S.R. 55, 13 Can. Cr. Cas. 301, the majority opinion was for declining jurisdiction on a case reserved in respect of a statement alleged by affidavits of two jurors to have been made to the jury by the sheriff having them in charge (but denied by him) because the case reserved sent up the affidavits to the court of appeal without any finding of the disputed fact. It was considered that the appeal court had no jurisdiction to decide the preliminary question of fact which the trial judge had referred to it along with the question of law which would arise only if the finding of fact was in accord with the jurors' affidavits. *R. v. Barnes*, *supra*.

Where a reserved case before the court of appeal does not reserve all the questions which that court thinks should have been reserved it may direct that a case be re-stated by the trial court so as to bring up all the questions. *R. v. Bleiler*, [1917] 1 W.W.R. 1459, 1463, 10 Alta. L.R. 520, 28 Can. Cr. Cas. 9.

If some of the questions reserved for the court of appeal are based upon an incorrect statement of the facts disclosed by the accompanying records of the trial so that the objections raised fail because such questions import premises inconsistent with the facts, the court of appeal will give no answer to the objectionable questions, but deal only with the others. *R. v. Moke*, [1917] 3 W.W.R. 575, 583, 28 Can. Cr. Cas. 296.

*Whether second appeal lies on other grounds*—It is doubtful whether there is power to entertain a second appeal brought on new grounds after the disposal of the first appeal. *R. v. Bela Singh* (1915) 22 B.C.R. 321, 27 Can. Cr. Cas. 40. Whether there is power or not to entertain successive appeals, such a practice is not to be encouraged. *R. v. Bela Singh*, *supra*.

*Misdirection and non-direction*—Under some circumstances non-direction to a jury upon a particular point may be, substantially and in effect, a misdirection, and so involve a question of law founding an appeal under Code secs. 1013, 1014. *R. v. Murray and Mahoney*, [1917] 2 W.W.R. 805; 11 Alta. L.R. 592, 28 Can. Cr. Cas. 247.

As to misdirection in particular circumstances, see the section of the Code dealing with the punishment of the particular crime.

*Question of law as to attempts*].—The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an "attempt" to commit it, is a question of law. Code sec. 72.

*Discretion as to trial of various counts separately or jointly*].—In *R. v. Hughes*, 17 Can. Cr. Cas. 450 (Ont.), it was said that the discretion of the trial judge under Code sec. 857 in trying the different counts of an indictment jointly or separately is not subject to review by the Court of Appeal.

*Discretion in discharging a jury*].—In *R. v. Lewis* (1909), 78 L.J.K.B. 722, it was held that the discretion of a judge in discharging a jury was not a question of law for the Court of Appeal to deal with.

So also in *R. v. Bordenink* [1919] 1 W.W.R. 968 (Sask.).

*Discretion as to postponement of trial*].—Where there has been an exercise of judicial discretion in granting or refusing the postponement of a trial (*e.g.*, where the trial judge has refused a postponement, because he was of the opinion that further time should not be allowed) the propriety of the exercise of his discretion is not reviewable by an appellate court and is not properly the subject of a reserved case under sec. 1014. *Mulvihill v. The King*, (1914) 6 W.W.R. 462, 49 S.C.R. 587, 23 Can. Cr. Cas. 194; *R. v. Mulvihill* (1914) 5 W.W.R. 1229, 19 B.C.R. 197, 22 Can. Cr. Cas. 354, 26 W.L.R. 955; *R. v. Blyth*, 19 O.L.R. 386, 15 Can. Cr. Cas. 224. But if it were clear that there had not been any exercise of judicial discretion, such might constitute an error of law upon which an appeal would lie. *Mulvihill v. The King*, 6 W.W.R. 462, 49 S.C.R. 587.

*Review of amendment or refusal of amendment to indictment*].—Code sec. 890. Under 890 (3) the Code has made a determination of the judge as to allowing an amendment a question of law which may be reviewed.

*Limitation as to substantial wrong or miscarriage on the trial*].—Code sec. 1019.

*Appeal after as well as before completion of sentence*].—There appears to be no good reason why an appeal should not be had even after completion of the punishment. Leave to appeal was granted under the English Act after the sentence was served, and on the hearing the conviction was set aside. *R. v. Williams*, (1912) 8 Cr. App. R. 71 and 84.

*Bail pending appeal*].—If the trial judge has ordered bail and has fixed the amount and the method of testing the sufficiency of the sureties, the taking of the recognizance is a ministerial act which may be delegated to justices of the peace; the recognizance is subject to estreat in the trial court. *Johnston v. Attorney-General*; *The King v. Johnston*, (1910) 16 Can. Cr. Cas. 296 (N.S.).

In Quebec, it is held that the court of King's Bench of that province exercising a general criminal jurisdiction and on its appeal side being a court of criminal appeal under sec. 1014, can admit the accused to

bail pending a further appeal on disposing of the case adversely to him, if there is a dissent entitling him to take a further appeal to the Supreme Court of Canada. *R. v. Brunet*, (1917) 27 Que. K.B. 224, 30 Can. Cr. Cas. 9.. The jurisdiction exists at common law, if not conferred by the Code; *R. v. Brunet*, *supra*; but if the application is not made until after the case has been transferred to the Supreme Court of Canada, the King's Bench is then disseized of the case and will not entertain the application but leave the prisoner to apply to the Supreme Court of Canada. *R. v. Brunet*, *supra*.

See also as to the common law power to bail, *R. v. Iwanachuk* [1918] 3 W.W.R. 207 (Alta.); *ex parte Simpson* (1918) 30 Can. Cr. Cas. 334 (N.S.).

*Writ of error abolished*—The procedure by writ of error for which is now substituted the procedure by case reserved or other appeal under the Code was formerly the only mode of attacking a conviction of a court of record. *Re O'Cain*, 13 R.L. (Que.) 275. Compare *Re Sproule*, 12 Can. S.C.B. 199; *R. v. Powell*, 21 U.C.Q.B. 215 (Ont.).

*Court of appeal in Ontario*—A divisional court of the appellate division of the Supreme Court of Ontario has jurisdiction as provided by the Criminal Code. Jurisdiction Act, R.S.O. 1914, ch. 56, sec. 26.

*Yukon Territory Appeals*—See the Yukon Act, R.S.C., ch. 63, secs. 102 and 103, and note to Code sec. 1013.

#### **Refusal to reserve.—Notice of motion for leave to appeal.**

**1015.** If the court refuses to reserve the question, the party applying may move the court of appeal as hereinafter provided.

2. The Attorney General or party so applying may, on notice of motion to be given to the accused or prosecutor as the case may be, move the court of appeal for leave to appeal.

3. The court of appeal may, upon the motion and upon considering such evidence, if any, as it thinks fit to receive, grant or refuse such leave.

*Origin*—Sec. 744, Code of 1892.

*If the trial court refuses to reserve*—Possibly an unreasonable delay by the trial judge in disposing of the application to reserve a case might be considered as a refusal. Sec. 1016A provides that if the judge or magistrate "refuses or neglects" to state a case after having granted a motion for a reserved case, the appellant may, on notice, apply to the court of appeal to state a case, and if a case is stated by the court of appeal it shall be dealt with as if duly stated by the judge or magistrate. Each point which is to be raised on the appeal must be first brought before the trial judge on an application that he state a case in respect thereof; if the trial judge is applied to in respect of certain points and refuses to reserve them, those and no others are to form

the grounds upon which leave to appeal may be asked. *R. v. Carlin* (No. 2), 12 Que. K.B. 483, 6 Can. Cr. Cas. 507, and see *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, 10 Alta. L.R. 275, 27 Can. Cr. Cas. 247; *R. v. Jennings* (No. 2), [1917] 1 W.W.R. 1073, 11 Alta. L.R. 290, 28 Can. Cr. Cas. 164. If he grants a reserved case on some of the questions and declines to grant as to others, the court of appeal on giving leave to appeal on the others, will direct that the whole case be argued at the one time, so that the questions reserved and the questions stated may be disposed of in the one judgment. *Giroux v. The King*, 25 Que. K.B. 505, 27 Can. Cr. Cas. 366; compare *R. v. Bela Singh*, (1915) 22 B.C.R. 321, 27 Can. Cr. Cas. 40, in which a doubt was raised as to the jurisdiction to hear a second appeal from the same conviction although founded on different grounds.

*Trial judge should certify reasons for refusing a reserved case*—Where the trial judge refuses to reserve a case it is expedient that he give his reasons for refusal and, in doing so, certify the facts sufficiently to show the court whether the question of law has a foundation in fact. *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, 410, 10 Alta. L.R. 275, 27 Can. Cr. Cas. 247. In default of the trial judge so certifying the grounds for refusing to reserve a case, it would be proper for the appeal court to request him to do so for the purpose of informing the court of appeal sufficiently to enable it to decide whether or not the trial judge should be directed to reserve the question. *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, at 410, per Beek, J. But whether or not this practice is followed, the court of appeal may, on a survey of the certified evidence brought before them, direct the trial judge to state a case on any point which he had previously declined to reserve. *Ibid.* And without bringing up the entire evidence and in default of any certificate of the trial judge's reasons for refusing a reserved case, the facts assented to by the prosecution and the defence on the motion for leave to appeal, may be a sufficient foundation for directing the trial judge to state a case. *R. v. Murray and Mahoney* (No. 2), [1917] 1 W.W.R. 404, 410, per Beek, J.

Affidavits will not be received at the instance of the Crown to prove that the trial judge in his oral judgment acquitting the accused did so upon points of law alleged to have been wrongly decided, if the written notes of such judgment certified by the judge and filed at a later date place the ground of acquittal upon an insufficiency of proof raising a pure question of fact. *R. v. Jacobs*, (1917) 26 Que. K.B. 382, 30 Can. Cr. Cas. 80.

*Serving the notice of motion for leave to appeal*—Where the Crown is the prosecutor the notice of motion by defendant for leave to appeal will be served on the Attorney-General for the province. *R. v. Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467; *R. v. Swett*, (1914) 7 W.W.R. 608, 23 Can. Cr. Cas. 272, 29 W.L.R. 887 (Sask.). Service on the Attorney-General means service at his office, and does not require that he, in per-

son, must be handed the notice. *R. v. Swett* (1914) 7 W.W.R. 608 (so held as to a habeas corpus notice required by court rule to be served "upon the Attorney-General"); and see *Lawler v. City of Edmonton* (1914) 7 W.W.R. 291. Service on the local agent of the Attorney-General is not sufficient unless it appears that the local agent was authorized to receive service or unless counsel appears for the Attorney-General and waives the objection. *R. v. Swett*, *supra*, per Stuart, J.

"Service" of a notice need not be personal service unless the enactment so requires in terms, as "service" *simpliciter* is not so restricted; *R. v. Trottier*, 5 W.W.R. 263; 6 Alta. L.R. 451; *Re Lawler and City of Edmonton*, 7 W.W.R. 291 (Alta.); the notice at the person's residence or place of business would be equally good service. *Lawler v. City of Edmonton*, 7 W.W.R. 291; *R. v. Trottier*, *supra*.

If the Crown appeals, the notice should be served on the accused personally, as it is to be presumed that his solicitor's authority terminated with the acquittal at the trial. *R. v. Williams*, 3 Can. Cr. Cas. 9 (Ont.).

*Notice to include grounds of appeal*—The grounds of appeal should be set out in the notice of motion. *R. v. Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467.

*Granting or refusing leave to appeal on point of law*—Unless the court is unanimous in refusing leave to appeal, the refusal may work a possible injustice to the accused as regards his right of further appeal to the Supreme Court of Canada under sec. 1024. The latter section gives the convicted person a further appeal from a judgment of the court of appeal affirming a conviction if there is a dissent by any of the judges, but not otherwise. Sec. 1013, sub-sec. 3; sec. 1024. And it is doubtful whether a motion for leave to appeal although commonly called an appeal from the refusal to reserve, is within sec. 1024.

In *R. v. Angelo* (1914) 5 W.W.R. 1303, 1306, 22 Can. Cr. Cas. 204, 19 B.C.R. 261, 27 W.L.R. 108, the court of appeal refused to accede to the request of counsel on both sides on a motion for leave to appeal under sec. 1015, to hear and deal with the appeal upon the agreement of counsel and upon the evidence, in like manner as though a case had been stated under Code sec. 1016. It was there held that the court of appeal is not to substitute itself nor allow counsel to substitute themselves for the tribunal which, under sec. 1016, is to exercise the statutory duty of "stating" a case. *R. v. Angelo*, *supra*, per Martin, J.A., at 5 W.W.R. 1306.

In some jurisdictions the entire case will be disposed of on the motion for leave, if the parties consent, and it appears to the court that there is no necessity for obtaining a formal stated case. See *R. v. Armstrong*, 15 O.L.R. 47, 12 Can. Cr. Cas. 544, 546; *R. v. Blythe*, 19 O.L.R. 386, 15 Can. Cr. Cas. 224; *R. v. Daley*, 39 N.B.R. 416, 16 Can. Cr. Cas. 168, 177.

What effect this practice may have upon the right of further appeal

in case of dissent is a question which does not appear to have been decided. In case the conviction were affirmed, but one or more judges dissented, the right of further appeal might be protected by the order being made for a stated case, and on the stated case being returned, a further order being made disposing of the case in terms of the majority opinion.

In a New Brunswick case it was held that after directing a case to be stated on certain questions the court of appeal could proceed on consent of the parties to hear argument on the questions by reference to the record and evidence. *R. v. Belyea*, (1915) 43 N.B.R. 375, 24 Can. Cr. Cas. 395. [Contra, see *R. v. Angelo*, (1914) 5 W.W.R. 1303, 19 B.C.R. 261, 22 Can. Cr. Cas. 304, (Martin, J.A.); *R. v. Fong Soon*, [1919] 1 W.W.R. 486, 489, (Martin, J.A.).]

*Refusing leave if no substantial wrong or miscarriage*—Leave to appeal will be refused if the court is of opinion that no substantial wrong or miscarriage was occasioned within the terms of Code sec. 1019, and that consequently the appeal could not be successful. *R. v. McLean*, 11 Can. Cr. Cas. 283, 39 N.S.R. 147; *R. v. Lai Ping*, 11 B.C.R. 102, 8 Can. Cr. Cas. 467; *R. v. Menard*, 2 O.W.R. 900, 8 Can. Cr. Cas. 80; *R. v. Burns*, 1 O.L.R. 336; *R. v. Farduto*, 21 Can. Cr. Cas. 144, 19 R.L. 165 (Que.); and see *R. v. Letain* [1918] 1 W.W.R. 505 (Man.); *R. v. Spain*, 27 Man. R. 473, [1917] 2 W.W.R. 465; *Kelly v. The King* [1917] 1 W.W.R. 463, 54 S.C.R. 220; *Ibrahim v. The King* [1914] A.C. 599.

*Motion for leave not prosecuted*—If the appellant files his motion but makes default in proceeding with it, the court may hear the other side and dispose of it in the appellant's absence. *Abeles v. The King*, 24 Que. K.B. 260, 24 Can. Cr. Cas. 308.

*Specific questions may be ordered to be stated*—The court of appeal may formulate the questions which the trial court shall include in the stated case, or order that the precise questions he had refused to reserve shall be stated. *R. v. Coleman* (1898) 30 Ont. R. 93, 2 Can. Cr. Cas. 523; *R. v. Tansley*, (1911) 3 O.W.N. 411, 19 Can. Cr. Cas. 42; and see *R. v. Sam Chak* (No. 1), 12 Can. Cr. Cas. 495, 42 N.S.R. 372; *R. v. Belyea*, 43 N.B.R. 375, 24 Can. Cr. Cas. 395; *Giroux v. The King* (1916) 25 Que. K.B. 505, 27 Can. Cr. Cas. 366. Furthermore, the court of appeal may order that the whole record and evidence shall be sent up and that the trial judge shall certify whether or not the reasons for his judgment or ruling as set forth in the stenographer's extended notes, is correctly reported. *Giroux v. The King*, (1916) 25 Que. K.B. 505, 27 Can. Cr. Cas. 366.

**After leave granted, case to be stated.—Motions to correct sentence.**

**1016.** If leave to appeal is granted, a case shall be stated for the opinion of the court of appeal as if the question had been reserved.

2. If the sentence is alleged to be one which could not by law be passed, either party may, without leave, upon giving notice of motion to the other side, move the court of appeal to pass a proper sentence.

3. If the court has arrested judgment, and refused to pass any sentence, the prosecutor may without leave make such motion.

*Origin*—Sec. 744, Code of 1892.

*Trial judge to state a case*—See notes to secs. 1013-1015.

*Motion to revise illegal sentence*—*R. v. Edwards*, 17 Man. B. 288, 13 Can. Cr. Cas. 202.

**Procedure where judge or magistrate dies, quits office or refuses to state case.**

**1016A.** If pending the statement of a case upon a question reserved the judge or magistrate before whom the trial was had dies or quits office, or if such judge or magistrate, having reserved a question, refuses or neglects to state a case, the party upon whose application the question was reserved may on notice of motion to be given to the accused or prosecutor, as the case may be, apply to the Court of Appeal to state a case, and if a case is thereupon stated, it shall be dealt with as if it had been duly stated by such judge or magistrate.

*Origin*—8-9 Edw. VII, ch. 9, sec. 2.

**Evidence for court of appeal.—Judge's notes.—Other evidence.—  
Sending back stated case to be amended.**

**1017.** On any appeal or application for a new trial, the court before which the trial was had shall, if it thinks necessary, or if the court of appeal so desires, send to the court of appeal a copy of the whole or of such part as may be material of the evidence or the notes taken by the judge or presiding justice at the trial.

2. The court of appeal may, if only the judge's notes are sent and it considers such notes defective, refer to such other evidence of what took place at the trial as it thinks fit.

3. The court of appeal may, in its discretion, send back any case to the court by which it was stated to be amended or restated.

*Origin*—Sec. 745, Code of 1892.

*Papers accompanying the case reserved or stated*—In stated or reserved cases there should be included a statement of the judge or magistrate, naming the material submitted as part of the case, such as: indictment, charge sheet, information, evidence; in fact, all papers that may furnish information to the court.

A defendant bringing an appeal by case stated or reserved, or a motion to state a case, ought not to be prejudiced because of any part of the material, *e.g.*, stenographer's notes of evidence, upon which he has a right to base his appeal, becoming unavailable without fault on his part, but through some omission of the Crown or of the Attorney-General's department or of the officers of the court. *R. v. Jennings* (1916) 10 W.W.R. 1049, 1050, 26 Can. Cr. Cas. 270, 34 W.L.R. 1058 (Alta.); *R. v. Rimes*, (1912) 28 Times L.R. 409.

It should not be left to the court of appeal to examine the Criminal Code to see if the indictment is good under some section other than that to which the nature of the charge relates, nor to find out from the book of evidence what the facts were on which the trial judge relied. The case should be stated so as to raise the real point involved. *R. v. Davis*, (1914) 5 W.W.R. 130; *R. v. Cohen*, 6 Can. Cr. Cas. 386, 393 (N.S.); *R. v. Footier*, (1903) 13 Que. K.B. 308, 7 Can. Cr. Cas. 417. But, if of opinion that it is inexpedient to send the case back to be re-stated, the court of appeal will dispose of it although not stated with the particularity that is desirable. *R. v. Davis*, (1914) 5 W.W.R. 1340.

The verity of a statement in the record in regard to a mixed matter of law and fact essential to his jurisdiction, made by or under the direction of a judge of a court of inferior jurisdiction, although it be a court of record, is not to be conclusively presumed. *Mayor of London v. Cox*, L.R. 2 H.L. 239, 262; *Falkingham v. Victorian Railway Commissioner* [1900] A.C. 452. And on a reserved case in a criminal matter, where the jurisdiction of a substitute judge depended on the absence of the regular judge, the entry in the trial book is not conclusive evidence of the latter's absence. *Brunet v. The King*, (1918) 57 S.C.R. 83, 30 Can. Cr. Cas. 16, 23.

*Reference to evidence other than the judge's notes*—See note to sec. 1015. Sec. 1017, sub-sec. (2) applies where "only the judge's notes" of the evidence at the trial are available. Many magistrates trying cases under sec. 777 have to take their own notes of the evidence in long-hand; but courts of record usually have an official stenographer whose notes, or the material portion of them, may be certified and forwarded to the court of appeal along with the record and questions submitted.

The reference in sec. 1017 to the notes taken by the judge applies



to the notes of the evidence of witnesses and the notes of objections taken at the trial, but not to the address made by the judge to the jury. *Di Lena v. The King* (1915) 24 Que. K.B. 262, 24 Can. Cr. Cas. 301. The appellate court is bound to receive and accept the charge of the judge to the jury as transmitted by the latter with his report and has no power to order the taking of evidence or to receive evidence for the purpose of establishing that this report does not conform to what was really said by the judge to the jury. *Di Lena v. The King*, *supra*; compare *R. v. Angelo*, 19 B.C.R. 261, 22 Can. Cr. Cas. 304, 5 W.W.R. 1303, 27 W.L.R. 108; *R. v. Jun Goon*, (1916) 10 W.W.R. 25, 22 B.C.R. 381, 25 Can. Cr. Cas. 415, 33 W.L.R. 761.

A copy of the whole or of the material parts of the evidence taken at the trial, which must always be necessary where one question is whether there was any evidence on which the accused could have been lawfully convicted, or, which is another way of putting it, whether there was reasonable evidence of guilt to support a conviction. *R. v. Beboning*, 13 Can. Cr. Cas. 405, 408.

**Powers of court of appeal upon hearing.**

**1018.** Upon the hearing of any appeal under the powers hereinbefore contained, the court of appeal may,—

- (a) confirm the ruling appealed from; or,
- (b) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new trial; or,
- (c) if it considers the sentence erroneous or the arrest of judgment erroneous, pass such sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence; or,
- (d) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal, or direct a new trial; or,
- (e) make such other order as justice requires.

*Origin*—Sec. 746, Code of 1892.

*No reversal of conviction or new trial unless substantial wrong occasioned by the error*—Code sec. 1019.

*Re-stating the case reserved*—See sec. 1017.

*Reducing an illegal sentence*—In reducing an excessive sentence under sec. 1018, the court may either impose such new sentence as it considers proper under the circumstances or may discharge the accused if it considers his interim punishment to have been ample for the offence. *R. v. Williams*, 16 Can. Cr. Cas. 482, 21 O.L.R. 467.

In *R. v. Dupont*, 4 Can. Cr. Cas. 566, the court gave effect to the principle that an offender shall not escape by reason of a wrong or even clearly *ultra vires* sentence if there has been a valid adjudication of guilt, but that it is the duty of the appellate court to pronounce the proper sentence; And see *R. v. Edwards*, 17 Man. R. 288, 13 Can. Cr. Cas. 202; or to remit the case to the trial court with directions. *R. v. Sperdakes*, (1911) 40 N.B.R. 428, 24 Can. Cr. Cas. 210.

*Mistrial*—A new trial may be directed if there has been a mistrial in consequence of an erroneous ruling. This corresponds with the English practice of awarding a *venire de novo*; see *R. v. Ingleson* (1914) 11 Cr. App. R. 21; *R. v. Baker* (1912) 7 Cr. App. R. 217.

*Misdirection or non-direction*—See note to sec. 1019.

*Ordering a new trial*—The Code gives the court of appeal express power to order a new trial, a power which was not included in the English Criminal Appeal Act. The lack of that power has to be borne in mind when considering judgments of that tribunal cited as precedents for quashing a conviction. The Court of Criminal Appeal, in *R. v. Ellson* (1911) 7 Cr. App. R. 4, expressed regret that power to order a new trial had not been included and added: "If a sufficient legal reason is advanced against the conclusion of a judge and jury, we have no alternative but to quash the conviction and no further proceedings can be had." Per Darling, J., in *R. v. Ellson* (1911) 7 Cr. App. R. 4 at p. 8.

The considerations influencing the exercise of the discretion to grant a new trial in one class of cases may differ materially from those affecting it in another class. Especially may this be so in cases where the accused has been discharged and the Crown is appealing. There the considerations that would govern where the accused was convicted and was the appellant, would not necessarily be applicable: *Rex v. Karn* (1903), 5 O.L.R. 704, 6 Can. Crim. Cas. 479; *R. v. Burr*, 12 Can. Cr. Cas. 104, 13 O.L.R. 485.

*Bail on granting new trial*—Code sec. 1023, sub-sec. (3).

**If no substantial wrong, conviction stands.—Proviso as to challenges.**

**1019.** No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or mis-

carriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

*Origin*—Sec. 746, Code of 1892.

*"Substantial wrong or miscarriage"*—Where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been shown and cannot be shown that it did in fact so operate, the court of appeal may order a new trial. *R. v. Hoo Sam* (1912) 1 W.W.R. 1049, 1059 (Sask.); *R. v. Holderman* (1914) 7 W.W.R. 729, 7 Sask. L.R. 279, 23 Can. Cr. Cas. 369; *R. v. Daley*, 39 N.B.R. 411; *R. v. Doyle*, 26 Can. Cr. Cas. 197, 28 D.L.R. 649. But to come within that principle as regards errors in the judge's summing up, to the jury, it must appear that the portion of the charge objected to might have operated prejudicially to the accused upon a material issue. *R. v. Hoo Sam*, (1912) 1 W.W.R. 1049, 1059. 19 Can. Cr. Cas. 259, 20 W.L.R. 571 (Sask.); *R. v. Theriault*, (1894) 32 N.B.R. 504; *R. v. Letain*, [1918] 1 W.W.R. 505, 29 Can. Cr. Cas. 389 (Man.).

The trial judge in his summing up in a criminal case may express his own opinion upon the facts upon which the jury has to pass, but he is not to make an improper use of that right, for it is one which is capable of being abused. *R. v. Moke*, [1917] 3 W.W.R. 575, 583, 28 Can. Cr. Cas. 296 (Alta.); *R. v. Swyryda*, 15 Can. Cr. Cas. 138. The charge is to be read as a whole and not by taking isolated sentences and expressions apart from their context; and if, along with his own opinion he made it plain that the jury were to be the judges of the facts and that they were not bound to accept his views, but must exercise their own judgment, this negatives any improper use of the trial judge's right to tell the jury his own opinion of the facts. *R. v. Moke*, [1917] 3 W.W.R. 575, 583, 584, 28 Can. Cr. Cas. 296 (Alta.).

The court will exercise its discretion by dismissing an appeal where the improper admission of evidence or other irregularity was so trivial that it may safely be assumed the jury was not influenced by it. *Allen v. The King*, 44 S.C.R. 331; *R. v. Kelly* [1917] 1 W.W.R. 463, 54 S.C.R. 220; *R. v. Murray & Mahoney*, [1917] 2 W.W.R. 805; *R. v. Spain*. [1917] 2 W.W.R. 465, 477, 27 Man. R. 473, 28 Can. Cr. Cas. 113; *R. v. Baugh* (1917) 38 O.L.R. 559.

If the circumstances are such that it is impossible to say that the minds of the jury may not have been prejudicially affected by the evidence complained of, then a substantial wrong has been occasioned. This result is accomplished if what has been improperly done may have influenced the jury adversely to the accused upon a material issue; *Allen v. The King* (1911) 44 S.C.R. 331, 18 Can. Cr. Cas. 31; *R. v. May* (1915) 7 W.W.R. 1261, 23 Can. Cr. Cas. 469 (B.C.).

It would seem that the appellate court is not to take up the task of weighing evidence which it is the function of the jury to weigh and decide upon. *Allen v. The King*, 44 S.C.R. 331. [Contra: *R. v. Romano*, (1915) 24 Que. K.B. 40, 24 Can. Cr. Cas. 30.]

The test as to whether there has been a miscarriage of justice by the improper admission of evidence must be whether the jury would have come to the same conclusion if the evidence had been properly excluded. The conviction will be quashed if the appellate court is unable to say that the jury would have come to the same conclusion, and it is insufficient that the appellate court can say that the jury "might" have done so. *R. v. Christie* (1913) 9 Cr. App. R. 169. But if it would be the "merest speculation" to suppose that the jury was substantially influenced by the inadmissible evidence, if it was "highly improbable although not impossible" that such was the case, the preponderance of unquestioned evidence may be so great that the appellate court cannot conclude that there has been any miscarriage of justice substantial or otherwise. *Ibrahim v. The King*, [1914] A.C. 599, 614, 83 L.J.P.C. 185; *Makin v. Attorney-General of New South Wales*, [1894] A.C. 57, 70, 63 L.J.P.C. 41; *R. v. Kelly* [1917] 1 W.W.R. 463, 54 S.C.R. 220; *R. v. Spain*, [1917] 2 W.W.R. 465, 469, 27 Man. R. 473, 28 Can. Cr. Cas. 113. So if substantial evidence against the defendant has been improperly admitted, the court will quash the conviction, where it cannot say that the jury would have returned the same verdict on the admissible evidence alone. *R. v. Campbell* (1912) 8 Cr. App. R. 75, distinguishing *R. v. Gray* (1911) 6 Cr. App. R. 242; and see *Vaithanatha v. King-Emperor* (1913) 29 Times L.R. 709 (P.C.).

Before the appellate court can set aside a conviction or order a new trial, it must be of the opinion that "some substantial wrong or miscarriage was . . . occasioned on the trial" by something "not according to law" which "was done at the trial," or by the "misdirection given." "Miscarriage" means here, "miscarriage of justice," the terminology used in the Imperial Criminal Appeal Act of 1907, 7 Edw. VII, ch. 23, sec. 4 (1). *R. v. Duckworth*, 37 O.L.R. 197, 26 Can. Cr. Cas. 314. As is shown in many cases, there are instances of errors which are not of sufficient importance to induce the court to say that there has been a "miscarriage of justice:" per Lord Reading, L.C.J., in *Rex v. Murray*, 9 Cr. App. R. 248, at p. 249; the error "could not have affected the result:" per Bankes, J., in *Rex v. King*, 10 Cr. App. R. 44, at p. 49; in some cases of misdirection the court "cannot think that, if the jury had had a proper direction . . . they would have come to any other conclusion:" per Lord Reading, L.C.J., in *Rex v. Curnock*, 10 Cr. App. R. 207, at pp. 208, 209; but it is thoroughly established that "once it comes to the conclusion that a wrong decision has been given during the course of the case, the court should never allow the conviction to stand unless it comes to the conclusion that the jury would certainly have convicted even if such wrong decision had

never been given:" per Lord Reading, L.C.J., in *Rex v. Smallman*, 10 Cr. App. R. 1, at p. 4. That this applies to a case of misdirection or nondirection as to the applicability of evidence, is clear from *Rex v. Curnock*, *supra*; had the court not been convinced (in the *Curnock* case) that the jury would have convicted even had they been charged that the evidence, admissible as it was, was not evidence of the truth of the facts stated, it would have set aside the conviction. *R. v. Duckworth*, 37 O.L.R. 197, 26 Can. Cr. Cas. 314, 347, per Riddell, J.; and see *Rex v. Morgan*, 7 Cr. App. R. 63; *Rex v. Monk*, 7 Cr. App. R. 119; *Rex v. Higgins*, 36 N.B.R. 18, 7 Can. Cr. Cas. 68; *Rex v. Brooks* (1906), 11 Can. Cr. Cas. 188, 11 O.L.R. 525; *Rex v. Paul* (1907), 18 Can. Cr. Cas. 219; *Rex v. Lew*, 19 Can. Cr. Cas. 281; *Eberts v. The King* (1912), 20 Can. Cr. Cas. 273; *Graves v. The King*, (1912) 47 S.C.R. 568, 12 E.L.R. 332, 20 Can. Cr. Cas. 438; *Rex v. Ratz* (1913), 21 Can. Cr. Cas. 343, 24 W.L.R. 908, 21 Can. Cr. Cas. 343; *Rex v. Allen* (1913), 41 N.B.R. 516, 22 Can. Cr. Cas. 124; *Rex v. Davis* (1914), 19 B.C.R. 50, 5 W.W.R. 1340; 22 Can. Cr. Cas. 431; *Rex v. Stroud*, 7 Cr. App. R. 38; *Rex v. Yousry*, 11 Cr. App. R. 13; *Ibrahim v. The King*, [1914] A.C. 599.

*Question of misdirection*—Where there has been a misdirection in law, the court of appeal will not interfere if it is satisfied that the jury on a proper direction in law *must* have found the same verdict, but if the court comes to the conclusion that the jury *might*, but not that they *must*, have returned the same verdict, the court must give effect to its view of the summing up, and if this was a misdirection on the onus of proof (*e.g.*, where the words used were to the effect that possession of stolen goods placed on the accused the onus of proving the truth of his explanation) the conviction cannot stand. *R. v. O'Neil*, 9 W.W.R. 1321, 9 A.L.R. 365, 25 Can. Cr. Cas. 323; *R. v. Kleparczuk* [1918] 1 W.W.R. 695, 698 (Beck, J.); *R. v. Schama*, (1914) 84 L.J.K.B. 396, 11 Cr. App. R. 45; *R. v. Badash*, (1918) 87 L.J.K.B. 732; *Eberts v. The King*, 47 S.C.R. 1, 20 Can. Cr. Cas. 273; *R. v. Jagat Singh* (1915), 9 W.W.R. 514, 25 Can. Cr. Cas. 281, 32 W.L.R. 637, 21 B.C.R. 545; *R. v. Hopper*, [1915] 2 K.B. 431, 11 Cr. App. R. 136; *R. v. Schurman*, (1914) 7 W.W.R. 680, 23 Can. Cr. Cas. 365, 30 W.L.R. 56; *R. v. Bleiler*, [1917] 1 W.W.R. 1459, 1460, 11 Alta. L.R. 550, 28 Can. Cr. Cas. 9.

If the trial judge misdirected the jury as to the evidence given by the accused in his own behalf so that it was not a fair presentation of his evidence on a material point, and, on exception taken by counsel to the charge, the judge declined to alter it, the court will hesitate to say that no substantial wrong has been done. *R. v. Kleparczuk* [1918] 1 W.W.R. 695 (Alta.).

Erroneous comment on secondary matters not prejudicing the accused will not be a ground for granting leave to appeal. *R. v. Shayanaz* (1916) 25 Que. K.B. 316, 26 Can. Cr. Cas. 438; *R. v. Smith* (1915) 11 Cr. App. R. 229, 238.

It is the duty of the judge in criminal trials to take care that the

verdict of the jury is not founded upon any evidence except that which the law allows, and to warn the jury not to act upon evidence which is not legal evidence against the prisoner. If a mistake had been made by counsel, that would not relieve the judge from the duty to see that proper evidence only was before the jury. *R. v. Gibson*, 18 Q.B.D. 537; *R. v. Saunders* [1899] 1 Q.B. 490; *R. v. Bridgewater*, 74 L.J.K.B. 35, at 37; *R. v. Long*, 5 Can. Cr. Cas. 493; *R. v. Law*, 15 Can. Cr. Cas. 382; *R. v. Doyle*, 26 Can. Cr. Cas. 197 (N.S.); *R. v. Brooks*, 11 Can. Cr. Cas. 188; *R. v. Walker*, 16 Can. Cr. Cas. 77.

On a trial without a jury if the trial judge has evidently been affected by an erroneous view of the law, stated in his reasons for judgment, on a material question as to the necessity of certain evidence and the appellate court is of opinion that if he had not entertained that erroneous view, he might have reached a different conclusion on the question of guilt, it is then open to the appellate court, on a case stated or reserved, to consider the evidence and to reverse the verdict if it finds it is not supported by the evidence. *R. v. Carswell*, (1916) 10 W.W.R. 1027, 26 Can. Cr. Cas. 288, 34 W.L.R. 1042 (Alta.).

*Receiving inadmissible evidence at trial*—If the written statement of one prisoner be put in by the Crown as evidence on a joint trial, and no objection was made, the fact that such statement contained nothing but what had already been brought out on the examination and cross-examination of the prisoner signing the statement may be considered as removing any cause of prejudice to the other defendant, and a conviction of the latter may be sustained although the trial judge had not cautioned the jury that a confession by one not made in the other's presence was not evidence against that other, if the court on a review of the entire case with the admissible evidence finds that there was no substantial wrong. *R. v. Davis*, (1914) 5 W.W.R. 1340, and 6 W.W.R. 12, 19 B.C.R. 50, 22 Can. Cr. Cas. 431, 26 W.L.R. 912.

When the judge below trying a case without a jury cannot say whether certain evidence improperly rejected would have affected his decision, it may reasonably be supposed that, if given, it might have affected the mind of the trial judge in deciding whether or not the defendant was guilty, and so the exclusion resulted in "some substantial wrong" on the trial. *R. v. Prentice and Wright*, (1914) 7 W.W.R. 271, 277, 7 Alta. L.R. 479, 23 Can. Cr. Cas. 436 (Beck, J.).

If a conviction were obtained on the evidence of a witness who had not been properly sworn, or who was illegally allowed to affirm, that would seem to be a good ground for setting it aside or ordering a new trial. *R. v. Deakin*, 16 B.C.R. 271, 19 Can. Cr. Cas. 62, 19 W.L.R. 43; *R. v. Lee Tuck* (1912) 2 W.W.R. 605, 614 (Alta.). For example, if a Chinese witness declaring himself a Christian and willing to be sworn on the Bible were arbitrarily directed to take some pagan Chinese oath. *Ibid*.

*Doctrine of substantial wrong as applied to specific crimes*—Other cases dealing with specific offences and irregularities will be found by reference to the appropriate section dealing with the punishment of the offence or with the procedure, as the case may be.

**Only one count affected.—Sentence as to rest.**

**1020.** If it appears to the court of appeal that such wrong or miscarriage affected some count only of the indictment, the court may give separate directions as to each count, and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require.

2. The order or direction of the court of appeal shall be certified under the hand of the presiding chief justice or senior puisné judge to the proper officer of the court before which the case was tried, and such order or direction shall be carried into effect.

*Origin*—Sec. 746, Code of 1892.

*Verdict on inconsistent counts*—

If a verdict be not sustainable on several counts because of their inconsistency and it is clear that the accused is guilty of one of them, the court of appeal on determining that there should be punishment as for one crime only, may remit the case with a direction that punishment be imposed for that one of the various counts on which the accused was convicted, as to which the maximum sentence is the lowest and leave it to the discretion of the trial judge to fix a lower punishment as for that one offence if so disposed. *Kelly v. The King* [1917] 1 W.W.R. 463, 483, 54 S.C.R. 220, 27 Can. Cr. Cas. 282, varying *R. v. Kelly*, [1917] 1 W.W.R. 46, 27 Man. R. 105, 27 Can. Cr. Cas. 140. The formal judgment of the court of appeal that the penalty to be imposed shall be limited to the lesser offence, *i.e.*, that for which the maximum penalty is the least of all those upon which there was a verdict of guilty, makes it unnecessary for the court to consider objections relating solely to the other charges, because, if no punishment is to be imposed in respect of such others, there is ordinarily no ground to claim "substantial wrong" under Cr. Code sec. 1019, and the questions on the other charges would be academic only. *Kelly v. The King*, [1917] 1 W.W.R. 463, 484; dismissing appeal from *R. v. Kelly* [1917] 1 W.W.R. 46, 54 S.C.R. 220, 27 Can. Cr. Cas. 282.

**Motion for new trial by leave of trial judge.—Verdict against weight of evidence.**

**1021.** After the conviction of any person for any indictable offence the court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the court of appeal for a new trial on the ground that the verdict was against the weight of evidence.

2. The court of appeal may, upon hearing such motion, direct a new trial if it thinks fit.

3. In the case of a trial before a court of general or quarter sessions such leave may be given, during or at the end of the session, by the judge or other person who presided at the trial.

*Origin*].—Sec. 747, Code of 1892.

*Appeal by leave on the weight of evidence*].—A motion for a new trial on the ground that the verdict is against the weight of evidence can only be made before the Court of Appeal upon leave granted by the court before which the trial has taken place. *R. v. Fouquet*, 14 Que. K.B. 87, 10 Can. Cr. Cas. 255.

A motion with leave under sec. 1021 may be combined with a reserved case under sec. 1014. *R. v. O'Neil*, (1916) 9 W.W.R. 1321, 9 Alta. L.R. 365; *R. v. Jenkins*, 14 B.C.R. 61, 14 Can. Cr. Cas. 221. It is a procedure available only to "the person convicted," and not to the prosecution. *R. v. Phinney* (No. 2), 36 N.S.R. 288.

The power of the court under sec. 1021 is limited to granting a new trial. If there was no evidence to go to the jury, and furthermore no evidence on the whole case having regard to the evidence given after the refusal to take the case from the jury, an appeal under sec. 1018 would lie as the entire lack of evidence to support the conviction raises a question of law; and under sec. 1018 the court may direct an acquittal or direct a new trial.

Where there is substantial evidence either way in a civil case, the Court of Appeal would not be entitled to substitute what was in fact their verdict for the verdict of the jury. *Millar v. Toulmin*, 12 A.C. 746, 57 L.J.Q.B. 301; *Winterbotham v. Sibthorp* (1918) 87 L.J.K.B. 527; and see *Paquin v. Beaulerck*, [1906] A.C. 148, 75 L.J.K.B. 395. Some doubt was expressed in *R. v. Murray*, 4 O.W.N. 368, 20 Can. Cr. Cas. 197, 8 D.L.R. 208, as to whether sec. 1021 applied at all to trials without a jury because of the word "verdict" therein, but a new trial was granted on an appeal by leave from a speedy trial under Part XVIII, the Crown not raising the point, and the court acceding the benefit of the doubt to the accused on that question. In *R. v. O'Neil*, (1916) 9 W.W.R. 1321, 25 Can. Cr. Cas. 323, 352, 9 Alta. L.R. 365, it



was considered that sec. 1021 was available as well in respect of a trial without a jury as to one with a jury.

It is within the province of the jury to refuse credit to testimony and leave to apply for a new trial will be refused if that is all that can be said against the verdict. *R. v. Molleur*, 15 Que. K.B. 1; *R. v. Harris*, 2 Can. Cr. Cas. 75 (Que.).

The same rule applies in a criminal as in a civil case, on an application for a new trial on the ground that the verdict of the jury is against the weight of evidence; the question is whether the verdict was such that the jury, viewing the whole of the evidence reasonably could find a verdict of guilty. *R. v. Jenkins*, (1908) 14 B.C.R. 61, 14 Can. Cr. Cas. 221; *R. v. Jagat Singh* (1915) 9 W.W.R. 514, 32 W.L.R. 637, 21 B.C.R. 545.

It is not enough that the trial judge favoured a different verdict from that which the jury found; *R. v. Brewster* (1896), 2 Terr. L.R. 353; nor that the appellate court would have been better satisfied with a different verdict, unless it can say further that the jury arrived at an erroneous conclusion. *R. v. Hamilton*, 16 U.C.C.P. 340; *R. v. Greenwood*, 23 U.C.Q.B. 255; *R. v. Jenkins*, 14 B.C.R. 61; *R. v. Clark*, (1901) 3 O.L.R. 176; *Metropolitan Ry. v. Wright*, 11 A.C. 152, 55 L.J.Q.B. 401. But the rule as to the burden of proof in criminal cases is different from that in civil cases, because of the doctrine of reasonable doubt, and although an appellant might fail in a civil case where the probabilities based on the evidence were equal, a defendant appealing on the weight of evidence should succeed because of the onus cast on the Crown to establish the crime beyond reasonable doubt. *R. v. Schama*, (1914) 84 L.J.K.B. 396, 11 Cr. App. R. 45; *R. v. Badash* (1918) 87 L.J.K.B. 732; *R. v. Hamilton* (1918) 87 L.J.K.B. 734. In cases tried without a jury, sec. 1021 may afford a convenient means of redress where the trial judge finds that the testimony to which he gave credence was unworthy of credence, and therefore gives leave to apply to the Court of Appeal for a new trial which he himself could not give. But the fact of the very conviction which is the subject of appeal should not create a presumption against the accused casting upon him the onus of showing a balance of probability in his favour. See *R. v. Schama*, supra; *R. v. Badash*, supra. [Contra: opinion of Stuart, J., in *R. v. O'Neil*, (1916) 9 W.W.R. 1321, 9 Alta. L.R. 365.]

*Direction as to bail on granting leave to appeal*—Code sec. 1023.

*Whether the refusal of leave is reviewable as a question of law*—In *R. v. Di Francesco*, (1918) 15 O.W.N. 138, an application was made to the trial judge for leave to apply to the court of appeal for a new trial in a manslaughter case upon an affidavit of a witness contradicting testimony given by that witness on the trial. Leave was refused, but a case was reserved for the court of appeal on the question whether the trial judge was bound as a matter of law to grant the leave, and sentence was sus-

pending the hearing, the prisoner, however, remaining in custody. *R. v. Di Francesco, supra.*

*The second trial*—Probably under Part XVIII (speedy trials), the defendant could re-elect for a trial by the county judge's criminal court after the verdict of the jury at the first trial had been set aside. Such a claim was denied in *R. v. Coote* (1903) 10 B.C.R. 285; but see as to subsequent amendments of the speedy trials clauses: *Giroux v. The King*, (1917) 56 S.C.R. 63, 29 Can. Cr. Cas. 258.

**New trial by order of Minister of Justice.**

**1022.** If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising His Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper.

*Origin*—Sec. 748, Code of 1892.

*Order of Minister of Justice*—See *R. v. Sternaman*, 29 Ont. R. 33, 1 Can. Cr. Cas. 1.

**Suspension of sentence in case of appeal.—Suspension in case of sentence of death or whipping.—Bail.**

**1023.** The sentence of a court shall not be suspended by reason of any appeal, unless the court expressly so directs, except where the sentence is that the accused suffer death or whipping.

2. The production of a certificate from the officer of the court that a question has been reserved, or that leave has been given to apply for a new trial, or of a certificate from the Minister of Justice that he has directed a new trial, shall be a sufficient warrant to suspend the execution of any sentence of death or whipping.

3. In all cases it shall be in the discretion of the court of appeal in directing a new trial to order the accused to be admitted to bail.

*Origin*—Sec. 749, Code of 1892.

**Appeal to Supreme Court of Canada.—None if court unanimous.**

**1024.** Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under sec. 1013

may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the court of appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect.

3. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court or a judge thereof.

4. The judgment of the Supreme Court shall, in all cases, be final and conclusive.

*Origin*—Sec. 750, Code of 1892; 50-51 Vict., Can., ch. 50, sec. 1; 38 Vict., Can., ch. 11, sec. 49.

*Bail pending the appeal*—See *R. v. Brunet* (1917), 27 Que. K.B. 224, 30 Can. Cr. Cas. 9; and notes to secs. 1013, 1014.

*Extension of time for appeal*—The extension may be granted even after the expiration of the prescribed period. *Gilbert v. The King*, (No. 1), (1907) 38 S.C.R. 207, 12 Can. Cr. Cas. 124; applying *Vaughan v. Richardson*, 17 S.C.R. 703.

In *Mulvihill v. The King*, 6 W.W.R. 462, 49 S.C.R. 587, 23 Can. Cr. Cas. 194, 18 D.L.R. 217, the defendant applied to extend the time for service of notice of appeal. He had the right to give notice of appeal within the fifteen days which section 1024 allows. But, having permitted that time to expire without giving notice, he asked indulgence on the ground that he had not until quite recently the means to launch or prosecute the appeal which he desires to take. Anglin, J., said, that before granting an extension of time to serve the notice it is the duty of the Supreme Court of Canada to satisfy itself that the proposed appeal involves a question of law which could be reserved under section 1014 of the Code and would properly form the subject of an appeal to that court, and to refuse the leave on determining that the question is not an appealable one.

*Appeal to the Supreme Court of Canada if dissent below*—The further appeal for which sec. 1024 provides is available only if any of the judges below dissent. Code sec. 1013, sub-sec. (3); *Amer. v. The Queen*, 2 S.C.R. 592; *Rice v. The King*, 32 S.C.R. 480.

It is doubtful whether anything except the point upon which there was a judicial dissent in the provincial court, on a case reserved, can be made the subject of a further appeal to the Supreme Court of Canada. *Eberts v. The King*, (1912) 3 W.W.R. 37, 47 S.C.R. 1, 20 Can. Cr. Cas. 273; *Minchin v. The King*, (1914) 6 W.W.R. 800, 23 Can. Cr. Cas. 414; *Viau v. The Queen*, 29 S.C.R. 90; *McIntosh v. The Queen*, 23 S.C.R. 180. But a reasonable latitude will be allowed counsel on the argument in going into the case below for the purpose of elucidating the appealable ground and the question of substantial wrong under sec. 1019. *Minchin v. The King*, *supra*. It is available only to the person convicted, not to the prosecution; *Viau v. The Queen*, 29 S.C.R. 90. And the conviction must have been for an indictable offence. *Ellis v. The Queen*, 22 S.C.R. 7. Contempt of court may be either civil or criminal, and if both criminal and indictable, the restrictions of sec. 1024 will apply. *Ellis v. The Queen*, *supra*; *Copeland-Chatterson Co. v. Business Systems*, 16 O.L.R. 481.

If the conviction is found to be bad, the court may itself order the discharge of the accused; *R. v. Laliberté*, 1 S.C.R. 117; or may remit the case to the lower court with directions.

*Certiorari and prohibition*—There is no appeal in a *certiorari* or prohibition matter arising out of a criminal charge. *R. v. Davidson*. [1917] 2 W.W.R. 718, 719, 11 Alta. L.R. 491, 28 Can. Cr. Cas. 56, *arguendo*. (Alta.); *Gaynor and Greene v. U.S.A.* 36 S.C.R. 247.

*Habeas corpus jurisdiction of Supreme Court of Canada*—Judges of the Supreme Court of Canada have by statute a concurrent jurisdiction with the provincial courts to issue writs of habeas corpus for the purpose of an inquiry into the cause of commitment in "any criminal case under any Act of the Parliament of Canada," extradition matters excepted. Supreme Court Act, R.S.C. 1906, ch. 139, sec. 62.

The Supreme Court jurisdiction in that respect extends only to those cases in which the commitment has followed upon a charge of a criminal offence which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada. *Re Dean*, 3 W.W.R. 1037, 48 S.C.R. 235, 20 Can. Cr. Cas. 374; *re McNutt*, 47 S.C.R. 259, 21 Can. Cr. Cas. 157, 13 E.L.R. 109.

The case of *re Dean*, *supra*, appears to support the theory that a federal statute which merely changed the punishment under a pre-confederation law of the province is not enough to cause jurisdiction to attach under the words, "commitment in any criminal case under any Act of the Parliament of Canada"; but see *re Sproule*, 12 S.C.R. 140. The habeas corpus jurisdiction of the Supreme Court of Canada includes criminal cases in Canada under the Army Act, Imp., made a

part of the law of Canada by Canadian legislation. *Re Grey*, [1918] 3 W.W.R. 111, 57 S.C.R. 150; Militia Act, R.S.C. 1906, ch. 41; Military Service Act, 1917, Can., ch. 19; The Army Act, 44-45 Vict., ch. 58, Imp. So a commitment made by a court-martial under the authority of the Army Act, is reviewable. *Re Grey*, *supra*.

It does not extend to cases in which the commitment is for an offence at common law or an offence under a statute which was passed prior to Confederation and is still in force. *Re Dean*, *supra*; *re Sproule*, 12 S.C.R. 140.

The special habeas corpus jurisdiction under the Supreme Court Act, Can., as to criminal matters, is in no case more than a co-ordinate jurisdiction with a judge of a provincial superior court. *Re Patrick White*, 31 S.C.R. 383. A judge of the Supreme Court of Canada may refer a habeas corpus application made to him to the full court. *Re Grey* [1918] 3 W.W.R. 111, 57 S.C.R. 150; *re Richard*, 38 S.C.R. 394. This habeas corpus jurisdiction does not include the power to issue a *certiorari*, and a case may therefore have to be decided solely upon the return to the writ of habeas corpus. *Ex parte Macdonald*, 27 S.C.R. 686; *re Trepanier*, 12 S.C.R. 113.

*Canada Supreme Court Rules applicable to criminal matters*—  
(65.) Criminal appeals may be heard on a written case certified under the seal of the court appealed from, and in which case shall be included all judgments and opinions pronounced in the courts below. The appellant shall also file six typewritten or printed copies of the case, with the memorandum of the points for argument, except in so far as dispensed with by the registrar. In appeals in habeas corpus cases under Sec. 62 of the Act, a printed or typewritten case containing the material before the judge appealed from and the judgment of the said judge, together with a memorandum of the points for argument, except in so far as dispensed with by the registrar, shall be filed.

(66.) In criminal appeals and in appeals in cases of habeas corpus under Sec. 62 of the Act, unless the court or a judge in chambers shall otherwise order, the case shall be filed fifteen clear days before the day of the session of the court at which the appeal is proposed to be heard.

(67.) In cases of criminal appeals and appeals in matters of habeas corpus under Sec. 62 of the Act, notice of hearing shall be served at least five days before the day of the session at which the appeal is proposed to be heard.

(72.) Applications for writs of habeas corpus *ad subjiciendum* shall be made by motion for an order which, if the judge so direct, may be made absolute *ex parte* for the writ to issue in the first instance; or the judge may direct a summons for the writ to issue, and the judge in his discretion may refer the application to the court. Such summons and order may be in the forms D. and E. respectively set out in the schedule to these rules.

(73.) If a summons for a writ to issue is granted, a copy thereof shall be served upon the Attorney-General of the Province in which the warrant of commitment was issued, and shall be returnable within such time as the summons shall direct.

(74.) On the argument of the summons for a writ to issue, the judge may, in his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ, which order shall be a sufficient warrant to any gaoler or constable or other person for his discharge.

(75.) The writ of habeas corpus shall be served personally, if possible, upon the party to whom it is directed; or, if not possible, or if the writ be directed to a goaler or other public official, by leaving it with a servant or agent of the person confining or restraining, at the place where the prisoner is confined or restrained, and if the writ be directed to more than one person, the original delivered to or left with such principal person, and copies served or left on each of the other persons in the same manner as the writ. Such writ of habeas corpus may be in the form F. set out in the schedule to these rules.

(76.) If a writ of habeas corpus be disobeyed by the person to whom it is directed, application may be made to the judge or the court, on an affidavit of service and disobedience, for an attachment for contempt. The affidavit of service may be in the form G. set out in the schedule to these rules.

(77.) The return to the writ of habeas corpus shall contain a copy of all the causes of the prisoner's detention endorsed on the writ, or on a separate schedule annexed to it.

(78.) The return may be amended or another substituted for it by leave of the court or a judge.

(79.) When a return to the writ of habeas corpus is made, the return shall be first read, and the motion then made for discharging or remanding the prisoner, or amending or quashing the return.

*Yukon Territory Appeals*—By the Yukon Act, R.S.C., ch. 63, secs. 102 and 103, the Supreme Court of Canada is the court of appeal from the verdict or judgment of a territorial court or a judge thereof.

#### **Appeals to Privy Council abolished.**

**1025.** Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

*Origin*—Sec. 751, Code of 1892; 51 Vict., Can., ch. 43, sec. 1.

*"Notwithstanding any Royal prerogative"*—It is still a matter of

doubt whether an appeal by special leave of the Judicial Committee is abolished by sec. 1025, or whether the section is limited in its application to appeals as of right. The question was raised in *Toronto Ry. v. The King*, [1917] A.C. 630, 29 Can. Cr. Cas. 29, 33, 117 L.T.R. 579, but the Judicial Committee found it unnecessary to express an opinion on the question, as they arrived at the conclusion that on the true construction of the Code the offence was a non-criminal one, although the process of indictment (Code sec. 223) was continued in respect thereof; and that sec. 1025, "which purports to limit the prerogative," did not apply. And see *Townsend v. Cox* [1907] A.C. 514, 12 Can. Cr. Cas. 509; compare *Webb v. Outrim* [1907] A.C. 81; *Commissioners v. Baxter* (1908) 24 Times L.B. 249. The point does not appear to have been raised in *Wentworth v. Mathieu* (1900) 3 Can. Cr. Cas. 429, [1900] A.C. 212, in which summary convictions under the Temperance Act of 1864, Can., were reviewed on special leave being granted. But sec. 1025 refers only to an appeal in any "criminal case from any judgment or order of any court in Canada," and this may, of itself, exclude summary convictions by justices as distinguished from a "court." A provincial court has no jurisdiction to give leave to appeal in a case to which sec. 1025 applies. *B. v. Keizer* (No. 2) 18 Can. Cr. Cas. 39.

The original statute, 51 Vict., Can., ch. 43, was transmitted by the Governor-General of Canada, who had assented to it, to the Principal Secretary of State for the Colonies, and was allowed by her late Majesty Queen Victoria without comment. *Toronto Ry. v. The King*, *supra*.

*Privy Council practice as to criminal appeals*—For the practice of the Judicial Committee in regard to appeals in criminal matters as to which the Royal prerogative may remain unaffected by legislation, reference may be made to *Arnold v. King-Emperor*, [1914] A.C. 644, 83 L.J.P.C. 299; *Lanier v. The King* [1914] A.C. 221, 83 L.J.P.C. 116; *Balmukand v. King-Emperor* [1915] A.C. 639, 84 L.J.P.C. 136; *Vaithinatha v. King-Emperor*, 29 Times L.B. 709; *Dal Singh v. King-Emperor*, (1917) 86 L.J.P.C. 140.

It is well settled that the unwritten principles of the constitution of the British Empire restrain the Judicial Committee from being used in general as a court of review in criminal cases. *Dal Singh v. King-Emperor* (1917) 86 L.J.P.C. 140. But while the Sovereign in Council does not interfere merely on the question whether the court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in such a fashion as amounts to a denial of justice. *Dal Singh v. King-Emperor*, (1917) 86 L.J.P.C. 140.

*Extradition appeals*—Orders of discharge in habeas corpus in extradition proceedings have been reversed by the Judicial Committee of the Privy Council on an appeal by leave to that tribunal. *Attorney-General of Canada v. Fedorenko* [1911] A.C. 735; *United States v. Gaynor* [1905] A.C. 128, 74 L.J.P.C. 44.

## PART XX.

### PUNISHMENTS, FINES, FORFEITURES, COSTS, AND RESTITUTION OF PROPERTY.

#### *Interpretation.*

#### **Definition of 'court' in ss. 1081, 1082 and 1083.**

**1026.** In the sections of this Part relating to suspended sentence, unless the context otherwise requires, 'court' means and includes any superior court of criminal jurisdiction, any judge or court within the meaning of Part XVIII and any magistrate within the meaning of Part XVI.

*Origin*—Sec. 974, Code of 1892; 52 Vict., Can., ch. 44, sec. 1.

*Suspended sentence*—The sections of the Code specially referred to are secs. 1081, 1082, and 1083.

#### *Punishment Generally.*

#### **Punishment only after conviction.**

**1027.** Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act.

*Origin*—Sec. 931, Code of 1892; R.S.C. 1886, ch. 181, sec. 1.

*"After being duly convicted"*—Certain defects in conviction are curable. See secs. 1120-1132.

#### **Degrees in punishment.—Discretion.**

**1028.** Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained



in the enactment, be in the discretion of the court or tribunal before which the conviction takes place.

*Origin*—Sec. 932, Code of 1892; R.S.C. 1886, ch. 181, sec. 2.

*Application also to summary convictions*—Sec. 1028 applies to summary convictions for offences under the Code or other federal statute, as well as to indictable offences. *Ex parte Kent*, 7 Can. Cr. Cas. 447; *R. v. Robidoux*, 2 Can. Cr. Cas. 19 (Que.).

*Subject to the limitations*—When a penal statute provides everything for which the offender can be condemned thereunder it is illegal for the court to convict him otherwise than according to the precise terms of the Act. *Poulin v. Quebec*, 15 Can. Cr. Cas. 391 (Que.). Where the statute stipulates the amount of the fine and the obligation for payment of costs, and in default of payment, imprisonment for six months at hard labour, a summary conviction which states that in default of payment of the fine and the costs, the offender shall be "imprisoned for six months, according to law," is void, as not following the terms of the statute and for uncertainty in leaving it to the gaoler to interpret the law. The prisoner has a right to object that his imprisonment without hard labour is illegal if the statute under which he is condemned makes hard labour obligatory. *Poulin v. City of Quebec*, 13 Can. Cr. Cas. 391, 33 Que. S.C. 190.

Unless there is express provision to the contrary, an enactment which authorizes both fine and imprisonment for a summary conviction offence is to be construed as giving a discretion to the magistrate to impose a fine or imprisonment or both. *Ex parte Kent*, 7 Can. Cr. Cas. 447.

If a conviction imposes a fine and in default to be imprisoned, it may be inferred that the imprisonment was for the purpose of enforcing the fine, and was not a substantive punishment, and the accused would be entitled to his release on paying the fine, although the commitment or conviction did not add the usual limitation of the imprisonment by stating the detention to be "unless such fine is sooner paid." *Nelson v. The King* (1914) 6 W.W.R. 706 (Sask.).

#### **Fine or penalty in discretion of court.**

**1029.** Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be.

*Origin*—Sec. 934, Code of 1892; R.S.C. 1886, ch. 181, sec. 33.

*Fine of corporation*—See secs. 247, 248, 284, 920, 1035 (3).

*Punishments Abolished.***Deodand abolished.**

**1030.** Outlawry in criminal cases is abolished.

*Origin*—Sec. 962, Code of 1892.

*Outlawry abolished*—Outlawry was a punishment inflicted upon an offender for contumacy in refusing to render himself amenable to the justice of the King's courts; 1 Chitty, Crim. L. 347; An outlawry in treason or felony amounted to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by a jury; 4 Bl. Com. 319; 2 Hawk. C. 48, s. 22; 33 and 34 Vict. (Imp.), c. 23, s. 1; but an outlawry, in case of a misdemeanour, did not enure as a conviction for the offence, but merely as conviction of the contempt for not answering. *R. v. Tippen*, 2 Salk. 494.

Outlawry proceedings in England are practically obsolete, although provided for in the Crown Office Rules of 1886.

**Solitary confinement or pillory, abolished.**

**1031.** The punishment of solitary confinement or of the pillory shall not be awarded by any court.

*Origin*—Sec. 963, Code of 1892; R.S.C. 1886, ch. 181, sec. 35, 32-33 Vict., Can., ch. 29, secs. 81 and 94.

**Deodand abolished.**

**1032.** There shall be no forfeiture of any chattels, which have moved to or caused the death of any human being, in respect of such death.

*Origin*—Sec. 964, Code of 1892; R.S.C. 1886, ch. 181, sec. 35; 32-33 Vict., Can., ch. 29, sec. 54; 9-10 Vict. (Imp.), ch. 62.

*Deodands*—The ancient rule was that any animate or inanimate thing that caused the death of a human being should be *deo dandum*, that is, given to God, which in practice meant that the deadly thing, or its value, was handed over to the King, so that the price of blood should be, at least theoretically, devoted to pious uses or objects of charity. For this reason the ancient form of indictment for homicide stated the value of the weapon which caused the death.

**No attainder.**

**1033.** No confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence, or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture

or escheat: Provided that nothing in this section shall affect any penalty or fine imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada.

*Origin*—Sec. 965, Code of 1892; 33-34 Vict. (Imp.), ch. 23, secs. 1, 5 and 6.

*Felo de se*—An attempt to commit suicide is now viewed in England as an attempted felony. *R. v. Mann* (1914), 10 Cr. App. B. 31; *R. v. Burgess, L. & C.* 258, explained. See Code secs. 269 and 270; *Stone v. World* newspaper, 44 O.L.R. 33.

*Abolition of attainder*—Formerly a man already under sentence for a "felony" could always plead to a subsequent indictment the plea of *autrefois attain*, which operated as a bar to any further proceeding until the attainder should be reversed. See 1 Chitty Cr. Law, (1826) 464; Stephen Cr. Dig., 6th ed., 19. The plea of *autrefois attain* was abolished in England by the statute 7 and 8 Geo. IV, ch. 28. Besides the abolition of the attainder itself by Code sec. 1033 there is the restriction of special pleas by Code sec. 905.

*Convict under penitentiary sentence*—A convict serving his term in a penitentiary for an indictable offence, can make a contract dealing with his goods and lands, where there is no disability under provincial law. *Young v. Carter*, 19 Can. Cr. Cas. 489, 26 O.L.R. 576, 3 O.W.N. 1486. The Forfeiture Act (Imp.) 33 and 34 Vict., ch. 23, did not apply to Quebec or Ontario. *Dumphy v. Kehoe* (1891) 21 Rev. Leg., 119.

The variation from the word "felony" in the English Act to the phrase "indictable offence" in the Code, is because of sec. 14 of the Canadian Code, whereby the distinction between felony and misdemeanour is abolished, and all are treated as indictable offences. The grade of crime is determined under the Code by the gravity of the offence and the degree of punishment attached.

"The effect of this section of the Code is equivalent to that of the English Act, leaving undisturbed in the possession of the convict all his property. The law in Canada has not gone further, as has been done in England, so as to interpose certain obstacles on the action of the convict with respect to his property and to vest the administration thereof in a statutory official. A convict offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs; and no disability or restraint is put upon the convict, so far as dealing with his property is concerned, beyond that which attaches to other owners." *Boyd, C.*, in *Young v. Carter*, (1912) 19 Can. Cr. Cas. 489, 26 O.L.R. 576, 3 O.W.N. 1486.

*Convict under death sentence competent as witness*—A person under sentence of death is now held to be competent as a witness on the trial of another for a criminal offence. *R. v. Kuzin* (1915), 24 Can. Cr.

Cas. 66, 8 W.W.R. 166, 25 Man. L.R. 218; *R. v. Hatch*, 16 Can. Cr. Cas. 196.

In *R. v. Webb*, 11 Cox C.C. 133, Lush, J., in 1867, held that a person under sentence of death was attainted and civilly dead, and refused to allow him to be called as witness.

In the civil action of *Graeme v. Globe Printing Co.*, 10 C.L.T. 367, it was held, following *Reg. v. Webb*, that a person under sentence of death was not a competent witness. In 1865, Byles, J., admitted the evidence of a person under sentence of death. *R. v. Moggi*, London *Times*, March 3, 1865, and *R. v. Fitzgerald* (1884), unreported, referred to in *Taylor on Evidence*, sec. 1347. Formerly a person under sentence of death was not a competent witness. The conviction and sentence caused him to be attainted, and the attainder destroyed his competency. It was not the sentence of death that destroyed the competency.

In 1867, When Lush, J., ruled as above in *The Queen v. Webb*, it was doubtful whether the disability imposed by the attainder resulting from the sentence of death, had been removed by statutes 6 and 7 Vict., ch. 85, sec. 1. But in 1870, there was passed in England the Forfeiture Act, 33 and 34 Vict., ch. 23, the first section of which says:—

"No confession, verdict, inquest, or judgment of or for any treason or felony or *felo de se* shall cause any attainder." This removed all difficulty in the way of calling, as a witness, a person under sentence of death, or under any other sentence, as it prevented the following, from the conviction, of those consequences which destroyed the competency.

Substituting "indictable offence" for "felony," sec. 1033 of our Code uses exactly the same language as the English statute of 1870 above quoted. *R. v. Kuzin*, (1915) 8 W.W.R. 166, 25 Man. L.R. 218, 24 Can. Cr. Cas. 66.

### *Disabilities.*

#### **Conviction of public official vacates office.**

**1034.** If any person hereafter convicted of treason or any indictable offence for which he is sentenced to death, or imprisonment for a term exceeding five years, holds at the time of such conviction any office under the Crown or other public employment, or is entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office or employment shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person receives a free pardon from His Majesty, within two months after such conviction, or before the filling up of such office or employment, if given at a later period.

2. Every such person sentenced to imprisonment as aforesaid or on whom sentence of death has been passed which has been commuted to imprisonment, shall become, and, until he undergoes the imprisonment aforesaid or suffers such other punishment as by competent authority is substituted for the same, or receives a free pardon from His Majesty, shall continue incapable of holding any office under the Crown, or other public employment, or of being elected, or sitting, or voting, as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise.

3. The setting aside of a conviction by competent authority shall remove the disability by this section imposed.

*Origin*—Sec. 961, Code of 1892; 33-34 Vict., Imp., ch. 23, sec. 2.

#### *Fines and Forfeitures.*

**Fines in lieu of other punishment.—Fines in addition to other punishment.—Fines upon corporations.**

**1035.** Any person convicted by any magistrate under Part XVI or by any court of an indictable offence punishable with imprisonment for five years or less may be fined in addition to, or in lieu of any punishment otherwise authorized, in which case the sentence may direct that in default of payment of his fine the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence, or forthwith as the case may require.

2. Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed.

3. Any corporation, convicted of an indictable or other offence punishable with imprisonment, may in lieu of the prescribed punishment be fined in the discretion of the court before which it is convicted.

*Origin*—Sec. 958, Code of 1892; 8-9 Edw. VII, Can., ch. 9.

*Application*—Sec. 1035 is limited in its application to the summary

trial of indictable offences under Part XVI, and to the trial of indictable offences in the ordinary way. *R. v. Frizell* (1914) 22 Can. Cr. Cas. 214, 5 O.W.N. 801, 25 O.W.R. 697.

As to the offence of common assault, sub-sec. 1 of sec. 1035 is subject to the limitations of Code sec. 291, so that a fine for that offence must not exceed \$100 upon indictment, whether or not it is intended to be in lieu of a sentence of imprisonment. *R. v. Johnson*, (1913) 24 W.L.R. 468 (Alta.).

Perjury being an offence punishable with imprisonment for more than five years (sec. 174), there is no jurisdiction to impose, as the punishment therefor, a fine in lieu of imprisonment, but both imprisonment and fine may be awarded under sub-sec. 2 of sec. 1035. *R. v. Legros*, 14 Can. Cr. Cas. 161, 17 O.L.R. 425.

A fine imposed on a summary trial for theft was upheld in *R. v. Sinclair*, 10 O.W.N. 119.

*Corporations*—Before the amendment of 1909, adding sub-sec. 3, the power of imposing a fine in lieu of imprisonment was limited to cases where the maximum term of imprisonment is five years. The amendment is intended to extend this, in the case of corporations, to offences which, if committed by an individual, would be punishable with imprisonment, no matter what the maximum is.

*Finding sureties for good behaviour*—See sec. 1058.

*Ordering costs on summary trial or speedy trial*—See sec. 1044.

*Suspended sentence*—See secs. 1081-1083.

**Fines, penalties and forfeitures go to provincial treasurer.—Exception, revenue laws, etc.—Where costs of prosecution borne by Canada.**

**1036.** Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except that,—

- (a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance; and,

(b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Fund of Canada.

2. Nothing in this section contained shall affect any right of a private person suing as well for His Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit.

3. The Lieutenant Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof paid over to the treasurer of the province under this section be paid to the municipal or local authority if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to attain the objects of such law and secure its due administration.

*Origin*—Sec. 927, Code of 1892; 8-9 Edw. VII, Can., ch. 9.

*Where application of fine is controlled by statute*—If the application of a penalty imposed in a conviction is fixed by statute, the conviction itself need not specify how it is to be applied. *Nelson v. The King* (1914) 6 W.W.R. 706 (Sask.).

*Collection of fines in Ontario when payable to Provincial Treasurer*—By an Ontario Order-in-Council approved on the 30th day of September, 1915, the following directions were given:—

(1.) That it shall be the duty of the Crown Attorney of each county to supervise the collection of fines, penalties, and forfeited recognizances to which the Province is entitled and that he be authorized to receive on behalf of the Treasurer of Ontario, from sheriffs, justices of the peace and others, all moneys to which the Province is entitled for fines, penalties and forfeited recognizances.

(2.) That it shall be the duty of each Crown Attorney to pay over to the Treasurer of Ontario on or before the last day of January, April, July and October, in each year all sums of money collected by him, with the proper particulars showing how the sum remitted is made up.

(3.) That each County Attorney be further required to report half-

yearly, on or before the 15th day of May and November of each year, particulars of all moneys received by him during the half-year ending on the last day of the preceding month, or in case no money has been received during such half-year, then to report such fact to the Treasurer of Ontario, a duplicate report to be sent in each case to the Inspector of Legal Offices.

(4.) That each Crown Attorney shall be entitled to an allowance of four per cent. on the moneys so collected, such percentage to be deducted by him on the transmission of the moneys to the Treasurer of Ontario. Unless where legal proceedings are instituted under the direction of the Attorney-General, the said allowances are to cover all charges by the Crown Attorney against the Province for services under this Order.

(5.) That each sheriff shall be required to give to the Crown Attorney of his county, from time to time, without charge, full information of all process in his hands in respect to any fine, penalty or estreated recognizance to which the Province is entitled.

(6.) That the Orders-in-Council as to collection of fines, penalties and forfeited recognizances dated 9th October, 1885, and 12th November, 1912, be rescinded.

**Direction to pay fine, penalty or forfeiture to municipality.**

**1037.** The Governor in Council may, from time to time, direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration.

*Origin*—Sec. 928, Code of 1892; R.S.C. 1886, ch. 180, sec. 3.

*May direct that any fine, penalty, or forfeiture be "paid," etc.*—In the Criminal Code the words "forfeit" and "forfeiture" are used in different senses. They are used sometimes in connection with goods or things and sometimes in connection with fines, penalties, or compensation. In Code forms 32, 39, 41 and 59 the words "forfeit and pay" are used with regard to fines, penalties or compensation. And in construing the words "fine, penalty or forfeiture" as used in sec. 1037, the word "paid" shows that the words are used in a restricted sense, as meaning only pecuniary fines or forfeitures. *Christian v. Christian*, (1916) 26 Can. Cr. Cas. 260 (N.S.); and see *R. v. Johnston* (No. 1) 11 Can. Cr. Cas. 8.

*"The same shall be applied"*—The use of the words "the same shall be applied" in the latter part of the section does not extend the



scope of the section because it is "the same" thing which was to be paid which is to be applied, and if, by reason of the use of the word "paid" in the earlier part of the section, the meaning of the words "fine, penalty or forfeiture" is restricted so as not to include goods or chattels, no other meaning can be given in the latter part of the section. *Christian v. Christian*, (1916) 26 Can. Cr. Cas. 260, 268 (N.S.).

**Recovering by civil action when no other provision.—Moiety to private party when no other provision.**

**1038.** Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any Act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, in the discretion of the court, by civil action or proceeding at the suit of His Majesty only, or of any private party suing as well for His Majesty as for himself in any form of action allowed in such case by the law of the province in which it is brought, and before any court having jurisdiction to the amount of the penalty in cases of simple contract.

2. If no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to His Majesty, and the other moiety shall belong to the private party suing for the same, if any, and if there is none the whole shall belong to His Majesty.

*Origin*—Sec. 929, Code of 1892; R.S.C. 1886, ch. 180, sec. 1.

**Goods forfeited under Part VII.—Reimbursement of innocent party.**

**1039.** Any goods or things forfeited under any provision of Part VII relating to forgery of trade marks and the fraudulent marking of merchandise, may be destroyed or otherwise disposed of in such manner as the court, by which the same are declared forfeited, directs; and the court may, out of any proceeds realized by the disposition of such goods, after all trade marks and trade descriptions are obliterated, award to any innocent party any loss he may have innocently sustained in dealing with such goods.

*Origin*—51 Vict., Can., ch. 41, sec. 15.

*Forgery of trade-marks and fraudulent marking of merchandise*—See secs. 335-337, 341, 342, 486-495, 685, 1039, 1040.

*Forfeiture of goods the subject of trade-mark offence*—See sec. 491 (3).

**Costs in trade mark prosecutions.**

**1040.** On any prosecution under this Act relating to the said last mentioned provisions, the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

*Origin*—51 Vict., Can., ch. 41, sec. 16.

**Application of fines in relation to coin.**

**1041.** A moiety of any of the penalties imposed under secs. 567, 624, 625 and 626, shall belong to the informer or person who sues for the same, and the other moiety shall belong to His Majesty for the public uses of Canada.

*Origin*—R.S.C. 1886, ch. 167, sec. 34.

**Application of fines in relation to deserters or their effects.**

**1042.** One moiety of the amount of any penalty recovered under secs. 82, 83, 438, 439 or 657, shall be paid over to the prosecutor or person by whose means the offender has been convicted, and the other moiety shall belong to the Crown.

*Origin*—R.S.C. 1886, ch. 169, sec. 9.

**Application of fines in relation to cruelty to animals.**

**1043.** One moiety of every pecuniary penalty recovered with respect to any offence under sec. 542 or 543 shall be paid over to the corporation of the city, town, village, township, parish, or place in which the offence was committed, and the other moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the justices seems proper.

*Origin*—R.S.C. 1886, ch. 172, sec. 7.

***Costs, Pecuniary Compensation and Restitution of Property.***

**Costs and expenses of prosecution may be ordered to be paid by party convicted.—Also allowance for loss of time.—Source from which payment obtained.—Payable from official fund.—Reimbursement.**

**1044.** Any court by which and any judge under Part XVIII, or magistrate under Part XVI, by whom judgment is pro-

nounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, if to such court or judge it seems fit so to do.

2. Such court or judge may include in the amount to be paid such moderate allowance for loss of time as the court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable.

3. The payment of such costs and expenses, or any part thereof, may be ordered by the court or judge to be made out of any moneys taken from such person on his apprehension, if such moneys are his own, or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner, subject to the provisions of this Act, as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being be enforced.

4. In the meantime, until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not been passed; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed.

*Origin*—Sec. 832, Code of 1892.

*Constables' fees*—See 1917 Tariff under sec. 770.

#### **Successful defendant recovers costs in case of libel.**

**1045.** In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information, either by warrant of dis-

treasury issued out of the said court, or by action or suit as for an ordinary debt.

*Origin*—Sec. 833, Code of 1892; R.S.C. 1886, ch. 174, secs. 153, 154; 37 Vict., Can., ch. 38, secs. 12 and 13.

*Costs against private prosecutor on dismissal of prosecution for criminal libel*—If the charge or complaint for defamatory libel was brought by a private prosecutor, sec. 1045 leaves the judge no option, because that section declares that in such case the accused has an absolute right to recover from the complainant the costs that have been incurred, if judgment is given for the defendant. *R. v. Fournier*, (1916) 25 Can. Cr. Cas. 430, 25 Que. K.B. 556; *R. v. Gouilliquid*, 7 Can. Cr. Cas. 432.

If the costs are taxed at the criminal trial, they may be included in the judgment of the criminal court and realized as such; *R. v. Fournier*, 25 Que. K.B. 556; or may be taxed either at the criminal trial, or afterwards and made the subject of a separate civil action to realize the amount. *Mackay v. Hughes*, 19 Que. S.C. 367; *Nichol v. Pooley*, 9 B.C.R. 21; *Nichol v. Pooley*, 9 B.C.R. 363; *R. v. Nichol*, 8 B.C.R. 276.

The amount taxed in the criminal court will control. *Mackay v. Hughes*, 19 Que. S.C. 367; and the civil action may be stayed to enable the plaintiff to have the costs taxed in the criminal court if he prefers to have them taxed there. *Mackay v. Hughes*, supra. The person claiming the costs is not to be allowed to pursue both remedies at once, and if he moves an order for costs in the criminal court but gets only a part of what he asks and does not wish to adopt the order made and from which there is no provision for an appeal, he will be put on terms in commencing and prosecuting a civil action that he will abide by any order made as to the costs of the abandoned proceedings in the criminal court. *Nichol v. Pooley*, 9 B.C.R. 363, affirming *Nichol v. Pooley*, 9 B.C.R. 21.

The objection that the indictment is laid in the name of the King, and that his representative, the Attorney-General, has absolute control over the procedure, cannot avail to relieve the private prosecutor. The procedure was instigated at his instance and he must be held responsible for its incidents and its result. As was pointed out in *Regina v. Patterson* (1875) 36 U.C.Q.B. 129 (Ont.) the enactment as to costs would be a dead letter, if the use of the King's name relieved the private prosecutor from such responsibility, in as much as every criminal charge is prosecuted in this country in the name of the Sovereign and the article of the Code, to be of any use, must be read as applicable to the person at whose instance the procedure in the name of the Sovereign was set in motion. *R. v. Blackley*, 13 Que. K.B. 472; *R. v. St. Louis*, 1 Can. Cr. Cas. 144 (Que.).

*Discharge on a nol. pros.*—As in case of a trial and verdict, it is the discharge pronounced upon a *nolle prosequi* which constitutes the judgment of the court, and the discharge pronounced by the court upon a

*nolle prosequi* may constitute "the judgment for the defendant" mentioned in sec. 1045, and render the private prosecutor liable for defendant's costs. The discharge on a *nol. pros.* is not the equivalent of an acquittal, and defendant, although not liable to be further prosecuted under the existing indictment is exposed, in law, to the renewal of it for the same alleged offence, yet his discharge is a substantial judgment in his favour *quoad* that indictment, and the very fact that the prosecution may be renewed is an additional reason why effect should be given in such cases to the stipulation in the defendant's favour as to the costs incurred by him in his defense, as otherwise such right of renewal might be exercised so as to operate as an intolerable abuse. *R. v. Blackley*, 13 Que. K.B. 472, 8 Can. Cr. Cas. 405.

*Defamatory libel*—See secs. 317-334, 861, 871, 888, 905, 910-913, 934, 947, 956, 1045, 1047.

**Imprisonment in default of payment of costs on conviction for assault.—Release on levy.**

**1046.** If a person convicted on an indictment for assault, whether with or without battery and wounding, is ordered to pay costs as aforesaid, he shall be liable, unless the said costs are sooner paid, to three months' imprisonment, in addition to the term of imprisonment, if any, to which he is sentenced for the offence, and the court may, by warrant, in writing, order the amount of such costs to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner.

2. If such sum is so levied, the offender shall be released from such imprisonment.

*Origin*—Sec. 834, Code of 1892; R.S.C. 1886, ch. 174, secs. 248, 249.

**Taxation of costs on lowest scale.—Scale in civil suits.**

**1047.** Any costs ordered to be paid by a court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit.

2. If such court has no civil jurisdiction, the fees shall be those allowed in civil suits in a superior court of the province according to the lowest scale.

*Origin*—Sec. 835, Code of 1892.

*Costs of prosecution when ordered against party convicted for indictable offence*—See Code sec. 1044.

*Costs ordered against person convicted of assault*—Code secs. 1044, 1046.

*Costs against private prosecutor on dismissal of criminal libel charge*—Code sec. 1045.

**Compensation for loss of property.**

**1048.** A court on the trial of any person on an indictment may, if it thinks fit, upon the application of any person aggrieved and immediately after the conviction of the offender, award any sum of money, not exceeding one thousand dollars, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the offence of which such person is so convicted.

2. The amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment may be enforced in such and the same manner as in the case of any costs aforesaid ordered by the court to be paid.

*Origin*—Sec. 836, Code of 1892; 33-34 Vict., Imp., ch. 23, sec. 4.

*"For any loss of property"*—See definition of property in sec. 2 (32), but *quære* whether electric power fraudulently consumed in contravention of sec. 351 is "property" under sec. 1048. See *R. v. Spurdakes*, (1911) 40 N.B.R. 428, 24 Can. Cr. Cas. 210.

*Costs of prosecution may be ordered against person convicted*—See sec. 1044.

**Compensation to bona fide purchasers of stolen property.**

**1049.** When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, if it is his, a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser.

*Origin*—Sec. 837, Code of 1892; R.S.C. 1886, ch. 174, sec. 251; 30-31 Vict., Imp., ch. 35, sec. 9.

*Receiving stolen property*—See secs. 399-403, 849, 954, 993, 994, 1049, 1050.

**Restitution of stolen property.—Writs of restitution.—Restitution although no conviction.—Restitution not ordered in case of valuable security when rights of third parties intervene.—Exception of cases under secs. 358 and 390.**

**1050.** If any person who is guilty of any indictable offence in stealing, or knowingly receiving, any property, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, or is tried before a judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative.

2. In every such case the court or tribunal before which such person is tried for any such offence, shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner.

3. The court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence, although the person indicted is not convicted thereof, if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he ~~was unlawfully deprived of it~~ by such offence.

4. If it appears before any award or order is made, that any valuable security has been *bona fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court or tribunal shall not award or order the restitution of such security or property.

5. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney,

factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for any indictable offence under secs. 358 or 390 of this Act.

*Origin*—56 Vict., Can., ch. 32, sec. 1, sec. 838, Code of 1892; 21 Hen. 8, ch. 11; Larceny Act, 1861, Imp., 24-25 Vict., ch. 96, sec. 100; Larceny Act, 1869, Can., 32-33 Vict., ch. 21, sec. 113.

*Application of sec. 1050*—At Common law the larceny of a chattel did not alter the ownership; the owner was entitled to recover it, if he could. But there was this curious provision, that unless the thief was attainted by appeal of felony at the suit of the owner on fresh pursuit, the property was forfeited to the Crown. If the thief was attainted of felony the owner then had his property restored to him; and that was the only mode of recovering his property at that time. An indictment of the thief at common law did not enable the owner to get back his property. *Chichester v. Hill* (1882) 52 L.J.Q.B. 160, 15 Cox C.C. 258.

The court in *Chichester v. Hill*, supra, in deciding upon the English statute in the same terms, said that in its opinion this proviso was intended to protect the *bona-fide* holder of a "valuable security" not only against an order for restitution but against all proceedings. *Ferguson v. Kemp* [1919] 1 W.W.R. 537 (Alta.).

*Stealing or knowingly receiving "any property"*—By sec. 2, sub-sec. (32), the term property includes not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise. *Howe v. Schroeder* (1905) 1 W.L.R. 174.

"Property" includes documents giving a right to recover or receive any money or goods, the money itself or any other personal property. Sec. 2, sub-sec. (32).

*Summary order for restitution*—While the summary order for restitution authorized by sub-sec. 2 can be made only by the court or tribunal before which the trial takes place, there still remains the alternative of a civil action in any court of competent jurisdiction to establish the title of the original owner even against an innocent purchaser. *Lapointe v. Charlebois*, 42 Que. S.C. 57; *Vezina v. Brosseau*, 30 Que. S.C. 493; *Horwood v. Smith*, 2 T. R. 570; *Scattergood v. Sylvester*, 19 L.J.Q.B. 447, 15 Q.B. 506; *Moss v. Hancock*, [1899] 2 Q.B. 111; *White v. Spettigue*, 13 M. & W. 603, and see *R. v. Horan*, Irish R., 6 C.L. 293; *R. v. Mayor, etc., of London*, L.R. 4 Q.B. 371 (*Walker v. Mayor, etc., of London*, 38 L.J.M.C. 107).

If the theft be of money, evidence of the identity of the money sought to be restored will be necessary; *R. v. McIntyre*, 2 P.E.I. 154; *R. v. Haverstock*, 5 Can. Cr. Cas. 133; but an order may be made



under sec. 1049 for compensation out of money found on the prisoner although its identity with that stolen cannot be shown.

*Exceptions*—Section 358 referred to in paragraph (5) declares guilty of an indictable offence one who steals anything by any act or omission amounting to theft under secs. 355, 356 or 357, which deal respectively with theft by person required to account (sec. 355), theft by person holding power of attorney (sec. 356), and misappropriation of proceeds held under direction (sec. 357). Sec. 390 deals with the offence of criminal breach of trust by a trustee of any property for the use or benefit of another either in whole or in part, or for any public or charitable purpose. Such trustee is guilty of an indictable offence if, with intent to defraud, and in violation of his trust, he converts anything of which he is trustee to any use not authorized by the trust. Sec. 390.

*Transfer of property to innocent purchaser*—Whether or not a "lawful title" has been acquired by the innocent purchaser is a question of civil law and subject to provincial statutes dealing with sales of goods. If goods are obtained on false pretences and there is a conviction for that offence, the case will not come under section 1050, but the provincial law will apply to determine the ownership, and apart from statute there would be no reversion of title to the vendor to enable him to recover from an innocent purchaser taking them from the person convicted merely of obtaining them fraudulently. But if there was a theft by a trick and the actual delivery was with the intention of parting only with the temporary possession of the goods, the property did not pass, and sec. 1050 would apply. *R. v. Walker*, 65 J.P. 729; *R. v. Russett*, [1892] 2 Q.B. 312, 17 Cox C.C. 534.

Current coin in the hands of an innocent person and taken for value would not be returned to the original owner, although identified. *Moss v. Hancock* [1899] 2 Q.B. 111, 68 L.J.Q.B. 657.

*Restitution on summary trial under Part XVI*—Sec. 795 in the summary trials clauses makes applicable to summary trials the provisions of sec. 1050 on a conviction under Part XVI.

*Juvenile offenders charged with theft*—Sec. 817 provides that no conviction under the authority of Part XVII (Juvenile offenders) shall be attended with any forfeiture, except such penalty as is imposed by the sentence; but whenever any person is adjudged guilty under the provisions of this Part, the presiding justice may order restitution of property in respect of which the offence was committed, to the owner thereof or his representatives. If such property is not then forthcoming, the justices, whether they award punishment or not, may inquire into and ascertain the value thereof in money; and, if they think proper order payment of such sum of money to the true owner, by the person convicted, either at one time or by instalments, at such periods as the justices deem reasonable. The person ordered to pay such sum may

be sued for the same as a debt in any court in which debts of the like amount are, by law, recoverable, with costs of suit, according to the practice of such court. Code sec. 817.

*Definition of theft*—See secs. 344-357.

*Receiving stolen property*—See secs. 399-403, 840, 954, 993, 994, 1049, 1050.

*Sale of Goods Act, Man.*—Section 25 of the Sale of Goods Act, R.S.M. 1902, c. 152, is as follows: "Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts to the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them." "(a) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in such goods shall not re-vest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender." In considering this statute in *Harding v. Johnston* (1909) 8 Man. R. 625, Howell, C.J., said: "This section (25) in no way relates to the sale of goods and seems out of place. Its prototype is sec. 24 of the English Act which was passed for the purpose of restoring to the owner stolen property, sold in market overt. The English section closes with the words "whether by sale in market overt, or otherwise." The "otherwise" is thought to refer to cases where stolen goods are purchased in a foreign state where such purchase passes property and perhaps to cases where rights are acquired under an inn-keeper's lien at Common Law, a right which probably does not exist here because of our statute. Sub-section (a) of section 25 was also copied from a sub-section to the English section and the reason of the English clause was to over-ride the decision in *Bentley v. Vilmont*, 12 A.C. 471, and change the criminal law. Our sub-section is meaningless and, although the Sale of Goods Act is a code of law and must be so construed, I think, as section 25 does not relate to sales of goods in any way, I must look at the former law and endeavor to find out what the legislative intent was.

"The section declares that upon conviction of the thief the property in the goods "reverts" to the owner. Under our law the property never passed out of the owner and so cannot revert. A consideration of the history of the section above referred to and the conditions of the law when the section was enacted leads me to hold that the legislature did not intend to prevent the owner from recovering his property before the conviction of the thief.

"Section 1050 of the Criminal Code has no application; it merely provides for summary restitution at the criminal trial. Perhaps some day the constitutionality of sub-sec. 3 may come up, as the power of Parliament to legislate as to the recovery of goods, where the thief has been acquitted, may be questioned." *Harding v. Johnston*, 8 Man. R. 629.

*Review of restitution order*—The order for restitution may be the subject of review by *certiorari* proceedings. *R. v. Forbes, ex parte Selig* (1910) 39 N.B.R. 592, 17 Can. Cr. Cas. 70; *R. v. Wightman*, 29 U.C.Q.B. 211.

*Restoration of money or goods taken from accused*—Money or goods taken from the accused on his arrest may be ordered to be restored to him if not connected with the offence nor required as evidence. *R. v. Harris*, 1 B.C.R. pt. 1, p. 255; *R. v. McIntyre*, 2 P.E.I. 154; *Ex parte McMichael*, 7 Can. Cr. Cas. 549; *United States v. Tounder* (1914) 23 Can. Cr. Cas. 76 (an extradition case).

### *Imprisonment.*

#### **Offences not capital how punished.**

**1051.** Every one who is convicted of any offence not punishable with death, shall be punished in the manner, if any, prescribed by the statute especially relating to such offence.

*Origin*—Sec. 950, Code of 1892; R.S.C. 1886, ch. 178, secs. 34, 35.

*Commencement of Term of Imprisonment*—The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced. Prisons Act, R.S.C. 1906, ch. 148, sec. 3, and Penitentiaries Act, ch. 147, sec. 43.

*Hard labour*—See the Prisons Act, R.S.C. 1906, ch. 148, secs. 12-15, and the Penitentiaries Act, ch. 147, sec. 62.

*North-West Territories*—For special provisions relating to imprisonment on conviction in the territories, see the N.W.T. Act, R.S.C., ch. 62, secs. 54-59.

*Conditional liberation on ticket of leave*—See the Ticket of Leave Act, R.S.C. 1906, ch. 150; *R. v. Johnson*, 4 Can. Cr. Cas. 178 (Que.).

#### **Punishment where not otherwise provided.**

**1052.** Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for five years.

2. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both.

*Origin*—Sec. 951, Code of 1892; R.S.C. 1886, ch. 181, sec. 24.

**Punishment for second offence committed after previous conviction.**

**1053.** Every one who is convicted of an indictable offence not punishable with death, committed after a previous conviction for an indictable offence, is liable to imprisonment for ten years, unless some other punishment is directed by any statute for the particular offence.

2. In such latter case the offender shall be liable to the punishment directed, and not to any other.

*Origin*—Sec. 952, Code of 1892; R.S.C. 1886, ch. 181, sec. 25.

*Proof of prior conviction*—As to the mode of proving the prior convictions, see secs. 757 (3) and 982.

*Offences after previous conviction*—See secs. 370, 375-377, 386 (2), 465, 530, 533-535, 568, 851, 963, 982, 1053, 1081.

**Maximum term may be shortened.—Minimum term.**

**1054.** Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

*Origin*—Sec. 953, Code of 1892; R.S.C. 1886, ch. 181, sec. 26.

*Discretion of court where different kinds of punishment authorized*—See sec. 1028.

*Maximum sentence*—Where the imprisonment has commenced under a sentence for ninety days and at a time of the year which would not include the month of February, and, consequently, the sentence would not in the ordinary course exceed three months, which was the maximum penalty allowed for the offence, it is not a ground for discharge on habeas corpus that a ninety day sentence may, under certain contingencies, exceed the statutory limit of three months. *Rex v. Governor of City Prison; Ex parte Green* (1914) 23 Can. Cr. Cas. 293 (N.S.).

**Cumulative punishments.**

**1055.** When an offender is convicted of more offences than one, before the same court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the

sentences passed upon the offender for his several offences shall take effect one after another.

*Origin*—Sec. 954, Code of 1892; R.S.C. 1886, ch. 181, sec. 27; 7-8 Geo. IV, Imp., ch. 28, sec. 10.

*Consecutive imprisonments*—Sec. 1055 appears to be an adaptation of the English statute 7 and 8 Geo. IV, ch. 28, sec. 10, which, however, was limited to cases of felony. The effect of the English statute, which also abolished the plea of *autrefois attaint*, was to place felonies in this regard in the position in which misdemeanours had always been at common law. See *R. v. Wilkes*, 19 St. Trials 1131; Stephen's Dig. Cr. Law, 6th ed. 19 (n); *R. v. Castro* (1880), 5 Q.B.D. 490, at pp. 515, 516, 49 L.J.Q.B. 759. "Unless otherwise directed in the sentence" the term of imprisonment commences on and from the day of passing sentence. See note to Code sec. 1051.

**Where imprisonment less than two years.**

**1056.** Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed: Provided that,—

- (a) when any one is sentenced to imprisonment in a penitentiary, and at the same sittings or term of the court trying him is sentenced for one or more other offences to a term or terms of imprisonment less than two years each, he may be sentenced for such shorter terms to imprisonment in the same penitentiary, such sentences to take effect from the termination of his other sentence; and,
- (b) when any one is sentenced for any offence who is, at the date of such sentence, serving a term of imprisonment in a penitentiary for another offence, he may be sentenced for a term shorter than two years to imprisonment in the same penitentiary, such sentence to take effect from the termination of his existing sentence or sentences;

(c) in the province of Manitoba and the province of British Columbia any one sentenced to imprisonment for a term of less than two years may be sentenced to any one of the common gaols in the province, unless a special prison is prescribed by law.

*Origin*—Sec. 955, Code of 1892; 63-64 Vict., Can., ch. 46, sec. 3; 1 Edw. VII, Can., ch. 42, sec. 2; 1909, Can., ch. 9.

*Sentence generally*—See secs. 1004-1011.

**Imprisonment with or without hard labour.**

**1057.** Imprisonment in a common gaol, or a public prison, other than a penitentiary or the Central Prison for the province of Ontario, the Andrew Mercer Ontario Reformatory for females or any reformatory prison for females in the province of Quebec, shall be with or without hard labour, in the discretion of the court or person passing sentence, if the offender is convicted on indictment, or under the provisions of Parts XVI or XVIII, or, in the province of Saskatchewan or Alberta, before a judge of a superior court, or in the Northwest Territories, before a stipendiary magistrate or in the Yukon Territory, before a judge of the Territorial Court.

2. In other cases such imprisonment may be with hard labour, if hard labour is part of the punishment for the offence of which such offender is convicted, and if such imprisonment is to be with hard labour, the sentence shall so direct.

*Origin*—Sec. 955 (6), Code of 1892.

*Imprisonment with or without hard labour*—The Penitentiaries Act and the Prisons and Reformatories Act make sentences of imprisonment in penitentiaries and the reformatories mentioned in Cr. Code, sec. 1057, equivalent to sentences of imprisonment with hard labour in all cases whether the sentence so directs or not. *R. v. Davidson*, [1917] 2 W.W.R. 160, at 163, 11 Alta. L.R. 9, 28 Can. Cr. Cas. 44. The result is that when an offender is convicted on indictment or under Part XVI (summary trial of certain indictable offences) or by a superior court judge in Saskatchewan or Alberta, or a judge of the Yukon Territorial Court, the imprisonment may be either with or without hard labour, in the discretion of the court, so long as the offender is not sentenced to a penitentiary or the prison or reformatories excepted, and this apparently without regard to the terms of the statute fixing the punishment. But

if the conviction is made by a lower tribunal and does not impose a penitentiary or reformatory sentence, then hard labour may be imposed only if the statute fixing the punishment says that it may be imposed, and the sentence given must, in such cases, specifically mention "hard labour." *R. v. Davidson*, [1917] 2 W.W.R. 160, 163, 11 Alta. L.R. 9, 28 Can. Cr. Cas. 44.

The discretion of the court under sec. 1057 of the Code includes the imposition of imprisonment with hard labour in default of payment of a fine as well as where imprisonment is the direct punishment for the offence either with or without a fine. *R. v. Davidson*, [1917] 2 W.W.R. 160, 163; *R. v. Nelson*, 6 W.W.R. 706, 28 W.L.R. 102, 22 Can. Cr. Cas. 303 (Sask.).

*Ontario Board of Parole*—See 6-7 Geo. V, Can., ch. 21.

*Transfer to Reformatory or Industrial farm in Ontario*—See amendment to the Prisons Act, 6-7 Geo. V, Can., ch. 21.

#### *Provisions as to Sureties.*

**Persons convicted may be bound over to keep the peace.—Committal in default.**

**1058.** Every magistrate under Part XVI and every court of criminal jurisdiction before whom any person is convicted of an offence and is not sentenced to death, shall have power, in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaviour for any term not exceeding two years, and that such person in default shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or until such recognizances are sooner entered into or such security sooner given.

2. Any such recognizance may be in form 49.

*Origin*—Sec. 958, Code of 1892.

*Sureties for good behaviour*—The provisions of sec. 1058 take the place of the former common law powers under which a misdemeanour might be punished at the discretion of the court by fine and imprisonment, and by adding a direction that the defendant should find sureties for a reasonable time and be imprisoned until he did so, the time of the imprisonment being, however, limited, at common law, only to the period for which the sureties were to be found. *R. v. Trueman*, (1913) 9 Cr. App. R. 45.

It was held in *R. v. Cole* (1902) 5 Can. Cr. Cas. 330, that the common law jurisdiction as to crime is still operative except where there is a

repugnancy in cases provided for by the Criminal Code, and that where there is a repugnancy the Code will prevail.

*Form of Recognizance to keep the peace*—Code form 49, following sec. 1152, is not applicable to the recognizance ordered under sec. 1058, but applies only to sec. 748. A recognizance under sec. 1058 should show jurisdiction on its face, and if it does not do so, its estreat may be refused. *Re Sarah Smith's bail*, 31 N.S.R. 468, 6 Can. Cr. Cas. 416.

*Sureties to keep the peace on charge before a justice*—See sec. 748 in cases where the summary convictions clauses (Code Part XV), apply.

*Ontario tariff for Clerks of the Peace*—

(12.) Every recognizance to keep the peace or for good  
behaviour ..... \$1.00

**Proceedings when party remains in prison for two weeks.—Procedure when brought up.**

**1059.** Whenever any person who has been required to enter into a recognizance with sureties, to keep the peace and be of good behaviour, or not to engage in any prize-fight has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts, to a judge of a superior court, or to a judge of the county court of the county or district in which such gaol or prison is situate, or, in the cities of Montreal and Quebec, to a judge of the sessions of the peace for the district, or, in the Northwest Territories, to a stipendiary magistrate.

2. Such judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound.

*Origin*—Sec. 960, Code of 1892; R.S.C. 1886, ch. 181, sec. 32, 51 Vict., Can., ch. 47, sec. 2.

. After two weeks' imprisonment in default of finding sureties under a justice's order made under sec. 748, the defendant may apply to a judge of a Superior Court under Code sec. 1059 for a release. *R. v. Mitchell*, 13 Can. Cr. Cas. 344 (Y.T.).

*Ontario tariff for Sheriffs*—

(44.) Services performed under section 1059 of The Criminal Code, in each case disposed of under that section.... \$2.00



*Whipping.*

**Sentence of punishment by whipping.—Number of strokes.—Instrument.—When whipping to take place.—Not on female.**

**1060.** Whenever whipping may be awarded for any offence, the court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the attorney general of the province in which such prison is situated.

2. The number of strokes shall be specified in the sentence; and the instrument to be used for whipping shall be a cat-o'-nine-tails unless some other instrument is specified in the sentence.

3. Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

4. Whipping shall not be inflicted on any female.

*Origin*—Sec. 957, Code of 1892, as amended, 63-64 Vict., Can., ch. 46, sec. 3.

*When sentence includes whipping*—The fixing of the time or times for punishment by whipping ordered to take place during the convict's term of imprisonment is left by Cr. Code, sec. 1060, in the discretion of the prison surgeon under whose supervision the whipping is to be done; and it is an excess of jurisdiction on the part of the magistrate holding a summary trial to order in the sentence that ten lashes be imposed six weeks after imprisonment and ten lashes six weeks before expiration of the 'term of six months' imprisonment imposed; but the court hearing a habeas corpus application may amend the conviction under Cr. Code sec. 1124, by imposing the proper sentence where satisfied of the offence. *R. v. Boardman*, 6 W.W.R. 1304, 23 Can. Cr. Cas. 191; *R. v. Crawford*, 5 A.L.R. 204, 20 Can. Cr. Cas. 49. The failure to direct in the conviction that the whipping shall take place under the medical supervision which sec. 1060 prescribes, will not invalidate the conviction, and *quære* whether the conviction should so state in any event. *Ibid*.

The magistrate imposing the punishment of whipping is to specify in the sentence the number of strokes and also whether it is to be at one time, or in two or three whippings, during the term of imprisonment. *R. v. Boardman*, (1914) 6 W.W.R. 1304, 23 Can. Cr. Cas. 191,

29 W.L.R. 176 (Alta.). No authority is given the magistrate to fix the time or times of the whipping, even by declaring that half of the lashes shall be within the first six weeks and the second half within the last six weeks of a six months' term. *R. v. Boardman*, 6 W.W.R. 1304 (Alta.). An excess of jurisdiction in that respect is, however, curable on *certiorari* or habeas corpus, if a perusal of the depositions satisfies the court as to the offence. Code secs, 797 (2), 1124; *R. v. Crawford*, (1912) 2 W.W.R. 952, 5 Alta. L.R. 204, 22 W.L.R. 107; *R. v. Boardman* (1914) 6 W.W.R. 1304.

The judge before whom a writ of habeas corpus is returned, and who quashes the writ on the ground that the petitioner is in custody under a sentence legally pronounced by a competent tribunal, has no power to direct such tribunal to execute a part of the sentence (in this case the penalty of whipping) which had been suspended in connection with the issue of the writ. *R. v. Goldsberry*, 11 Can. Cr. Cas. 159; same case, *sub. nom.* *Goldsberry v. Bernatchez*, 28 Que. S.C. 52; and see *R. v. Frejd*, 18 Can. Cr. Cas. 114, 22 O.L.R. 566.

*Powers of Deputy Minister of Justice and Deputy Attorney-General*—See notes to secs. 592 and 873A.

### *Capital Punishment.*

**Punishment to be the same on conviction by verdict or by confession.**

**1061.** Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same punishment, whether he is convicted by verdict or on confession, and this as well in the case of accessories as of principals.

*Origin*—Sec. 935, Code of 1892; R.S.C. 1886, ch. 181, sec. 4.

*Offences made capital by statute*—See sec. 74 (treason), sec. 263 (murder), sec. 299 (rape).

**Form of sentence of death.**

**1062.** In all cases where an offender is sentenced to death, the sentence or judgment to be pronounced against him shall be that he be hanged by the neck until he is dead.

*Origin*—Sec. 936, Code of 1892; R.S.C. 1886, ch. 181, sec. 5.

**Sentence of death to be reported to Secretary of State.—Judge may grant reprieve in certain cases.**

**1063.** In the case of any prisoner sentenced to the punishment of death, the judge before whom such prisoner has been

convicted shall forthwith make a report of the case to the Secretary of State, for the information of the Governor General; and the day to be appointed for carrying the sentence into execution shall be such as, in the opinion of the judge, will allow sufficient time for the signification of the Governor's pleasure before such day.

2. If the judge thinks such prisoner ought to be recommended for the exercise of the royal mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other judge of the same court, or any judge who might have held or sat in such court, may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for any of the purposes aforesaid.

3. In the Northwest Territories and in the Yukon Territory, when any person is convicted of a capital offence and is sentenced to death the judge or stipendiary magistrate who tried the case shall forthwith forward to the Secretary of State of Canada full notes of the evidence with his report upon the case, and the execution shall be stayed until such report is received and the pleasure of the Governor General therein is communicated to the Commissioner of the Northwest Territories or of the Yukon Territory, as the case may be.

4. Secs. 69 and 70 of chapter 50 of the Revised Statutes, 1886, intituled An Act respecting the North-West Territories, and sec. 43 of The Northwest Territories Act, chapter 62 of the Revised Statutes, 1906, are repealed.

*Origin*—Sec. 937, Code of 1892; R.S.C. 1886, ch. 181, sec. 8; 3-4 Geo. V, ch. 13, sec. 31; 32-33 Vict., Can., ch. 29, sec. 121.

*Reprieve after death sentence*—Reprieves were granted under this section in *B. v. Capelli*, 10 O.W.R. 443, and *B. v. Blythe*, 19 O.L.R. 386, 15 Can. Cr. Cas. 224; and refused in *R. v. Cook* (No. 2) (1914), 23 Can. Cr. Cas. 86.

*Reprieve under Royal prerogative*—A reprieve *ex mandato regis* was formerly grantable by the Crown at its mere discretion; 1 Chitty Cr. Law 758, and see Code sec. 1080; but the standing royal instructions to Governors-General of Canada under letters patent of 1878 provide that the Governor-General shall not pardon or reprieve after a sentence of death without the advice of the Privy Council of Canada, and in

other cases shall not do so without the advice of one at least of his Ministers. Attorney-General of Canada v. Attorney-General of Ontario, 19 A.R. (Ont.) 31; and in appeal 23 Can. S.C.R. 458. The remission of fines and sentences imposed under provincial laws are controlled by the provincial and not the federal law. Ibid.

**Prisoner under sentence of death to be confined apart.**

**1064.** Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or a minister of religion, shall have access to any such convict, without permission, in writing, of the court or judge before whom such convict has been tried, or of the sheriff.

*Origin*—Sec. 938, Code of 1892; R.S.C. 1886, ch. 181, sec. 9.

*Safe keeping of convict under sentence of death*—Sec. 1064 is directory, and was enacted for the purpose of safely keeping the person who was under death sentence until the sentence is carried out. The section is subject to sec. 977, under which the convict may be produced as a witness on another prosecution. R. v. Kuzin (1915), 24 Can. Cr. Cas. 66, 25 Man. R. 218, 8 W.W.R. 166; R. v. Hatch, 16 Can. Cr. Cas. 196.

**Place of execution.**

**1065.** Judgment of death to be executed on any prisoner shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution.

*Origin*—Sec. 939, Code of 1892; R.S.C. 1886, ch. 181, sec. 11.

**Persons who shall be present at execution.**

**1066.** The sheriff charged with the execution, and the gaoler and medical officer or surgeon of the prison, and such other officers of the prison and such persons as the sheriff requires, shall be present at the execution.

*Origin*—Sec. 940, Code of 1892; R.S.C. 1886, ch. 181, sec. 11.

*Deputies of sheriff, gaoler, or gaol surgeon*—See sec. 1069.

**Persons who may be present at execution.**

**1067.** Any justice for the district, county or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the sheriff proper to admit within the prison for the purpose, and any minister of religion who desires to attend, may also be present at the execution.

*Origin*—Sec. 941, Code of 1892; R.S.C. 1886, ch. 181, sec. 12.

**Execution.—Certificate of death by surgeon.—Declaration by sheriff and gaoler.**

**1068.** As soon as may be after judgment of death has been executed on the offender, the medical officer or surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, in form 71, and deliver the same to the sheriff.

2. The sheriff and the gaoler of the prison, and such justices and other persons present, if any, as the sheriff requires or allows, shall also sign a declaration in form 72 to the effect that judgment of death has been executed upon the offender.

*Origin*—Sec. 942, Code of 1892; R.S.C. 1886, ch. 181, secs. 13, 14.

**Death sentence.—Deputies may act for sheriff, etc.**

**1069.** The duties imposed upon the sheriff, gaoler, medical officer or surgeon by the three sections last preceding, may be, and, in his absence, shall be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, or discharging the duties of any such officer.

*Origin*—Sec. 943, Code of 1892; 63-64 Vict., Can., ch. 46, sec. 3.

**Inquest on death sentence being executed.—Identity.**

**1070.** A coroner of a district, county or place to which the prison belongs wherein judgment of death is executed on any offender shall, within twenty-four hours after the execution, hold an inquest on the body of the offender.

2. The jury at the inquest shall inquire into and ascertain

the identity of the body, and whether judgment of death was duly executed on the offender.

3. The inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff.

4. No officer of the prison and no prisoner confined therein shall, in any case, be a juror on the inquest.

*Origin*—Sec. 944, Code of 1892; R.S.C. 1886, ch. 181, sec. 18.

**Place of burial of executed culprit.**

**1071.** The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, unless the Lieutenant Governor in Council orders otherwise.

*Origin*—Sec. 945, Code of 1892; R.S.C. 1886, ch. 181, sec. 18.

**Certificate to be sent to Secretary of State and exhibited at prison.  
—Copies exhibited in prison.**

**1072.** Every certificate and declaration, and a duplicate of the inquest required by this Part shall in every case be sent with all convenient speed by the sheriff to the Secretary of State, or to such other officer as is, from time to time, appointed for the purpose by the Governor in Council:

2. Printed copies of such several instruments shall as soon as possible, be exhibited and shall, for twenty-four hours at least, be kept exhibited on or near the principal entrance of the prison within which judgment of death has been executed.

*Origin*—Sec. 946, Code of 1892; R.S.C. 1886, ch. 181, sec. 20.

**Omission not to make execution illegal.**

**1073.** The omission to comply with any provision of the preceding sections of this Part shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal.

*Origin*—Sec. 947, Code of 1892; R.S.C. 1886, ch. 181, sec. 21.

**Judgment of death.—Forms of procedure in other respects.**

**1074.** Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if the above provisions had not been passed.

*Origin*].—Sec. 948, Code of 1892; R.S.C. 1886, ch. 181, sec. 22.

**Rules and regulations as to executions.—Orders in council.**

**1075.** The Governor in Council may, from time to time make such rules and regulations to be observed on the execution of judgment of death in every prison, as he, from time to time, deems expedient for the purpose, as well of guarding against any abuse in such execution, as of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place.

2. All such rules and regulations shall be laid upon the tables of both Houses of Parliament within six weeks after the making thereof, or, if Parliament is not then sitting, within fourteen days after the next meeting thereof.

*Origin*].—Sec. 949, Code of 1892; R.S.C. 1886, ch. 181, secs. 44, 45.

*Pardon.*

**Any person imprisoned under statute although for non-payment of money.—Discharge under pardon with performance of conditions if any has effect of pardon under great seal.—No effect on punishment for subsequent offence.**

**1076.** The Crown may extend the royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some other person than the Crown.

2. Whenever the Crown is pleased to extend the royal mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or conditional pardon, by warrant under the royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition

in the case of a conditional pardon, shall, as to the offence of which he has been convicted, have the same effect as a pardon of such offender under the great seal.

3. No free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any offence other than that for which the pardon was granted.

*Origin*—Sec. 966, Code of 1892; R.S.C. 1886, ch. 181, secs. 38, 39; 32-33 Vict., Can., ch. 29, secs. 125, 126; 7-8 Geo. IV, Imp., ch. 28, sec. 13 (1827).

*Parliamentary pardons*—The pardons under the sign manual pursuant to the corresponding English statute of 1827 were known as parliamentary pardons as distinguished from royal pardons passed under the Great Seal. Its effect was to give legal recognition of a conditional pardon for felony on other terms than that of undergoing a sentence of transportation which was the customary condition of a conditional pardon prior to 1827. Sibley on Criminal Appeals (Eng.), 91, 92.

*Plea of pardon*—See sec. 906.

*Pardon or reprieve by the Crown*—See note to sec. 1063 as to death sentences. A pardon, or the alternative of the remission of the remainder of the sentence, is commonly asked on the ground of the discovery of new facts casting doubt on the propriety of a conviction, or that a convict can no longer be confined without his life being endangered because of his extreme ill-health, or on the ground of his having assisted the prison authorities in a murderous attack on them by another prisoner. Sibley on Criminal Appeals (1908), p. 102.

*Minister of Justice may order new trial on application for pardon or remission*—See sec. 1022.

#### Commutation of sentence.—Authentication.

**1077.** The Crown may commute the sentence of death passed upon any person convicted of a capital offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labour.

2. An instrument under the hand and seal-at-arms of the Governor General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of



State or of the Under Secretary of State, shall be sufficient authority to any judge or justice, having jurisdiction in such case, or to any sheriff or officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted.

*Origin*—Sec. 967, Code of 1892; R.S.C. 1886, ch. 181, sec. 40; 32-33 Vict., Can., ch. 29, sec. 127.

**Undergoing sentence equivalent to a pardon.—No effect on punishment for subsequent offence.**

**1078.** When any offender has been convicted of an offence not punishable with death, and has endured the punishment adjudged, or has been convicted of an offence punishable with death and the sentence of death has been commuted, and the offender has endured the punishment to which his sentence was commuted, the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the great seal.

2. Nothing in this section contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other offence.

*Origin*—Sec. 968, Code of 1892; R.S.C. 1886, ch. 181, sec. 41; 32-33 Vict., Can., ch. 29, sec. 128.

*Subsequent conviction*—The second sub-section is intended to preserve the added penalties which are provided throughout the Code and in other statutes for persons who commit offences after previous conviction for some indictable offence not necessarily of a similar character.

**Release from all further criminal proceedings for same offence.**

**1079.** When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if, any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance.

or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause.

*Origin*—Sec. 969, Code of 1892; R.S.C. 1886, ch. 181, sec. 42.

*Discharge from summary conviction in certain cases on making compensation*—See sec. 729.

"*Other criminal proceedings for the same cause*"—See note to sec. 15.

*Plea of autrefois convict on charge of indictable offence*—See secs. 905-909.

**Royal prerogative, not affected by Part XX.**

**1080.** Nothing in this Part shall in any manner limit or affect His Majesty's royal prerogative of mercy.

*Origin*—Sec. 970, Code of 1892; R.S.C. 1886, ch. 181, sec. 43; 32-33 Vict., Can., ch. 29, sec. 129. Compare 7 Edw. VII, Imp., ch. 23.

*King's prerogative of mercy*—This refers to royal pardons under the great seal, but by sec. 1076 the statutory pardon under the sign manual or the Governor-General's warrant shall have the same effect as a pardon under the great seal. The practice in dealing with petitions for pardons or remission of sentence conforms closely with that which prevails in England on application to the Home Secretary. See the Adolph Beck case, British Parliamentary papers, 1904 (appendix 60, p. 331).

*Reprieves, pardons and commutations of sentence*—See secs. 1063, 1076, 1077.

*Limitation in royal instructions to Governors-General*—See note to sec. 1063.

*Suspended Sentence.*

**Release on suspended sentence.**

**1081.** In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of

*Origin*—Sec. 973, Code of 1892; 52 Vict., Can., ch. 44, sec. 3.

*"Court"*—Sec. 1026 declares that "court" in this section, unless the context otherwise requires, shall mean and include any superior court of criminal jurisdiction, any judge or court within the meaning of Part XVIII (speedy trials clauses), and any magistrate within the meaning of Part XVI (summary trials).

*Default under recognizance given on suspension of sentence*—Unless the defendant is before the same court on another charge and is there convicted of same, there must be an information under oath, charging a breach of the recognizance, and an opportunity afforded the defendant to make answer in respect of the alleged breach, before imposing the sentence which had been suspended. *R. v. Siteman*, 6 Can. Cr. Cas. 224 (N.S.). If the prosecution has been conducted by the Crown, the informant will have no *status* to proceed for the breach of the recognizance. *R. v. Young*, 2 O.L.R. 228; *R. v. Siteman*, *supra*.

### *Remitting Penalties.*

**Governor in Council may remit penalty or forfeiture under Canada laws.**

**1084.** The Governor in Council may at any time remit, in whole or in part, any pecuniary penalty, fine or forfeiture imposed by any Act of the Parliament of Canada, whether such penalty, fine or forfeiture is payable to His Majesty or to some other person, or in part to His Majesty and in part to some other person, and whether it is recoverable on indictment, information or summary conviction, or by action or otherwise.

*Origin*—2 Edw. VII, Can., ch. 26, sec. 1.

*Remitting fines*—Sec. 1084 applies only to offences under Dominion statutes. Costs incurred by a private prosecutor and ordered to be paid by the defendant are not to be remitted although the fine itself may be. Sec. 1085. The remission of penalties under provincial statutes is under provincial control. *Attorney-General of Canada v. Attorney-General of Ontario*, 23 S.C.R. 458.

### **Terms of remission.—Costs.**

**1085.** Such remission may, in the discretion of the Governor in Council, be on terms as to the payment of costs or otherwise: Provided that where proceedings have been instituted by private persons costs already incurred shall not be remitted.

*Origin*—2 Edw. VII, Can., ch. 26, sec. 2.

## PART XXI.

### RENDER BY SURETIES, AND RECOGNIZANCES.

#### *Interpretation.*

**Definition.**—‘Cognizor,’ in secs. 1113-1119.

**1086.** In the sections of this Part relating exclusively to the province of Quebec, unless the context otherwise requires, ‘cognizor’ includes any number of cognizors in the recognizance whether as principals or sureties.

*Origin*—Sec. 926, Code of 1892, R.S.C. 1886, ch. 179, secs. 21, 22, 23.

#### *Division of Part.*

**Certain sections apply only to Quebec, and others not to Quebec.**

**1087.** Secs. 1088 to 1101 inclusive are general in their application. Secs. 1102 to 1112 inclusive do not apply to the province of Quebec. Secs. 1113 to 1119 inclusive apply to the province of Quebec only.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23.

#### *General.*

**Render of accused by surety.—Arrest by sureties.**

**1088.** Any surety for any person charged with any indictable offence may, upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a judge of a superior court or from a judge of a county court having criminal jurisdiction, or in the province of Quebec from a district magistrate, an order in writing under his hand, to render such person to the common gaol of the county where the offence is to be tried.

2. The sureties, under such order, may arrest such person and deliver him, with the order, to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law.

*Origin*—Sec. 910, Code of 1892; R.S.C. 1886, ch. 179, secs. 1, 2.

*Common law rights preserved*—See Code sec. 1093.

*Proving sheriff's certificate of render*—See sec. 1090.

*Bail after committal for trial*—Secs. 703 and 704 in Part XIV also provide a summary method by which the sureties for a person committed for trial as a result of a preliminary enquiry under Part XIV may obtain from a magistrate an order for the arrest of such person for whom they are bail on showing that he is about to abscond for the purpose of evading justice.

#### **Bail after render.**

**1089.** The person rendered may apply to a judge of a superior court, or in cases in which a judge of a county court may admit to bail, to a judge of a county court, to be again admitted to bail, who may on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet.

2. Such order shall be dealt with in the same manner as the first order for bail, and so on as often as the case requires.

*Origin*—Sec. 911, Code of 1892; R.S.C. 1886, ch. 179, sec. 3.

#### **Discharge of recognizance after render.**

**1090.** On due proof of such render, and certificate of the sheriff, proved by the affidavit of a subscribing witness, that such person has been so rendered, a judge of a superior or county court, as the case may be, shall order an entry of such render to be made on the recognizance by the officer in charge thereof, which shall vacate the recognizance, and may be pleaded or alleged in discharge thereof.

*Origin*—Sec. 912, Code of 1892; R.S.C. 1886, ch. 179, sec. 5.

#### **Render of accused in court by sureties.**

**1091.** The sureties may bring the person charged as aforesaid into the court at which he is bound to appear, during the

sitting thereof, and then, by leave of the court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to gaol, there to remain until discharged by due course of law; but such court may admit such person to bail for his appearance at any time it deems meet.

*Origin*—Sec. 913, Code of 1892; R.S.C. 1886, ch. 179, sec. 5.

**Sureties responsible for appearance of accused.—Committal or new sureties.**

**1092.** The arraignment or conviction of any person charged and bound as aforesaid, shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence, as the case may be.

2. The court may nevertheless commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance.

3. Such commitment shall be a discharge of the sureties.

*Origin*—Sec. 914, Code of 1892; R.S.C. 1886, ch. 179, sec. 6.

**Right of surety to render not affected.**

**1093.** Nothing in the foregoing provisions shall limit or restrict any right which a surety now has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety.

*Origin*—Sec. 915, Code of 1892; R.S.C. 1886, ch. 179, sec. 7.

*Common law rights of bondsmen*—The defendant when bailed is placed in the custody of his bondsmen and they may re-seize him if they have reason to suppose that he is about to flee from justice and may bring him before a magistrate who will commit him to close custody. *R. v. Butcher*, 3 R.B. 678.

**Officer to prepare list of persons under recognizance making default.**

**1094.** If any person bound by recognizance for his appearance to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, or for whose appearance any other person has become so bound, makes default, the officer of the court by whom estreats are made out, shall prepare a list in writing, specifying the name

of every person so making default, and the nature of the offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety.

2. Such officer shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why each such person did not appear, and whether, by reason of the non-appearance of such person, the ends of justice have been defeated or delayed.

*Origin*—Sec. 917, Code of 1892; B.S.C. 1886, ch. 179, sec. 10; C.S.C. (1859) ch. 99; 7 Geo. IV, Imp., ch. 64, sec. 31.

*Staying levy or discharging forfeited recognizance*—See secs. 1108-1110.

*Recognizance to prosecute*—See secs. 687, 688, 692, 840, 1094, 1095, 1108-1110.

*Recognizance to give evidence*—See secs. 692-694, 840-842, 1094, 1095, 1108-1110.

*Recognizance to keep the peace*—See secs. 748 and 1058, 1094, 1108-1110.

*Recognizance to answer for common assault*—See Code secs. 291, 709, 732.

*Bail in other cases by accused to appear and take his trial*—A recognizance of bail conditioned for the appearance of the accused for trial at a jury court is not within Code secs. 1094 and 1095, except where the charge is one of common assault; and no preliminary order of the presiding judge for the estreat is required in cases to which Code secs. 1094 and 1095 do not apply. The special provisions in that regard were intended to remedy the hardship of indiscriminately estreating recognizances given for appearance to prosecute or give evidence, or to answer for common assault or to articles of the peace or the appearance of another person for that purpose. *R. v. Zarkas*, [1918] 1 W.W.R. 323, 328 (Sask.).

#### **Proceedings on forfeited recognizance.**

**1095.** Every such officer shall, before any such recognizance is estreated, lay such list before the judge or one of the judges who presided at the court, or if such court was not presided over by a judge, before two justices who attended at such court, and such judge or justices shall examine such list, and make such order touching the estreating or putting in process any such recognizance as appears just, subject, in the province of Quebec, to the provisions hereinafter contained.

2. No officer of any such court shall estreat or put in process any such recognizance without the written order of the judge or justices before whom respectively such list has been laid.

*Origin*—Sec. 918, Code of 1892; R.S.C. 1886, ch. 179, sec. 11; C.S.C. (1859) ch. 99; 7 Geo. IV, Imp., ch. 64, sec. 31.

*Estreating recognizance*—This section applies only to the recognizances referred to in sec. 1094 and does not apply to a recognizance whereby the bail became bound for the appearance of their principal to stand his trial upon an indictment other than for common assault. *Re Talbot's Bail* (1892), 23 O.R. 65.

Judges should be careful to see that an estreat of bail is ordered only upon material justifying it. *Re Hopfe's bail* (1913) 4 W.W.R. 1, 22 Can. Cr. Cas. 116, 23 W.L.R. 751 (Alta.).

*Notice of estreat*—The Code does not require any notice to be given before the estreating of a recognizance and at least where there is no express Crown Rule requiring a notice it is unnecessary. *R. v. Sullivan*, 29 W.L.R. 115, 23 Can. Cr. Cas. 174 (Y.T.). Nor is notice such as is provided in the English Crown Office Rules demanded by any such general provision that the latter shall regulate the practice so far as may be where no other provision is made. *R. v. Zarkas*, [1918] 1 W.W.R. 323 (Sask.). Compare *Re Barrett's bail*, 36 N.S.R. 135, 7 Can. Cr. Cas. 1; *Re Burns' bail*, 17 Can. Cr. Cas. 292; *R. v. Creelman* (1893) 25 N.S.R. 404. Where no notice has to be given the surety before estreating, the recognizance, whatever may be the ground on which the notice is held unnecessary, there is still an opportunity for the surety to be heard after the estreat has been ordered. Code secs. 1109, 1110.

#### **Proceedings for enforcing recognizance on certiorari.**

**1096.** The like proceedings may be had for enforcing the condition of a recognizance taken under sec. 1126 as might be had for enforcing the condition of a recognizance taken under the Act of the Parliament of the United Kingdom, passed in the fifth year of the reign of His Majesty King George the Second, and chaptered 19.

*Origin*—Code of 1892, sec. 893; R.S.C. 1886, ch. 179; 49 Vict., Can., ch. 49, sec. 6.

*"The like proceedings," etc.*—What is now sec. 1096 was, in the prior Code, a part of an enactment which formally repealed as to Canada, sec. 2 of the English statute, 5 Geo. II, ch. 19, and declared what is now sec. 1126 to be in substitution for sec. 2 of the English statute. It is not clear whether the reference to the like proceedings as "might be had," etc., was to be limited under the original Canadian Act, 49 Vict., Can., ch. 49, to the proceedings which the English statute itself



provided, namely, a writ of attachment, or whether the supposed alternative method of a writ of *scire facias* was also available. The statute of 5 Geo. II was introduced into Ontario and Quebec as part of the Criminal law of England. See Code sec. 10 and note to same. Code secs. 11 and 12 state the different dates upon which the English law was introduced in British Columbia and Manitoba. The opinion is hazarded that the intention of the present section is to preserve in each province the practice which at the time of the passing of 49 Vict., Can., ch. 49, was available in the particular province for the enforcement of a *certiorari* recognizance given under the English statute there in force. In those provinces in which sec. 3 of the English Act had the force of law and had not been superseded or repealed by provincial legislation prior to Confederation, the procedure by attachment would apply. If, however, in any province a different procedure had become operative, such local procedure would be continued in its application to the substituted law (now sec. 1126) in like manner as it had subsisted under the statute of Geo. II in that province.

The operation of sec. 1096 may also be supplemented by rules of court passed under the statutory power conferred by sec. 576 and 1126, though probably such rules could not repeal or abrogate the effect of sec. 1096. See *R. v. Townshend*, 43 N.S.R. 1, 13 Can. Cr. Cas. 209.

**Justices to certify default.—Form of certificate.**

**1097.** Whenever a person gives security by or is discharged upon recognizance and does not afterwards appear at the time and place mentioned in the recognizance, or whenever the conditions or any of them in any recognizance entered into by an applicant to whom a case stated by a justice under this Act has been delivered, have not been complied with, the justice who took the recognizance, or any justice who is then present, having certified upon the back of the recognizance the non-appearance of the person or the non-compliance with the condition, as the case may be, may transmit such recognizance to the proper officer in the province appointed by law to receive the same, to be proceeded upon in like manner as other recognizances.

2. Such certificate shall be *prima facie* evidence of such non-appearance or non-compliance.

3. Such certificate shall be in form 73.

*Origin*—Secs. 805, 878, 900, Code of 1892.

*Recognizance on remand before justices*—See sec. 681 (preliminary enquiry); 722 (summary conviction matters).

*Recognizance on stated case by a justice*—See sec. 762.

*Form of Certificate of non-appearance to be endorsed on the defendant's recognizance*—Code form 73, following sec. 1152.

The certificate of default will be good if the defendant was not present, although the usual mode of calling him three times in the courtroom and three times outside, was not adopted. *R. v. Sullivan* (1914) 23 Can. Cr. Cas. 174, 29 W.L.R. 115, 18 D.L.R. 535.

*Recognizance to be transmitted to the "proper officer" in the province*—See secs. 1098 and 1099. The magistrate's certificate is *prima facie* evidence of non-compliance with the condition of a recognizance to appear before the magistrate; sec. 1097 (2); and it was said by Irving, J., in *R. v. Harvie* (1913) 3 W.W.R. 727, 18 B.C.R. 5, 20 Can. Cr. Cas. 369, that if the certificate is to be reviewed, this should be done by *certiorari*. On the roll being transmitted to the sheriff by the proper officer designated by secs. 1098 and 1099, along with a conditional writ of execution (Code form 75), the bondsmen have the opportunity to be heard on the return day before the judge, and relief may be granted in a case of hardship, sec. 1110; *R. v. Harvie*, 3 W.W.R. 727, *supra*. On transmission of a recognizance to a court of civil jurisdiction it would seem that the enforcement of it is a civil matter for the collection of a debt due to the Crown; *Re Talbot's Bail*, 23 Ont. R. 65; *Re McArthur's Bail*, 3 Can. Cr. Cas. 195; *R. v. Harvie*, 3 W.W.R. 727; but if the judge of a criminal court such as the County Judge's Criminal Court, makes an unauthorized order for estreat and the issue of an unconditional writ of *feri facias* and *capias*, and there is no right of appeal because made in a criminal matter, *certiorari* proceedings might be taken to have the order quashed after an application to the judge to discharge his own order. *R. v. Harvie*, *supra*.

A recognizance illegally taken by justices without jurisdiction is not summarily enforceable by estreat proceedings and a writ of *fi. fa.* and *capias*. *Re Hopfe's bail*, (1913) 4 W.W.R. 1, 22 Can. Cr. Cas. 116, 23 W.L.R. 751 (Alta.).

#### **Estreat of recognizance in Ontario.**

**1098.** The proper officer to whom the recognizance and certificate of default are to be transmitted in the province of Ontario, shall be the clerk of the peace of the county for which such justice is acting.

2. The court of general sessions of the peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court.

*Origin*—Sec. 878, Code of 1892, as amended, 63-64 Vict., Can., ch. 46, sec. 3.

**Estreat in B.C.—Estreat in provinces other than Ont. and B.C.**

**1099.** In the province of British Columbia, such proper officer shall be the clerk of the county court having jurisdiction at the place where such recognizance is taken, and such recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such county court.

2. In the other provinces of Canada such proper officer shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law heretofore in force; and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected.

*Origin*—Sec. 878, Code of 1892, as amended, 63-64 Vict., Can., ch. 46, sec. 3.

**Manner of estreat.**

**1100.** All recognizances taken or entered into under any provision of this Act which are forfeited or in respect to which the conditions of such recognizances, or any of them, have not been complied with, shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the court before which the principal party thereto was bound to appear.

*Origin*—Sec. 598, Code of 1892; 48-49 Vict., Can., ch. 7, sec. 9.

*Objection to form of recognizance*—The alleged recognizance is irregular if it does not acknowledge an indebtedness in the amount of the penalty, as by the omission of the words "to owe" in the customary form. *R. v. Hoodless*, 45 M.C.Q.B. 556 (Ont.). It has been held that a recognizance taken on Sunday by a justice upon a committal for trial then made, is valid. *Ex parte Garland*, 8 Can. Cr. Cas. 385.

Where a recognizance of bail is taken at an assize court and then verbally acknowledged by the sureties in open court to bind the sureties for the appearance of their principal to stand his trial upon an indictment, notice of the recognizance to the sureties is unnecessary. *Re Talbot's Bail* (1892), 23 Ont. B. 65. The practice which prior to the Code demanded the giving of notice at the time the recognizance was entered into (R.S.O. 1886, ch. 174, sec. 81) no longer prevails. *R. v. Zarkas*, [1918] 1 W.W.R. 323 (Sask.).

*Motion to vacate an estreat*—A long delay in moving to vacate an estreat upon a mere irregularity or informality may disentitle the

applicant to relief. *R. v. May*, 9 Can. Cr. Cas. 529, 5 O.W.R. 67. If the affidavits are conflicting upon a question extrinsic of the record, the court ordinarily will refuse to vacate the estreat upon a point not arising on the record. *R. v. Bole*, 9 Can. Cr. Cas. 500. The surety for the accused as well as the accused himself may effectually waive irregularities in matters of mere procedure. *Re Burns' Bail*, (1906) 17 Can. Cr. Cas. 292 (N.S.); *R. v. Sullivan*, (1914) 23 Can. Cr. Cas. 174, 29 W.L.R. 115 (Y.T.).

*Rules of Court as to estreat of recognizances*—See sec. 576.

*Record of estreat*—See secs. 1102-1105, 1108.

**Proceeds paid to Minister of Finance.**

**1101.** The sheriff or other officer shall, without delay, pay over all moneys collected under the provisions of this Part by him, to the Minister of Finance, or other authority or person entitled to receive the same.

*Origin*—Sec. 925, Code of 1892; R.S.C. 1886, ch. 179, sec. 20.

*Provisions not Applicable to the Province of Quebec.*

**Entry of fines, amercements and recognizances on a roll.—Affidavit.**

**1102.** Unless otherwise provided, all fines, issues, amercements and forfeited recognizances, the disposal of which is within the legislative authority of the Parliament of Canada, set, imposed, lost or forfeited before any court of criminal jurisdiction shall, within twenty-one days after the adjournment of such court be fairly entered and extracted on a roll by the clerk of the court, or in case of his death or absence, by any other person, under the direction of the judge who presided at such court, which roll shall be made in duplicate and signed by the clerk of the court, or in case of his death or absence, by such judge.

*Origin*—Sec. 916, Code of 1892; R.S.C. 1886, ch. 179, secs. 8, 9, 15; 49 Vict., Can., ch. 25, sec. 14; C.S.U.C. (1859) ch. 117, secs. 1-4 and 9; 3 Geo. IV, Imp., ch. 46, secs. 2 and 3.

*"Unless otherwise provided"*—See secs. 1094-1099.

**1103.** The clerk of the court shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, that is to say:

‘I, A. B. (*describing his office*), make oath that this roll is truly and carefully made up and examined and that all fines,

issues, amercements, recognizances and forfeitures which were set, lost, imposed or forfeited, at or by the court therein mentioned, and which, in right and due course of law, ought to be levied and paid, are, to the best of my knowledge and understanding, inserted in the said roll; and that in the said roll are also contained and expressed all such fines as have been paid to or received by me, either in court or otherwise, without any wilful discharge, omission, misnomer or defect whatsoever. So help me God.'

2. Any justice for the county is hereby authorized to administer such oath.

*Origin*—Sec. 916, Code of 1892; R.S.C. 1886, ch. 179, secs. 8, 9, 15.

*Oath to estreat roll*—The oath of the local registrar to the estreat roll may be sworn before a justice (sub-sec. 2); but it may also be sworn before a commissioner for taking affidavits or other person authorized by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 25 (derived from C.S.U.C., ch. 117, sec. 9); R. v. Zarkas [1918] 1 W.W.R. 323 (Sask.).

#### Filing of rolls in provinces other than Quebec.

**1104.** If such court is a superior court having criminal jurisdiction, one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer,—

- (a) in the province of Ontario, of the High Court of Justice;
- (b) in the provinces of Nova Scotia, New Brunswick and British Columbia, of the Supreme Court of the province;
- (c) in the province of Prince Edward Island, of the Supreme Court of Judicature of that province;
- (d) in the province of Manitoba, of the Court of King's Bench of that province;
- (e) in the province of Saskatchewan or Alberta, of the Supreme Court of the Northwest Territories pending the abolition of that court by the legislature of the province, and thereafter, of such court in either of the said provinces as may in respect of that province be substituted by the legislature thereof for the Supreme Court of the Northwest Territories; and,

(f) in the Yukon Territory, of the Territorial Court; on or before the first day of the term next succeeding the court by or before which such fines or forfeitures were imposed or forfeited.

*Origin*—Sec. 916, Code of 1892; R.S.C. 1886, ch. 179, secs. 8, 9, 15.

**Filing of rolls in sessions or county court.—Writ of *feri facias* and *capias*.**

**1105.** If such court is a court of general sessions of the peace, or a county court, one of such rolls shall remain deposited in the office of the clerk of such court.

2. The other of such rolls aforesaid shall, as soon as the same is prepared, be sent by the clerk of the court making the same, or in case of his death or absence, by such judge as aforesaid, with a writ of *feri facias* and *capias*, according to form 74, to the sheriff of the county in and for which such court was holden.

*Origin*—Sec. 916, Code of 1892; R.S.C. 1886, ch. 179, secs. 8, 9, 15.

*Writ of *feri facias* and *capias**—The process of execution after estreat may be issued out of a civil court, and it was suggested in *R. v. Harvie*, 3 W.W.R. 727, by Macdonald, C.J.A., that it would not be irregular to let the process issue out of a criminal court.

**Levy under writ.—Arrest.**

**1106.** Such writ shall be authority to the sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands or tenements cannot be found, whereof the sums required can be made.

2. Every person so taken shall be lodged in the common gaol of the county, until satisfaction is made, or until the court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case and until such order has been fully complied with.

*Origin*—Sec. 916, Code of 1892; R.S.C. 1886, ch. 179, secs. 8, 9, 15.

**Sale of lands by sheriff under *fi. fa.* and *capias*.**

**1107.** If upon any writ issued under sec. 1105, the sheriff takes lands or tenements in execution he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ comes to the hands of the sheriff.

*Origin*].—Sec. 920, Code of 1892; R.S.C. 1886, ch. 179, sec. 14.

**Discretion of court as to estreat.—Procedure.**

**1108.** Except in the case of persons bound by recognizance for their appearance, or for whose appearance any other person has become bound to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, in every case of default whereby a recognizance becomes forfeited, if the cause of absence is made known to the court in which the person was bound to appear, the court, on consideration of such cause, and considering also, whether, by the non-appearance of such person the ends of justice have been defeated or delayed, may forbear to order the recognizance to be estreated.

2. With respect to all recognizances estreated, if it appears to the satisfaction of the judge who presided at such court that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied.

3. The clerk of the court shall, for such purpose, before sending to the sheriff any roll, with a writ of *feri facias* and *capias*, as directed by sec. 1105, submit the same to the judge who presided at the court, and such judge may make a minute on the said roll and writ of any such forfeited recognizances and fines as he thinks fit to direct not to be levied.

4. The sheriff shall observe the direction in such minute written upon such roll and writ, or endorsed thereon, and shall forbear accordingly to levy any such forfeited recognizance or fine so directed not to be levied.

*Origin*—Sec. 919, Code of 1892; R.S.C. 1886, ch. 179, secs. 12, 13.

*Liability of sureties for the default, although defaulter since taken into custody*—Relief was granted to the sureties in respect of an estreat of their recognizance for defendant's appearance, when the defendant was subsequently taken into custody and so remained at the time of the application, but only upon condition that the sureties pay the Crown's costs of the application. *R. v. Bailly*, 18 Can. Cr. Cas. 289, 3 E.L.R. 74.

*Judge may defer consideration of estreat record to next sittings*—

It is not essential to the validity of an estreat of bail given for appearance for trial that the record of proposed estreates should be made and passed upon at the same sittings at which the default occurred; the trial judge may direct that the estreat record may be held over until the following sittings, and it may then be dealt with. *R. v. Bailly*, 18 Can. Cr. Cas. 289, 3 E.L.R. 74.

**Discharge from custody on giving security.**—Writ of *feri facias* and *capias* on non-appearance.

**1109.** If any person on whose goods and chattels a sheriff, bailiff or other officer is authorized to levy any such forfeited recognizance, gives security to the said sheriff or other officer for his appearance at the return day mentioned in the writ, in the court into which such writ is returnable, then and there to abide the decision of such court, and also to pay such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as are adjudged and ordered by the court, such sheriff or officer shall discharge such person out of custody, and if such person does not appear in pursuance of his undertaking, the court may forthwith issue a writ of *feri facias* and *capias* against such person and the surety or sureties of the person so bound as aforesaid.

*Origin*—Sec. 921, Code of 1892; R.S.C. 1886, ch. 179, sec. 16; 3 Geo. IV, Imp., ch. 46, sec. 5.

**Discharge of forfeited recognizance.**

**1110.** The court, into which any writ of *feri facias* and *capias* issued under the provisions of this Part is returnable, may inquire into the circumstances of the case, and may in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such



court appears just; and such order shall accordingly be a discharge to the sheriff, or to the party, according to the circumstances of the case.

*Origin*—Sec. 922, Code of 1892; R.S.C. 1886, ch. 179, sec. 17; 3 Geo. IV., Imp., ch. 46, sec. 6.

*The court into which the writ is returnable*—The court here specified, although it may be a civil court, is given a discretionary power to discharge the recognizance itself. When the order is made by a civil court it is held to be a civil and not a criminal proceeding. *Re McArthur's Bail* (1897), 3 Terr. L.R. 37, 3 Can. Cr. Cas. 195; *re Talbot's Bail*, 23 Ont. R. 65. The rules of practice will determine whether the application should be made to the court *en banc* or to a judge. It was held in *re Pippy*, (1908) 4 Can. Cr. Cas. 305, that an application in Nova Scotia under sec. 1110 should be made to the judge of the Supreme Court of Nova Scotia (see sec. 1104 (b)) presiding at the criminal sittings of that court; but see *re McArthur's Bail* (1897), 3 Terr. L.R. 37, 3 Can. Cr. Cas. 195, where an order made by the superior court judge who presided at the criminal trial, relieving the bail on payment of certain compensation and costs, was reversed on appeal, on the ground that sec. 1110 gave jurisdiction only to the full court.

#### Return of writ by sheriff.

**1111.** The sheriff, to whom any writ is directed under this Part, shall return the same on the day on which the same is made returnable, and shall state, on the back of the roll attached to such writ, what has been done in the execution thereof; and such return shall be filed in the court into which such return is made.

*Origin*—Sec. 923, Code of 1892; R.S.C. 1886, ch. 179, sec. 18.

#### Roll and return to Minister of Finance.

**1112.** A copy of such roll and return, certified by the clerk of the court into which such return is made, shall be forthwith transmitted to the Minister of Finance, with a minute thereon of any of the sums therein mentioned, which have been remitted by order of the court, in whole or in part, or directed to be forborne, under the authority of sec. 1108.

*Origin*—Sec. 924, Code of 1892; R.S.C. 1886, ch. 179, sec. 19.

*Provisions Applicable only to the Province of Quebec.*

**Estreat on default in Quebec.**

**1113.** Whenever default is made in the condition of any recognizance lawfully entered into or taken in any criminal case, proceeding or matter, in the province of Quebec, within the legislative authority of the Parliament of Canada, so that the penal sum therein mentioned becomes forfeited and due to the Crown, such recognizance shall thereupon be estreated or withdrawn from any record or proceeding in which it then is, or, where the recognizance has been entered into orally in open court, a certificate or minute of such recognizance, under the seal of the court, shall be made from the records of such court.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23. Compare R.S. Que. 1909, article 3394.

**Transmission of recognizance, etc., to Superior Court in Quebec.**

**1114.** Such recognizance, certificate or minute, as the case may be, shall be transmitted by the court, recorder, justice, magistrate or other functionary before whom the cognizor, or the principal cognizor, where there is a surety or sureties, was bound to appear, or to do that by his default to do which the condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purposes, with the certificate of the court, recorder, justice, magistrate or other functionary as aforesaid, of the breach of the condition of such recognizance, of which, and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23. Compare R.S. Que., 1909, article 3395.

"*Shall be conclusive evidence*"—The certificate of forfeiture is "conclusive evidence" only for the purposes of the entry of the *ex parte* judgment authorized by sec. 1115; after such entry is made, the certificate as well as the judgment thereon may be attacked. *R. v. Edwards*, 23 Can. Cr. Cas. 296 (Que.). It may be attacked either before or after the issue of a writ of *fi. fa.* and *capias*. *R. v. Edwards*, *supra*.

In *R. v. Tremblay*, 27 Can. Cr. Cas. 46 (Que.), it was said, in respect of an alleged default under a recognizance to appear in the

King's Bench on a committal for trial, that there was no procedure for attacking the certificate in the King's Bench, but it could be attacked in the Superior Court in the mode allowed by the Quebec Code against any judgment by default. In that case the proceedings were taken by an "opposition to judgment," and see *R. v. Edwards*, *supra*, where the same process was followed.

In *R. v. Davis*, (1914) 24 Can. Cr. Cas. 382, the procedure was by *requête civile* and an ancillary writ of *certiorari*.

In *R. v. Walker*, 23 Can. Cr. Cas. 179, 18 D.L.R. 541, the order of a magistrate certifying the forfeiture of a recognizance to keep the peace given under sec. 748 (2) on complaint of threats was made the subject of an appeal by stated case.

*Alternative procedure by action in certain cases*—See sec. 1119.

#### **Judgment to be entered against cognizor in Quebec.**

**1115.** The date of the receipt of such recognizance or minute and certificate by the prothonotary of the said court shall be endorsed thereon by him, and he shall enter judgment in favour of the Crown against the cognizor for the penal sum mentioned in such recognizance, and execution may issue therefor after the same delay as in other cases, which shall be reckoned from the time the judgment is entered by the prothonotary of the said court.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23.

#### **Execution against cognizor on fiat in Quebec.—Costs.—Imprisonment.**

**1116.** Such execution shall issue upon fiat or *præcipe* of the Attorney General, or of any person thereunto authorized in writing by him; and the Crown shall be entitled to the costs of execution and to costs on all proceedings in the case subsequent to execution, and to such costs, in the discretion of the court, for the entry of the judgment, as are fixed by any tariff.

2. The cognizor shall be liable to coercive imprisonment for the payment of the judgment and costs.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23.

#### **Execution in Quebec against cognizor.—Insufficient goods or lands.**

**1117.** When sufficient goods and chattels, lands or tenements cannot be found to satisfy the judgment against a cognizor and the same is certified in the return to the writ of execution

or appears by the report of distribution, a warrant of commitment addressed to the sheriff of the district may issue upon the fiat or *præcipe* of the Attorney General, or of any person thereunto authorized in writing by him, and such warrant shall be authority to the sheriff to take into custody the body of the cognizor so in default and to lodge him in the common gaol of the district until satisfaction is made, or until the court which issued such warrant, upon cause shown as hereinafter mentioned, makes an order in the case and such order has been fully complied with.

2. Such warrant shall be returned by the sheriff on the day on which it is made returnable and the sheriff shall state in his return what has been done in execution thereof.

3. On petition of the cognizor, of which notice shall be given to the clerk of the Crown of the district, the court may inquire into the circumstances of the case and may in its discretion order the discharge of the amount for which he is liable or make such order with respect thereto and to his imprisonment as may appear just, and such order shall be carried out by the sheriff.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23.

*If no goods or lands on which to levy*—Where there are several cognizors the goods and lands of all of them must be proceeded against before enforcing the default by personal arrest of any of them. *R. v. Ferris* (1895), 9 Que. S.C. 376.

#### Process on recognizance in Quebec.

**1118.** When a person has been arrested in any district for an offence committed within the limits of the province of Quebec, and a justice has taken recognizances from the witnesses heard before him or another justice, for their appearance at the next session or term of the court of competent criminal jurisdiction, before which such person is to undergo his trial there to testify and give evidence on such trial and such recognizances have been transmitted to the office of the clerk of such court, the said court may proceed on the said recognizances in the same manner as if they had been taken in the district in which such court is held.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23.

**Recovery by action on recognizance in Quebec.**

**1119.** Whenever any sum forfeited by the non-performance of the conditions of a recognizance cannot for any reason be recovered in the manner provided in the last four preceding sections, the same shall be recoverable, with costs, by action in any court having jurisdiction in civil cases to the amount, at the suit of the Attorney General of Canada or of Quebec, or other person or officer authorized to sue for the Crown; and in any such action it shall be held that the person suing for the Crown is duly empowered so to do, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the Crown, unless the defendant proves the contrary.

2. The cognizor for the recovery of the judgment in any such action shall be liable to coercive imprisonment in the same manner as a surety is in the case of judicial suretyship in civil matters.

*Origin*—Sec. 926, Code of 1892; R.S.C. 1886, ch. 179, secs. 21, 22, 23.

## PART XXII.

### EXTRAORDINARY REMEDIES.

#### Ordering further detention of person accused on inquiry as to legality of imprisonment.

**1120.** Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, habeas corpus or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice, under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

*Origin*—Sec. 752, Code of 1892; Code Amendment Act, 1908, ch. 18.

*"In custody charged with an indictable offence"*—There is a division of opinion in Canadian courts as to whether the sec. 1120 applies after a conviction, and while a prisoner is serving a sentence thereunder, as well as to a commitment which is not one in execution. That it does so apply was affirmed in *R. v. Frejd*, 22 O.L.R. 566; *R. v. Graf*, 19 O.L.R. 238, 15 Can. Cr. Cas. 193; *R. v. Macdonald*, 21 O.L.R. 38, 16 Can. Cr. Cas. 121; *ex parte Carroll*, 29 Can. Cr. Cas. 213 (Que.); *re Le Blanc*, 22 Can. Cr. Cas. 208 (N.S.). Compare under a similar provincial law *R. v. Ackers*, 16 Can. Cr. Cas. 222 (Ont.); *R. v. Morgan*, 2 O.L.R. 413, affirmed by *R. v. Morgan*, 3 O.L.R. 356.

Doubt was expressed as to its application to convicted persons in *R. v. Goldsberry*, 11 Can. Cr. Cas. 159 (Que.); and in the later case of *R. v. Morgan*, (1913) 25 Can. Cr. Cas. 192, 20 R.L. 277 (Que.), it was held that a person "charged" does not mean a person sentenced although the trial was illegal.

*"May make an order"*—The word "may" is to be construed as permissive. R.S.C. 1906, ch. 1, sec. 34 (24). If no application be made by the prosecution or by the Crown for the further detention of the prisoner and for time to bring in a new warrant in substitution for

the defective one, there is nothing to prevent the court from ordering his discharge. *Re Le Blanc*, 22 Can. Cr. Cas. 208, distinguishing *R. v. Corbett*, 2 Can. Cr. Cas. 499.

If a penalty imposed by the magistrate did not exceed the authorized maximum and the conviction and commitment were regular, the court, on habeas corpus, has no jurisdiction to revise the sentence. *O'Neil v. Carboneau*, (1918) 29 Can. Cr. Cas. 340 (Que.).

If a valid cause of detention appears at the time of the return to the writ of habeas corpus, a discharge must be refused although the commitment was illegal at its inception. *R. v. Mitchell*, (1911) 24 O.L.R. 324, 19 Can. Cr. Cas. 113.

*Direction for amended commitment to cure defect appearing on habeas corpus*—In *Côté v. Morin*, (1917) 50 Qua. S.C. 124, 30 Can. Cr. Cas. 59, sec. 1120 was referred to as the basis of the practice of permitting the substitution of a new warrant of commitment for another when the latter is irregular; and was applied to a commitment following a summary conviction; and see *R. v. Morgan*, 5 Can. Cr. Cas. 63; *R. v. Barre*, 15 Man. R. 420, 11 Can. Cr. Cas. 1; *R. v. Wright*, 10 Can. Cr. Cas. 461; *re Plunkett*, 1 Can. Cr. Cas. 365, 3 B.C.R. 484; *R. v. Macdonald*, 21 O.L.R. 38, 16 Can. Cr. Cas. 121.

Under some circumstances powers analogous to those conferred by sec. 1120 may exist apart from the statute, and, whether or not the section applies to commitments in execution, it is said that there is an inherent power in a court exercising the powers of the former Court of King's Bench in England to retain the prisoner in custody until a formal defect is remedied. *Ex parte Carroll*, 29 Can. Cr. Cas. 213 (Que.); *R. v. Frejd*, 22 O.L.R. 566; *R. v. Richards*, 5 Q.B. 1126.

An amended commitment in execution of a conviction must conform to the conviction itself, and if the conviction be defective there may be a direction for an amended conviction in cases in which an amendment of the conviction would be permissible on a *certiorari*. See Code sec. 1121-1125, 1128-1132.

For examples of directions that the magistrate file an amended conviction see also *re Le Blanc*, (1914) 22 Can. Cr. Cas. 208; *R. v. Macdonald*, 21 O.L.R. 38; *R. v. Smith*, 16 Can. Cr. Cas. 425.

The power of amending a conviction under sec. 1124 now extends to convictions on summary trial (Part XVI), as well as to summary convictions (Part XV). Code sec. 797 (2); and see *R. v. Crawford*, (1912) 2 W.W.R. 952, 20 Can. Cr. Cas. 49 (Alta.). Cases under the prior law—*R. v. Randolph*, 4 Can. Cr. Cas. 165, 32 Ont. R. 212; *R. v. Shing*, 17 Can. Cr. Cas. 463—are no longer of authority for refusing to order further detention in respect of a summary trial conviction and commitment, under the like circumstances as upon a summary conviction.

Compare *R. v. Payne*, 30 Can. Cr. Cas. 382 (Que.).

Further detention may be refused and the prisoner's discharge ordered if there has been a gross miscarriage of justice both as to the

illegal term imposed and the class of imprisonment. *R. v. Hayward*, 5 Q.L.R. 65, 6 Can. Cr. Cas. 399.

Apart from sec. 1120 the court has the power to receive an amended commitment at the hearing of the habeas corpus motion; *R. v. Richards*, 5 Q.B. 926; but under sec. 1120 if an amended commitment is not produced, but the court is of opinion that the defect might be cured by an amended commitment, and that such will "best further the ends of justice," it will give a direction that such be filed, and remand the prisoner to custody to be further detained as if such direction had already been complied with. *R. v. Macdonald*, 21 O.L.R. 38, 16 Can. Cr. Cas. 121.

Like all other powers of this nature bestowed upon or inherent in the judges of the King's Bench, it is not to be exercised as a matter of course, but only when such action is necessary in the interest of justice. *Ex parte Carroll*, 29 Can. Cr. Cas. 213 (Que.); *R. v. Kolember*, 22 Can. Cr. Cas. 341 (Y.T.).

*Remands to custody for further proceedings or proceedings de novo*—If the magistrate had jurisdiction to hold a preliminary enquiry, but proceeded without jurisdiction to hold a summary trial, the jurisdiction is properly exercised by an order remanding the accused to be dealt with upon a preliminary enquiry. *R. v. Manzi* (1915), 8 O.W.N. 533, 24 Can. Cr. Cas. 359; *R. v. Frejd*, 22 O.L.R. 566. [Contra, *R. v. Kolember*, 22 Can. Cr. Cas. 341 (Y.T.); *R. v. Blucher*, 7 Can. Cr. Cas. 278; *R. v. Alexander*, (1913) 5 W.W.R. 17, 21 Can. Cr. Cas. 473, 25 W.L.R. 290 (Alta.).]

Conversely, if the magistrate, after hearing evidence on both sides in a summary trial (Part XVI), illegally renounced his summary trial jurisdiction and committed for trial, the court on habeas corpus may discharge the accused if it considers that the ends of justice have been served by the imprisonment, he has undergone under the committal for trial. *R. v. Hicks* (1912), 2 W.W.R. 1100, 20 Can. Cr. Cas. 192, 22 W.L.R. 236 (Alta.).

If hard labor has been imposed where not authorized, that part of the conviction is severable and the direction of hard labor may be quashed on habeas corpus or certiorari and an amended conviction substituted. *Re Muschik*, (1916) 9 W.W.R. 1285, 9 Sask. L.R. 1, 25 Can. Cr. Cas. 170; *R. v. Atkinson*, (1914) 6 W.W.R. 1055, 23 Can. Cr. Cas. 149, 28 W.L.R. 412 (Man.); *R. v. McAnn*, 4 B.C.R. 587, 3 Can. Cr. Cas. 110. But the substitution of a valid conviction will not validate the hard labor already suffered under the illegal direction. *R. v. McAnn*, supra.

*Habeas corpus Rules*—Code sec. 576.

*Order of protection to magistrate and officer*—See sec. 1132.

*Bail on habeas corpus*—See *R. v. Imanachuk* [1918] 3 W.W.R. 207 (Alta.); *ex parte Simpson* (1918), 30 Can. Cr. Cas. (N.S.); *re Hearson*, 7 Times L.R. 284; *re Watts*, 3 O.L.R. 279, 5 Can. Cr. Cas. 538.



**Want of form.**—Summary conviction affirmed on appeal, validated notwithstanding defect.—Defective commitment validated if conviction valid.

**1121.** No conviction or order made on summary conviction which has been affirmed, or affirmed and amended, in appeal, shall be quashed for want of form, or be removed by *certiorari* into any superior court, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same.

*Origin*—Sec. 886, Code of 1892.

*Summary convictions or orders against defendant affirmed on appeal*—An order dismissing a complaint is not included. *R. v. Laird*, 1 Terr. L.R. 179.

Where the defendant has appealed against a summary conviction and it is affirmed on appeal, he may still have a *certiorari* upon any ground which impeaches the jurisdiction of the magistrate. *R. v. Starkey*, 7 Man. R. 43; *Johnston v. O'Reilly*, 12 Can. Cr. Cas. 218, 16 Man. R. 405; *Fanchaux v. Georgett* (1915) 9 W.W.R. 458, 8 Sask. L.R. 324, 32 W.L.R. 863, 25 Can. Cr. Cas. 76; (*R. v. Georgett*, 23 Can. Cr. Cas. 341, reversed on appeal).

A commitment in respect both of the imprisonment imposed in a summary conviction for the offence and of the costs of the unsuccessful appeal therefrom is severable, and if the unexpired term under either has been legally awarded, it will constitute an answer in *habeas corpus*. *Collette v. The King*, 16 Can. Cr. Cas. 281, 19 Que. K.B. 124.

**Summary conviction.**—Appeal taken is a bar to *certiorari*

**1122.** No writ of *certiorari* shall be allowed to remove any conviction or order had or made before any justice if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal.

*Origin*—Sec. 887, Code of 1892; R.S.C. 1886, ch. 178, sec. 84.

"*If the defendant has appealed*"—In *Reg. v. Lynch*, 12 O.R. 372, and in *Johnston v. O'Reilly*, 16 Man. R. 405, 12 Can. Cr. Cas. 218, it was held that serving a valid notice of appeal is appealing.

If the appeal proceedings were abortive because of some defect which deprived the appeal tribunal of jurisdiction to hear the appeal, *certiorari* is not taken away. *R. v. O'Brien*, 38 N.B.R. 109; *Fanchaux v. Georgett* (1915) 9 W.W.R. 458, 8 Sask. L.R. 325, 25 Can. Cr. Cas. 76;

R. v. Alford, 10 Can. Cr. Cas. 61; R. v. Caswell, 33 U.C.Q.B 303; R. v. Becker, 20 Ont. R. 676.

The statutory right to appeal and its exercise do not preclude the court from granting *certiorari* where want of jurisdiction is shown; R. v. Starkey, 7 Man. L.R. 43; Johnston v. O'Reilly, 12 Can. Cr. Cas. 218, 16 Man. L.R. 405; Davis v. Feinstein (1915) 8 W.W.R. 1003, 24 Can. Cr. Cas. 160, 24 D.L.R. 798, 25 Man. R. 507.

In R. v. Ashcroft, 2 Can. Cr. Cas. 385, it was held that a party has always a right to a writ of *certiorari* on the ground of want of jurisdiction, no matter whether an appeal is pending or not. And see *re Ruggles*, 35 N.S.R. 57; Denault v. Robida, 10 Que. S.C. 199; Pakhala v. Hannuksela (1912) 2 W.W.R. 911, 921; R. v. Haines, *ex parte* McCorquindale, 39 N.B.R. 49, 15 Can. Cr. Cas. 187; R. v. Chappus, 39 O.L.R. 329, affirming 38 O.L.R. 576.

"Court to which an appeal is authorized by law"—If the notice of appeal is given to the court of the wrong district (sec. 749) it is not within this phrase. R. v. Deer, [1919] 1 W.W.R. 410 (Sask.); R. v. Delegarde, 36 N.B.R. 503; same case, *ex parte* Cowan, 9 Can. Cr. Cas. 454.

#### Theft by juvenile not over 16.—Conviction or warrant under Part XVII.

**1123.** No conviction under Part XVII shall be quashed for want of form or be removed by *certiorari* or otherwise into any court of record; and no warrant of commitment under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted and there is a good and valid conviction to sustain the same.

*Origin*—Sec. 820, Code of 1892; R.S.C. 1886, ch. 177, sec. 15.

*Juvenile Offenders*—Part XVII deals with the summary trial of juveniles for theft or offences punishable as theft. Sec. 802.

**Validation of summary convictions, etc., notwithstanding irregularity or insufficiency under certain conditions.—Same power to amend on *certiorari*, as on an appeal.—Sufficiency of statement in information, warrant, etc.**

**1124.** No conviction or order made by any justice, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the court or judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction,

order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence: Provided that the court or judge, where so satisfied, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by sec. 754 conferred upon the court to which an appeal is taken under the provisions of sec. 749.

2. Any statement which, under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant.

*Origin*—R.S.C. 1886, ch. 178, sec. 87; 53 Vict., ch. 37, sec. 27; sec. 889, Code of 1892.

*"Conviction or order made by any justice"*—Sec. 797, sub-sec. (2) added by 3-4 Geo. V, Can., ch. 13, sec. 28, enacts that the provisions of sec. 1124 shall apply to convictions or orders made under Part XVI, a question upon which there were conflicting decisions before that enactment. *R. v. Shing* (1910) 20 Man. R. 214, 15 W.L.R. 714, 17 Can. Cr. Cas. 463; *R. v. Crawford* (1912) 2 W.W.R. 952, 22 W.L.B. 107; *R. v. Stark* (1911) 18 W.L.R. 419, 19 Can. Cr. Cas. 67; *R. v. Randolph*. 32 Ont. R. 212.

As regards summary trials the application of sec. 1124 is not limited to the special appeals under secs. 773, sub-secs. (a) and (f) for which sec. 797 provides; and an excess of punishment in the conviction may be corrected in a manner analogous to that exercisable on an appeal taken from a summary conviction under Part XV. See *R. v. Boardman* (1914) 4 W.W.R. 1304; *R. v. Crawford* (1912) 2 W.W.R. 952. But a doubt is raised by one Ontario case as to whether *certiorari* is applicable as an alternative to an appeal by a case reserved or stated under sec. 1013 *et seq.* following a summary trial based upon the extended jurisdiction of sec. 777, even to test the question of jurisdiction. *R. v. Sinclair*, 38 O.L.B. 149.

*"On being removed by certiorari"*—This phrase includes a process for removal of convictions on notice substituted for a writ of *certiorari* by Crown Rules. *R. v. Jackson*, (1917) 40 O.L.R. 173; *R. v. Titchmarsh* (1914) 32 O.L.R. 569.

*Crown Rules on certiorari practice*—Code sec. 576.

*"Upon perusal of the depositions"*—Where there is no limitation upon the right to *certiorari*, the court will look at the depositions, and if there be no legal evidence at all to support the finding, will quash a summary conviction. *R. v. Barber Asphalt Co.*, 23 O.L.R. 372; *R. v.*

Coulson, 27 Ont. R. 59; *R. v. McPherson* (1916) 9 W.W.R. 613, reversing 9 W.W.R. 164 (Sask.); *R. v. Toy Moon* (1911) 1 W.W.R. 50, 21 Man. R. 527; *Lacasse v. Fortier*, (1917) 30 Can. Cr. Cas. 87 (Que.); *R. v. Emery*, [1917] 1 W.W.R. 337, 10 Alta. L.R. 139; *ex parte Dalley*, 27 N.B.R. 129; *ex parte Coulson*, 33 N.B.R. 341; *White v. Feast*, L.R. 7 Q.B. 353.

A proper test is whether the facts from which the magistrate's conclusion was drawn would be sufficient to submit to the jury if the offence had been triable by a jury instead of by the magistrate. *R. v. Kolotyła*, 21 Man. R. 197; *R. v. Davidson*, 8 Man. R. 325. But it will not consider the weight of conflicting evidence if the conviction is otherwise regular. *Re Trepanier*, 12 S.C.R. 111 at 129 (Can.); *R. v. McPherson*, *supra*; *R. v. Nickerson*, (1909) 39 N.B.R. 428; *R. v. Reinhardt*, 27 Can. Cr. Cas. 445 (Ont.).

The effect of sec. 1124 construed with secs. 754 and 749, was held in *R. v. Toy Moon*, (1911) 1 W.W.R. 50, 21 Man. R. 527, to be that the Court shall, notwithstanding any defect in the conviction, determine the complaint on the merits, and it is empowered to confirm, reverse, or modify the decision of the justice or make such other conviction as the Court thinks just: sec. 754. Under these provisions, the Court should look at the evidence to ascertain if an offence of the nature described in the conviction was committed for which the accused might have been convicted by the magistrate; and the conviction may be modified or a new conviction may be made, so as to declare the accused guilty of the offence warranted by the evidence. *R. v. Dickey*, (1916) 9 W.W.R. 142, 144, per Beck, J.; *R. v. Barb* [1917] 2 W.W.R. 326; 28 Can. Cr. Cas. 93; *R. v. Emery* [1917] 1 W.W.R. 337, 10 Alta. L.R. 139, 27 Can. Cr. Cas. 116, overruling *R. v. Carter*, 9 Alta. L.R. 481, 26 Can. Cr. Cas. 51, 34 W.L.R. 448; *R. v. Covert*, [1917] 1 W.W.R. 919, 10 Alta. L.R. 349, 28 Can. Cr. Cas. 25, and see *R. v. Morin*, [1917] 3 W.W.R. 693, 28 Can. Cr. Cas. 414.

If the depositions apart from physical exhibits not returned with them do not show that an offence was committed, the court should continue the *certiorari* proceedings so that the exhibits may be produced. *R. v. Dickey* (1916) 9 W.W.R. 142, 146 (Alta.).

If there is an irregularity which apart from sec. 1124 or other curative sections would impel the court to quash the conviction, and of the class to which sec. 1124 applies, then the direction of this enactment to the court is such that the court is not compelled to overlook the irregularity if it would not have made any conviction on the evidence which the magistrate had before him. *R. v. Tystad*, 15 Can. Cr. Cas. 236 (Y.T.); *R. v. Law Bow*, 7 Can. Cr. Cas. 468; *R. v. Melvin*, 38 O.L.R. 231; *R. v. Schooley*, 11 O.W.N. 341, 27 Can. Cr. Cas. 444; *R. v. Barb*, [1917] 2 W.W.R. 326, 28 Can. Cr. Cas. 93 (Alta.).

*Cases under statutes taking away right to certiorari*—If the right to *certiorari* has been taken away in respect of a particular class of

offences by the statute governing them, and the *certiorari* is therefore limited strictly to matters of jurisdiction of the magistrate, it is said that the court on *certiorari* will not look at the depositions to see if there was any evidence upon which to convict as that would be reviewing the erroneous finding by the magistrate that there was sufficient evidence, and it is to be assumed that the statute taking away *certiorari* prohibited such a review. *R. v. Davis*, (1913) 23 Can. Cr. Cas. 33 (N.B.); *ex parte Daley*, 27 N.B.R. 129; *R. v. Hornbrook*, 39 N.B.R. 298; *R. v. Holyoke*, 42 N.B.R. 135; *R. v. Hoare* (1915) 49 N.S.R. 119; *R. v. Walsh*, 29 N.S.R. 53; *ex parte Coulson*, 33 N.B.R. 341; *R. v. Wallace* (1883) 4 Ont. R. 127; *R. v. Cantin*, 39 O.L.R. 20; *R. v. Berry* (1916) 38 O.L.R. 177; *R. v. Chappus*, 39 O.L.R. 329, affirming 38 O.L.R. 576. But that limitation is not to be taken as depriving the court of jurisdiction if the conviction is manifestly against natural justice and upon evidence not directed to the real question raised by a plea of not guilty to the offence. If there is a manifest defect in the jurisdiction of the tribunal or a manifest fraud in the party procuring the conviction, the court will review those grounds notwithstanding a statute taking away *certiorari*. *Colonial Bank v. Willan*, (1874) L.R. 5 P.C. 417, 442, and see *R. v. Morn Hill Camp*, [1917] 1 K.B. 176; *R. v. Bolton*, 1 Q.B. 66. So also a review may be granted in respect of the improper conduct of the magistrate, or the failure to observe the fundamental principles entitling the defendant to a fair trial. *Re Sing Kee*, 8 B.C.R. 20; *ex parte Legere*, 27 N.B.R. 292.

And although *certiorari* is taken away in respect of summary convictions under a special statute (as the Opium and Drug Act, 1-2 Geo. V, ch. 17), it seems that the depositions may be looked at in determining whether costs should be granted or refused on dismissing the motion. *R. v. Featherstone* [1919] 1 W.W.R. 829 (Alta.).

**Magistrate may return an amended conviction**—Apart from the provisions of sec. 1124, permitting the court, in certain events, to amend the conviction brought up, it is permissible for the convicting magistrate to return an amended conviction in substitution for the original or for that already returned as a part of the record, so long as the new conviction conforms to the actual adjudication and furthermore is supported by the evidence. *R. v. Bissette* [1917] 3 W.W.R. 501 (Alta.); *R. v. Smith*, 45 N.S.R. 517; *R. v. Nelson* (1914) 6 W.W.R. 706, 7 Sask. L.R. 92, 28 W.L.R. 102; *R. v. Barre*, 15 Man. R. 420; *R. v. McAnn*, 4 B.C.R. 587; *R. v. Bennett*, 3 Ont. R. 45; *R. v. Watchman*, (1914) 7 W.W.R. 880, 30 W.L.R. 534, 7 Sask. L.R. 350, 23 Can. Cr. Cas. 362; *ex parte Giberson*, 16 Can. Cr. Cas. 66, 71 (N.B.); *R. v. Whiffin*, (1900) 3 Terr. L.R. 3; *Sellwood v. Mount*, 10 L.J.M.C. 121, 1 Q.B. 726, 7 C. & P. 75; *R. v. Fitzgerald*, (1911) 1 W.W.R. 109, 19 W.L.R. 462 (Alta.); *R. v. O'Brien*, *ex parte Grey*, 37 N.B.R. 604.

**What defects not curable on certiorari**—A defect in a summary conviction may be so fundamental that it will not be amended on

*certiorari*. *R. v. Little* (1915) 10 W.W.B. 893 (where neither the information nor the conviction described anything criminal); *R. v. Roach*, (1914) 6 O.W.N. 632, 23 Can. Cr. Cas. 28; *Smith v. Moody* [1903] 1 K.B. 56; *R. v. Lamothe* 18 O.L.R. 310; *R. v. Aikens*, (1915) 23 Can. Cr. Cas. 467 (N.S.); *R. v. Hayes*, 5 O.L.R. 198; *R. v. Bridges*, 13 B.C.R. 67; *R. v. Reedy*, 18 O.L.R. 1; *R. v. C.P.R.*, 12 Can. Cr. Cas. 549 (Terr.).

*Reducing illegal and excessive punishment*—The power of reducing the punishment where in excess of the legal maximum is exercisable upon the material returned; a trial *de novo* is not necessary for the purpose of revising a punishment in that event. *R. v. McKenzie*, 41 N.S.R. 178. It may be reduced either to the statutory maximum or below it, in like manner as an appeal judge might deal with an appeal under sec. 754. *R. v. McKenzie*, *supra*; *R. v. Budolph*, 1 O.W.N. 257, 17 Can. Cr. Cas. 206; *R. v. Gavin*, 30 N.S.B. 162; *R. v. Spooner*, 32 Ont. R. 481; *R. v. Van Fleet*, [1918] 1 W.W.R. 322 and 432 (Alta.); *R. v. Code*, 1 Sask. L.R. 295, 13 Can. Cr. Cas. 372.

And on a habeas corpus with which no *certiorari* in aid had been issued, the decision may either be delayed for the purpose of allowing the Crown to bring the conviction and proceedings before the court upon *certiorari*, or if these are produced to the court the conviction may be amended without that formality. *R. v. Avon* (1919) 16 O.W.N. 162.

The imposition of illegal costs may be cured by striking out the clause of the conviction dealing with costs, thus amending the conviction in the manner authorized by sec. 754. *R. v. Gage* (1916) 27 Can. Cr. Cas. 330, 10 O.W.N. 364.

The court may quash the conviction instead of reducing the illegal punishment if the ends of justice are better served in that way. Code sec. 1120; and cases there cited.

A conviction containing an illegal penalty was quashed where evidence was irregularly given of a previous offence and the court was not satisfied that the accused was guilty of the charge. *R. v. L'Hirondelle*, (1916) 10 W.W.R. 837, 26 Can. Cr. Cas. 71 (Alta.).

If a summary trial was held on a plea of not guilty, but the depositions were not taken down in writing as they should have been, the conviction must be quashed. *Perron v. Senecal*, (1915) 24 Can. Cr. Cas. 358, 17 Que. P.R. 134.

If the plea were one of guilty, although there were no depositions, it would seem that the same powers of amendment as the appeal judge would have under sec. 754 might the more easily be applied. A perusal of the depositions is required solely for the purpose of satisfying the court that notwithstanding the irregularity in the proceedings or the excess in the punishment the accused was really guilty; and it seems incorrect to say that the words "upon perusal of the depositions" create a condition precedent barring an amendment of the conviction where depositions had been unnecessary because of defendant's plea.

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Contra: *R. v. Alexander*, (1913) 5 W.W.R. 17, 21 Can. Cr. Cas. 473, 25 W.L.R. 290 (Alta.).

*Recognizance on certiorari*—A separate section of the Code (sec. 1126) confers power on the court having authority to quash a conviction, etc., before a justice, to provide by a general order for security by recognizance or deposit. Sec. 1096 relates to the enforcement of the recognizance.

*Ordering restitution of fine on quashing conviction*—On making the order to quash, the court may also direct that the fine and costs still in the custody of the magistrate or other local authority shall be returned to the defendant. *R. v. Hung Gee* (No. 2), (1913) 4 W.W.R. 1133, 24 W.L.R. 862, 21 Can. Cr. Cas. 411; *R. v. Wightman*, 29 U.C.Q.B. 211 (Ont.); *Mercier v. Plamondon*, 6 Can. Cr. Cas. 223 (Que.).

**Irregularities enable under sec. 1124.**

**1125.** The following matters amongst others shall be held to be within the provisions of the last preceding section:—

- (a) The statement of the adjudication, or of any other matter or thing, in the past tense instead of in the present;
- (b) The punishment imposed being less than the punishment by law assigned to the offence stated in the conviction or order, or to the offence which appears by the depositions to have been committed;
- (c) The omission to negative circumstances, the existence of which would make the act complained of lawful, whether such circumstances are stated by way of exception or otherwise in the section under which the offence is laid, or are stated in another section.

2. Nothing in this section contained shall be construed to restrict the generality of the wording of the last preceding section.

*Origin*—Sec. 890, Code of 1892; R.S.C. 1886, ch. 178, sec. 80.

**General order for security by recognizance on certiorari.—Or deposit as security.**

**1126.** The court having authority to quash any conviction, order or other proceeding by or before a justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice, brought before such

court by *certiorari*, shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction or order has been made, or before a judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the court where such conviction, order or proceeding is affirmed.

*Origin*—49 Vict., Can., ch. 49, sec. 9; sec. 892, Code of 1892.

*Enforcing recognizance on certiorari*—See sec. 1096.

*Crown Rules as to certiorari*—Code sec. 576.

**No *procedendo* necessary on discharge of motion to quash.**

**1127.** If a motion or rule to quash a conviction, order or other proceeding is refused or discharged, it shall not be necessary to issue a writ of *procedendo*, but the order of the court refusing or discharging the application shall be a sufficient authority for the registrar or other officer of the court forthwith to return the conviction, order or proceeding to the court or justice from which or whom they were removed, and for proceedings to be taken thereon for the enforcement thereof, as if a *procedendo* had issued, which shall forthwith be done.

*Origin*—Sec. 895, Code of 1892; R.S.C. 1886, ch. 178, sec. 93.

*Directing further proceedings in other cases*—See Code sec. 1120; R. v. Ziekriek, 11 Man. R. 452; R. v. Harrison, 15 O.L.R. 231.

**Conviction, etc., not set aside for want of proof of order in council, proclamation, etc.—Publication in *Canada Gazette*,—Judicial notice.**

**1128.** No order, conviction or other proceeding made by any justice or stipendiary magistrate shall be quashed or set aside, and no defendant shall be discharged, by reason of any



objection that evidence has not been given of a proclamation or order of the Governor in Council, or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada, or of the publication of such proclamation, order, rules, regulations or by-laws in the *Canada Gazette*.

2. Such proclamation, order, rules, regulations and by-laws and the publication thereof shall be judicially noticed.

*Origin*—Sec. 894, Code of 1892; 51 Vict., Can., ch. 45, sec. 10.

*Judicial notice*—See also secs. 17 and 18 of the Canada Evidence Act, R.S.C. 1906, ch. 145.

**Conviction not to be set aside for defect in form.**

**1129.** Whenever it appears by any conviction made by a justice or stipendiary magistrate that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case.

*Origin*—Sec. 896, Code of 1892; R.S.C. 1886, ch. 178, sec. 94.

*"Defects of form" cured if merits have been tried and defendant has not appealed*—Sec. 1129 has reference to *certiorari* proceedings. *R. v. Hostyn*, 1 W.L.R. 113. Compare secs. 1121-1124, 1132.

**Validation of proceedings under Summary Trials Part notwithstanding want of form.**

**1130.** No conviction, sentence or proceeding under Part XVI shall be quashed for want of form; and no warrant of commitment upon a conviction under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted and there is a good and valid conviction to sustain the same.

*Origin*—Sec. 800, Code of 1892; R.S.C. 1886, ch. 176, sec. 24.

*Defects of form in summary trial proceedings*—This section is sufficient in its terms to cover even so serious a defect as the absence of the signature and seal of one of the two justices, if there is a valid

conviction in other respects. *R. v. James* (1915) 9 W.W.R. 235, 9 A.L.R. 66, 25 Can. Cr. Cas. 23. A defective commitment is not cured by sec. 1130 if it recites a conviction invalid on its face; *R. v. Gibson*, 29 Ont. R. 660. An omission to state in the conviction that the accused consented to summary trial in a case where such consent was essential to the jurisdiction, has been held to be a matter of form curable by this section if, in fact, the consent was given. *R. v. Burtress*, 3 Can. Cr. Cas. 536. And the use of the information as a "charge in writing" if a defect at all is one of form only. *R. v. McLeod*, 39 N.S.R. 108; and see *R. v. Gill*, 18 O.L.R. 234, 14 Can. Cr. Cas. 294; *R. v. Wong Joe*, [1918] 3 W.W.R. 672 (B.C.).

**No action against official when conviction quashed.**

**1131.** If an application is made to quash a conviction, order or other proceeding made or had by or before a justice or stipendiary magistrate, on the ground that such justice or stipendiary has exceeded his jurisdiction, the court or judge to which or whom the application is made, may, as a condition of quashing the conviction, order or other proceeding, if the court or judge thinks fit so to do, provide that no action shall be brought against the justice or stipendiary by or before whom such conviction, order or other proceeding was made or had, or against any officer acting thereunder or under any warrant issued to enforce any such conviction or order.

*Origin*—Compare sec. 891, Code of 1892.

"*As a condition of quashing the conviction*"—The protection order under sec. 1131 can be made only in a proceeding in which the conviction is being quashed. In habeas corpus proceedings in Ontario an order for discharge *ex debito justitiæ* could not be accompanied by an order for protection, unless the conviction was before the court for review. *R. v. Lowery*, (1907) 15 O.L.R. 182, 13 Can. Cr. Cas. 105; *R. v. Peart*, 7 O.W.N. 126; and see *R. v. Tunnheim*, [1919] 1 W.W.R. 480 (Sask.). But protection might be granted when the conviction itself came up on a motion to quash and not merely on a *certiorari* in aid of the habeas corpus. Meanwhile the conviction, if valid on its face, would be available in defence of an action brought against the magistrate or officer.

A protection order was refused under the special circumstances set out in *R. v. Hackam*, 15 O.W.N. 190 and 345.

"*As a condition of quashing*"—In *R. v. Morningstar*, 11 O.L.R. 318, the view was taken that the applicant might reject the condition and that, in that event, the order would be for dismissal of the *certiorari*.

**Public works.**—Proceedings relating to Part III not void for defect of form.

**1132.** No action or other proceeding, warrant, judgment, order or other instrument or writing, authorized by any provisions of Part XII relating to Part III or necessary to carry out its provisions, shall be held void or be allowed to fail for defect of form.

*Origin*—R.S.C. 1886, ch. 151, sec. 23.

## PART XXIII.

### RETURNS.

#### Quarterly returns of summary convictions by justices.

**1133.** Every justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, make to the clerk of the peace or other proper officer of the court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him, and of the receipt and application by him of the moneys received from the defendants.

2. Such return shall include all convictions and other matters not included in some previous return, and shall be in form 75.

3. If two or more justices are present, and join in the conviction, they shall make a joint return.

4. Every justice, to whom any such moneys are afterwards paid, shall make a return of the receipt and application thereof, to the court having jurisdiction in appeal as hereinbefore provided, which shall be filed by the clerk of the peace or the proper officer of such court with the records of his office.

5. In the province of Prince Edward Island such return shall be made to the clerk of the court of assize of the county in which the convictions are made, and on or before the fourteenth day next before the sitting of the said court next after such convictions are so made.

6. Every such return shall be made in the district of Nipissing, in the province of Ontario, to the clerk of the peace for the county of Renfrew, in the said province.

*Origin*—Sec. 902, Code of 1892; R.S.C. 1886, ch. 178, sec. 99.

*"Every justice"*—See definition in sec. 2 (18).

**Neglect or false return or taking unlawful fees.—Penalty.—Disposition of penalty.**

**1134.** Every justice, before whom any conviction takes place, or who receives any such moneys, who neglects or refuses to make such return thereof, or wilfully makes a false, partial or incorrect return, or wilfully receives a larger amount of fees than by law he is authorized to receive, and every justice who upon or in connection with, or under colour or pretense of, any information, complaint or judicial proceeding or inquiry had or taken before him, wilfully exacts, receives, appropriates or retains any fees, moneys or payments which he is not by law authorized to receive or to be paid, shall incur a penalty of eighty dollars, together with costs of suit, in the discretion of the court, which may be recovered by any person who sues for the same by action of debt or information in any court of record in the province in which such return ought to have been or is made.

2. One moiety of such penalty shall belong to the person suing, and the other moiety to His Majesty for the public uses of Canada.

3. Nothing in this section shall have the effect of preventing any person aggrieved from prosecuting, by indictment, any justice, for any offence, the commission of which would have subjected him to indictment immediately before the first day of July, 1893.

*Origin*—4 Edw. VII, Can., ch. 9, sec. 1; secs. 902 and 905, Code of 1892; R.S.C. 1886, ch. 178, secs. 100, 101, 105.

*"Wilfully exacts, receives," etc.*—A "wilful" receiving is an intentional receiving with knowledge that he is not legally entitled. *McGillivray v. Muir* (1903) 7 Can. Cr. Cas. 360, 6 O.L.R. 154; *R. v. Tisdale*, 20 U.C.Q.B. 272; *R. v. Graham*, 2 O.W.N. 306, 17 Can. Cr. Cas. 264; *Parsons v. Crabbe*, 31 U.C.C.P. 151.

**Public works.—Return by justice of certificates under Part III.**

**1135.** When any certificate is granted under sec. 118 of this Act, the justice granting it shall forthwith make a return thereof to the proper officer in the county, district or place in which such certificate has been granted for receiving returns under this Part.

2. On default of making such return within ninety days after a certificate is granted, the justice shall be liable, on summary conviction, to a penalty of not more than ten dollars.

*Origin*—Sec. 105, Code of 1892.

*Permits to carry weapons*—See sec. 118.

**Public works.—Monthly returns under Part III.**

**1136.** Every commissioner under Part III of this Act shall make a monthly return to the Secretary of State of all weapons delivered to him, and by him detained under Part III.

*Origin*—R.S.C. 1886, ch. 151, sec. 12

**Posting up of returns.—Copy of returns to Minister of Finance.**

**1137.** The clerk of the peace of the district or county to whom returns under this Part are made, or the proper officer, other than the clerk of the peace, to whom such returns are made, shall, within seven days after the adjournment of the then next ensuing general or quarter sessions, or of the term or sitting of such other court having jurisdiction in appeal as aforesaid, cause the said returns to be posted up in the court-house of the district or county, and also in a conspicuous place in the office of such clerk of the peace, or other proper officer, for public inspection, and the same shall continue to be so posted up and exhibited until the end of the next ensuing general or quarter sessions of the peace, or for the term or sitting of such other court as aforesaid.

2. For every schedule so made and exhibited by such clerk or officer, he shall be allowed such fee as is fixed by competent authority.

3. Such clerk of the peace or other officer of each district or county, within twenty days after the end of each general or quarter sessions of the peace, or the sitting of such court as aforesaid, shall transmit to the Minister of Finance a true copy of all such returns made within his district or county.

*Origin*—Sec. 903, Code of 1892; R.S.C. 1886, ch. 178, sec. 104.

**Mistake not to vitiate return.**

**1138.** No return purporting to be made by any justice under this Act shall be vitiated by the fact of its including, by mistake, any convictions or orders had or made before him in any matter over which any provincial legislature has exclusive jurisdiction, or with respect to which he acted under the authority of any provincial law.

*Origin*—Sec. 906, Code of 1892; R.S.C., ch. 178, sec. 106.

**Thefts by juveniles not over 16.—Returns under Part XVII.**

**1139.** Every clerk of the peace or other proper officer shall transmit to the Minister of Agriculture a quarterly return of the names of offenders, the offences and punishments mentioned in convictions transmitted to him under Part XVII of this Act.

*Origin*—Sec. 823, Code of 1892; R.S.C. 1886, ch. 177, sec. 19.

*Theft by juveniles*—See Part XVII (secs. 800-821).

*"Other proper officer"*—See Code sec. 816.

## PART XXIV.

### LIMITATION OF ACTIONS.

#### *Prosecutions for Crimes.*

##### **Limitation of time for prosecutions for certain offences.**

**1140.** No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced,—

- (a) after the expiration of three years from the time of its commission if such offence be
  - (i) treason, except treason by killing His Majesty, or where the overt act alleged is an attempt to injure the person of His Majesty—sec. 74,
  - (ii) treasonable offences—sec. 78,
  - (iii) any offence against Part VII relating to the fraudulent marking of merchandise; or,
- (b) after the expiration of two years from its commission if such offence be
  - (i) a fraud upon the government—sec. 158,
  - (ii) a corrupt practice in municipal affairs—sec. 161,
  - (iii) unlawfully solemnizing marriage—sec. 311; or.
- (c) after the expiration of one year from its commission if such offence be
  - (i) opposing reading of Riot Act and continuing together after proclamation—sec. 92,
  - (ii) refusing to deliver weapon to justice—sec. 126,
  - (iii) coming armed near public meeting—sec. 127,
  - (iv) lying in wait near public meeting—sec. 128,
  - (v) seduction of girl under sixteen—sec. 211,
  - (vi) seduction under promise of marriage—sec. 212,
  - (vii) seduction of a ward or employee—sec. 213,
  - (viii) parent or guardian Procuring defilement of girl—sec. 215,



- (ix) unlawfully defiling women, procuring, etc.—sec. 216,
- (x) householders permitting defilement of girls on their premises—sec. 217; or,
- (d) after the expiration of six months from its commission if the offence be
  - (i) unlawful drilling—sec. 98,
  - (ii) being unlawfully drilled—sec. 99,
  - (iii) having possession of offensive weapons for purposes dangerous to the public peace—sec. 115,
  - (iv) proprietor of newspaper publishing advertisement offering reward for recovery of stolen property—sec. 183, par. (d); or,
- (e) after the expiration of three months from its commission if the offence be
  - (i) cruelty to animals—secs. 542 and 543,
  - (ii) railways and vessels violating provisions relating to conveyance of cattle—sec. 544,
  - (iii) refusing peace officer or constable admission—sec. 545; or,
- (f) after the expiration of one month from its commission if the offence be improper use of offensive weapons under secs. 116 and 118 to 124, inclusive.

2. No person shall be prosecuted, under the provisions of sec. 74 or 78 of this Act, for any overt act of treason expressed or declared by open and advised speaking unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given.

*Origin*—Sec. 551, Code of 1892.

*Time limit for prosecution in certain cases*—Where there is an information before a magistrate that is the commencement of the prosecution. *R. v. Smith* (1862) L. & C. 131, 9 Cox C.C. 110; *R. v. O'Connor* (1913) 8 Cr. App. R. 167; *R. v. Brown* (1913) 8 Cr. App. R. 173; *Thorpe v. Priestnell* [1897] 1 Q.B. 159; *Radcliffe v. Bartholomew* [1892] 1 Q.B. 161, 61 L.J.M.C. 63; *R. v. Lennox*, 34 U.C.Q.B. 28; *R. v. S.*—, [1919] 1 W.W.R. 977 (Sask.).

Where there is no statutory provision such as is here contained for certain offences, a prosecution by indictment is not barred by lapse of time; *R. v. Sovereign*, 20 Can. Cr. Cas. 103; even where summary proceedings under Part XV for the same offence would have been barred under sec. 1142. *R. v. Edwards*, 2 Can. Cr. Cas. 96, 29 Ont. R. 451; *R. v. Coolen*, 36 N.S.R. 510, 7 Can. Cr. Cas. 522; *R. v. Loughheed*, 8 Can. Cr. Cas. 184; *R. v. Muma*, 17 Can. Cr. Cas. 285, 22 O.L.R. 227; *R. v. Lartie*, 25 Can. Cr. Cas. 300.

If an indictment can be preferred without a preliminary enquiry before the magistrate, *ex. gr.* by leave of the Attorney-General or of the presiding judge (Code sec. 873), or a charge in lieu of indictment in provinces which have no grand jury system (Code sec. 873A), and that course is followed, then the prosecution is deemed to commence when such indictment or charge is preferred. See *R. v. Parker*, 9 Cox 475, L. & C. 459; 33 L.J.M.C. 135.

Sec. 1140 imposes a limitation on the prosecution under sec. 213 for the offence of seduction of a ward or of an employee but not upon the prosecution for seduction of a step-child or foster child of the accused, no corresponding amendment having been made to sec. 1140 on the amendment of sec. 213 to include the latter offence. *R. v. S.*— [1919] 1 W.W.R. 977 (Sask.); 1917 Can. Stat., ch. 14, sec. 2.

#### **Time for suing claim for penalty or forfeiture.**

**1141.** No action, suit or information shall be brought or laid for any penalty or forfeiture under any Act, except within two years after the cause of action arises or after the offence for which such penalty or forfeiture is imposed is committed, unless the time is otherwise limited by any Act or by law.

*Origin*—Sec. 930, Code of 1892; R.S.C. 1886, ch. 180, sec. 5.

*Action, suit or information for any penalty or forfeiture*—Punishments imposed for indictable offences are not included in this limitation; *R. v. Elliott*, 9 O.L.R. 648, 9 Can. Cr. Cas. 505; nor the penalty or fine which may be imposed on summary conviction, which latter is dealt with by sec. 1142.

Penalties concerning the importation and employment of aliens mentioned in 1 Edw. VII, c. 13, s. 1, have been held to be subject to this prescription of two years. *Montreal Harbour Commissioners v. Recorder's Court*, 8 Que. P.R. 63.

*Criminal informations*—See Archbold, Quarter Sess., 5th ed., 292; *Attorney-General v. Radloff*, 10 Ex. 84, 23 L.J. Ex. 240.

#### **Limitation of time in summary conviction matters.**

**1142.** In the case of any offence punishable on summary conviction, if no time is specially limited for making any complaint, or laying any information, in the Act or law relating to

the particular case, the complaint shall be made, or the information laid, within six months from the time when the matter of the complaint or information arose, except in the Northwest Territories and the Yukon Territory, in all which Territories the time within which such complaint may be made or such information laid shall be twelve months from the time when the matter of the complaint or information arose.

*Origin*].—Sec. 841, Code of 1892; 61 Vict., Can., ch. 6, sec. 9; 6-7 Edw. VII, ch. 8, sec. 2; 52 Vict., Can., ch. 45, sec. 5.

*Time limitation for summary conviction prosecutions*].—Summary conviction proceedings will be barred under sec. 1142, although the offence may be one for which there is an alternative procedure by indictment which is not affected. *R. v. Lartie*, 25 Can. Cr. Cas. 300; *R. v. Edwards*, 29 Ont. R. 451; *R. v. McKinnon*, 3 O.L.R. 508.

Faults of procedure may generally be waived by the person affected by them. These are irregularities, and if one who may insist on them waives them, submits to the judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time. It would be otherwise if jurisdiction had not existed *ab initio* as, for example, if the offence had been prescribed when the complaint has been sworn to; in that case the presence of the accused would not be sufficient to give jurisdiction to the tribunal; but it is otherwise when the question is about a mere irregularity of procedure. *R. v. Kay, ex parte Le Blanc*, 41 N.B.R. 99, 21 Can. Cr. Cas. 221; *Dixon v. Wells*, 25 Q.B.D. 249, 255, 17 Cox 48, 59 L.J.M.C. 116; *Bedard v. The King*, 26 Can. Cr. Cas. 99, 106; *Ex parte Dolan, R. v. Kay*, 26 Can. Cr. Cas. 171 (N.B.); *R. v. Limerick, ex parte Johnson* (1916) 44 N.B.R. 353, 27 Can. Cr. Cas. 421.

An information laid within the time may be so radically defective that it cannot be amended after the limitation period; as where it discloses no offence. *R. v. Guertin*, 19 Man. R. 33; *R. v. Speed*, 20 Man. R. 33; *R. v. O'Connor*, 20 Can. Cr. Cas. 75; *R. v. Hawthorne*, 2 Can. Cr. Cas. 468. But if the defect be one of form only, the amendment may be made. *R. v. Ayer*, 17 O.L.R. 509. If the information or complaint was laid in time, the summons may follow within a reasonable time thereafter, although the limitation period has elapsed. *R. v. Hudgins*, 14 O.L.R. 139, 12 Can. Cr. Cas. 223; *R. v. Peck, ex parte Beal*, 9 E.L.R. 501; *R. v. Le Blanc*, 21 Can. Cr. Cas. 221, 12 E.L.R. 66, 41 N.B.R. 99.

A penalty on a plea of guilty was supported without amendment of the summary conviction in *R. v. Graves*, Nov. 30, 1918 (N.S.), where the charge was absence as a deserter from a date long prior to the six months period, Mellish, J., favoring the view that the plea and punishment should on habeas corpus be assumed to relate only to the offence within the six months.

*Actions against Persons Administering the Criminal Law.*

**Actions against persons administering the criminal law.—Limitation of time.—Venue.**

**1143.** Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division, where the act was committed, and not elsewhere, and shall not be commenced except within six months next after the act committed.

*Origin*].—Sec. 975, Code of 1892; R.S.C. 1886, ch. 185, sec. 1.

*Legislative power*].—The constitutionality of the legislation contained in secs. 1143-1148 has been upheld. *Mack Sing v. Smith*, (1908) 1 Sask. L.R. 454, 461; *Zimmer v. G.T.R.*, 19 A.R. 693 (Ont.); *Levesque v. N.B. Railway*, 29 N.B.R. 588.

*Liability of police officers*].—Police constables appointed by a municipality under statutory authority for the purpose of administering the general law of the land are public officers with such powers and duties as the State confers on them, rather than servants or agents of the municipality. *McCleave v. City of Moncton*, 32 S.C.R. 106; *Pon Yin v. City of Edmonton*, (1915) 8 W.W.R. 809 (Alta.). So, if the wrong complained of was not committed by the police constable in the exercise of a duty imposed upon him by its direction or authority, the municipality is not liable under the doctrine of *respondet superior*. *McCleave v. City of Edmonton*, 32 S.C.R. 106; *Pon Yin v. Edmonton*, supra. Police constables are said to be servants of the Crown and acting in the interests of the public, and not merely as servants of the appointing authority or paymaster, when they are doing the things prescribed for them in the Criminal Code. *Pon Yin v. City of Edmonton*, 8 W.W.R. 809, 813 (Alta.). But in carrying on their work the police "must act strictly within the law, and will be held liable personally for any breach of it, and cannot fall back on their employers for indemnity in case of a judgment against them for damages." *Hyndman, J.*, in *Pon Yin v. City of Edmonton*, 8 W.W.R. 809 at 814.

Compare *McKenzie v. Chilliwhack* 15 B.C.R. 256, 14 W.L.R. 621, in appeal [1912] A.C. 888, 82 L.J.P.C. 22; *Nettleton v. Prescott*, 16 O.L.R. 538; *Matson v. Leask* [1919] 2 W.W.R. 59 (B.C.); *Bowles v. Winnipeg* [1919] 1 W.W.R. 198 (Man.).

*Protection also under provincial law*].—Code sec. 1148.

**Action against person administering the criminal law.—Notice of action.**

**1144.** Notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

*Origin*].—Sec. 976, Code of 1892; R.S.C. 1886, ch. 185, sec. 2.

*Notice of action*].—Similar legislation to that contained in sec. 1144 will be found in the statute law of the various provinces. The provincial law as to notice will, of course, apply where the alleged illegal act of the magistrate or other official purported to be done under a provincial statute. And where the similar provincial legislation as to notice of action is not in conflict with sec. 1144, it may be necessary to refer to both the federal and the provincial law to ascertain the full scope of the protection afforded to persons administering the criminal law as regards civil actions brought against them for misfeasance. A provincial statute might possibly amplify this protection, although the province would have no legislative power to lessen it nor to abrogate any of the provisions of the Criminal Code as to matters dealt with by secs. 1143 to 1147 inclusive, and secs. 1149 to 1151. The class of action to which sec. 1144 applies is an action or prosecution for anything "purporting to be done in pursuance of an Act of the Parliament of Canada." Sec. 1143. By sec. 1148 express provision is made that these provisions of the Criminal Code shall not prevent the operation of provincial laws for the protection of justices or other officers from vexatious actions for things purporting to be done in the performance of their duty.

If the magistrate or officer does something quite outside of and beyond his jurisdiction, he will not be entitled to notice of action. *Spurrell v. Lauder* (1914) 6 W.W.R. 1051; *Agnew v. Jobson* (1877) 13 Cox 625, 42 J.P. 424; *Kelly v. Barton*, 26 Ont. R. 608, and in appeal 22 A.R. (Ont.) 522; *Cook v. Leonard*, 6 B.C.R. 351; *Mack Sing v. Smith*, 1 Sask. L.R. 454; *Linden v. Brown*, 17 A.R. 173 (Ont.); *McGuinness v. Dafeo*, 3 Can. Cr. Cas. 139, 147, 23 A.R. 704 (Ont.); *White v. Hamm*, 36 N.B.R. 237; *Friel v. Ferguson*, 15 U.C.C.P. 584; *McIver v. McGillivray*, 24 C.L.T. 142, 237, distinguishing *Mott v. Milne*, 31 N.S.R. 372.

If the act complained of is based upon a summary conviction the notice may be given before the conviction has been quashed; *Haylock v. Sparke*, 1 E. & B. 471, 22 L.J.M.C. 67; although the conviction, if valid on its face, might be an answer until set aside. *Gates v. Devenish*, 6 U.C.Q.B. 260; *Eastman v. Reid*, 6 U.C.Q.B. 611. The purpose of the notice is to give the defendant an opportunity to tender amends. The action itself must be commenced within six months after the "act committed" (sec. 1143); and the clear one month's notice must intervene before the action is commenced (sec. 1144). "At least" one month

means a clear month. *Canadian Canning Co. v. Fagan*, 12 B.C.R. 23; *McQueen v. Jackson* [1903] 2 K.B. 163, 72 L.J.K.B. 606; *Re Railway Sleepers Co.*, 29 Ch.D. 204.

**Action against person administering the criminal law.—Evidence under the general issue.**

**1145.** In any such action the defendant may plead the general issue, and give the provisions of this title and the special matter in evidence at any trial had thereupon.

*Origin*—Sec. 977, Code of 1892; R.S.C. 1886, ch. 185, sec. 3; 11-12 Vict., Imp., ch. 44, sec. 10.

**Tender or payment into court in such action.**

**1146.** No plaintiff shall recover in any such action if tender of sufficient amends is made before such action brought, or if a sufficient sum of money is paid into court by or on behalf of the defendant after such action brought.

*Origin*—Sec. 978, Code of 1892; R.S.C. 1886, ch. 185, sec. 4; 11-12 Vict. (Imp.), ch. 44, sec. 11.

**Judgment if action not brought in time, etc.—Costs.—No costs unless action approved by judge.**

**1147.** If such action is commenced after the time limited as aforesaid for bringing the same, or is brought or the venue laid in any other place than as aforesaid, a verdict shall be found or judgment shall be given for the defendant; and thereupon, or if the plaintiff becomes non-suit or discontinues any such action after issue joined, or if upon demurrer or otherwise judgment is given against the plaintiff, the defendant shall, in the discretion of the court, recover his full costs as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases.

2. Although a verdict or judgment is given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial is had certifies his approval of the action.

*Origin*—Sec. 979, Code of 1892; R.S.C. 1886, ch. 185, sec. 5.

**Other protecting Acts remain.**

**1148.** Nothing herein shall prevent the effect of any Act in force in any province of Canada, for the protection of justices or other officers from vexatious actions for things purporting to be done in the performance of their duty.

*Origin*—Sec. 980, Code of 1892; R.S.C. 1886, ch. 185, sec. 6.

*Provincial law as to vexatious actions against justices and public officers*—See note to sec. 1144.

**Preserving the peace near public works.—Actions under Part III.**  
**—Limitation.—Venue.—Evidence under general issue.—Costs**

**1149.** Every action brought against any commissioner under Part III of this Act or any justice, constable, peace officer or other person, for anything done in pursuance of the said Part, shall be commenced within six months next after the alleged cause of action arises; and the venue shall be laid or the action instituted in the district or county or place where the cause of action arose; and the defendant may plead the general issue and give this Act and the special matter in evidence.

2. If such action is brought after the time limited, or the venue is laid or the action brought in any other district, county or place than in this section prescribed, the judgment or verdict shall be given for the defendant; and in such case, or if the judgment or verdict is given for the defendant on the merits, or if the plaintiff becomes non-suited or discontinues after appearance is entered, or has judgment rendered against him on demurrer, the defendant shall be entitled to recover double costs.

*Origin*—R.S.C. 1886, ch. 151, sec. 24.

*Preservation of the peace near public works*—See secs. 142-154.

**Justice making false return.—Extorting illegal fees.—Actions for penalties under sec. 1134.—Limitation.—Venue.—Costs.**

**1150.** All actions for penalties arising under the provisions of sec. 1134 shall be commenced within six months next after the cause of action accrues, and the same shall be tried in the district; county or place wherein such penalties have been incurred; and if a verdict or judgment passes for the defendant, or the plaintiff becomes non-suit, or discontinues the action

after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant shall, in the discretion of the court, recover his costs of suit, as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases.

*Origin*—Sec. 904, Code of 1892; R.S.C. 1886, ch. 178, sec. 102.

*Justice's neglect to make returns*—See Code sec. 1134.

*Justice taking unlawful fees*—See Code sec. 1134.

*False return under sec. 1133*—See Code sec. 1134.

**Case stated by justice in summary conviction matter.—Justice not liable for enforcement of conviction as affirmed or amended.**

**1151.** No action or proceeding shall be commenced or had against a justice for enforcing a conviction, order or determination affirmed, amended or made by the court under sec. 765.

*Origin*—Sec. 900, Code of 1892; 53 Vict., Can., ch. 37, sec. 28.

*Stated case on points of law on summary conviction*—See sec. 761-769.



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## PART XXV.

### FORMS.

#### Statutory forms validated.—Variation.

**1152.** The several forms in this Part, varied to suit the case, or forms to the like effect, shall be deemed good, valid and sufficient in the cases thereby respectively provided for; and may, when made for one class of officials, be varied so as to apply to any other class having the same jurisdiction.

*Origin*—Secs. 541, 982, Code of 1892; R.S.C. 1886, ch. 174, sec. 7; 32-33 Vict., Can., ch. 30.

*Effect of statutory forms and of variances therefrom*—This section has been held to authorize the variance of Code forms 53 and 54 in such particulars as may be necessary where warrants to the like effect are issued to enforce a judgment on appeal from justices instead of the summary conviction itself from which the appeal was taken. *Collette v. The King*, 16 Can. Cr. Cas. 281; *ex parte Hilchie*, 11 Can. Cr. Cas. 85. The forms given are not imperative; *R. v. May* (1905) 9 Can. Cr. Cas. 529, 5 O.W.R. 67; *R. v. Hamilton*, 12 Man. L.R. 354, 2 Can. Cr. Cas. 390; and it seems that a statutory notice will be valid as being "to the like effect" where it states on its face by whom it is given, although signature, as indicated in the statutory form, was omitted. *R. v. Bryson*, 10 Can. Cr. Cas. 398.

In addition to the special enactment here contained as to the Code forms, there is the general provision of the Interpretation Act, R.S.C. 1906, ch. 1, sec. 31, applicable to all Dominion statutes, that "whenever forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them."

Illustrations appended to sections of a statute should be accepted if that can be done as being of relevance and value in construing the text; they should only be rejected as repugnant to the section as the last resort of construction. *Mahomed v. Yeoh* [1916] 2 A.C. 575. As to particular offences, see also the notes to the Code section dealing with the offence.

## FORM 1.

(Section 629.)

*Information to obtain a Search Warrant.*

Canada,  
Province of  
County of

}  
,  
}

The information of A. B., of in the said  
county (*yeoman*), taken this day of in the  
year before me, J. S., Esquire, a justice of the peace,  
in and for the district (or county, *etc.*), of , who  
says that (*describe things to be searched for and offence in respect of  
which search is made*), and that he has just and reasonable cause to  
suspect, and suspects, that the said goods and chattels, or some part  
of them, are concealed in the (*dwelling-house, etc.*), of C. D., of  
in the said district (or county, *etc.*), (*here add the causes of suspicion,  
whatever they may be*): Wherefore (*he*) prays that a search warrant  
may be granted to him to search the (*dwelling-house, etc.*) of the said  
C. D., as aforesaid, for the said goods and chattels so stolen, taken and  
carried away as aforesaid (*or as the case may be*).

Sworn (or affirmed) before me the day and year first above men-  
tioned, at in the said county of

J. S.,

J. P., (*name of district or county, etc.*)

63-64 V, c. 46, form J.

## FORM 2.

(Section 630.)

*Warrant to Search.*

Canada,  
Province of  
County of

}  
,  
}

To all or any of the constables and other peace officers in the said  
county of

Whereas it appears on the oath of A. B., of , that there  
is reason to suspect that (*describe things to be searched for and  
offence in respect of which search is made*) are concealed in  
at

This is, therefore, to authorize and require you to enter between  
the hours of (*as the justice shall direct*) into the said premises, and to

## FORMS

[§ 1152.]

search for the said things, and to bring the same before me or some other justice.

Dated at \_\_\_\_\_, in the said county of \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_.

J. S.,

J. P., (*name of county.*)

To \_\_\_\_\_ of \_\_\_\_\_  
55-56 V, c. 29, sch. 1, form I.

## FORM 2A.

(Section 629A.)

Canada, }  
Province of }  
County of }

Whereas proof upon oath has this day been made before me, a justice of the peace in and for the said county of \_\_\_\_\_ that the name of J. S. to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned, I do therefore hereby authorize W. T., who brings me this warrant, and all other persons to whom this warrant was originally directed or by whom it may be lawfully executed, and also all peace officers of the said county of \_\_\_\_\_, to execute the same within the said county of \_\_\_\_\_.

J. L.,

J. P., (*name of county.*)

## FORM 3.

(Section 654.)

*Information and Complaint for an Indictable Offence.*

Canada, }  
Province of }  
County of }

The information and complaint of C. D., of \_\_\_\_\_, (*yeoman*), taken this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before the undersigned (*one*) of His Majesty's justices of the peace in and for the said county of \_\_\_\_\_, who saith that (*etc., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at \_\_\_\_\_

J. S.,

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form C.

## FORM 4.

(Section 656.)

*Warrant to Apprehend a Person Charged with an Indictable Offence  
Committed on the High Seas or Abroad.*

*For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed 'on the high seas, out of the body of any district or county of Canada and within the jurisdiction of the Admiralty of England.'*

*For offences committed abroad for which the parties may be indicted in Canada, the warrant also may be the same as in ordinary cases, but describing the offence to have been committed 'on land out of Canada, to wit: at \_\_\_\_\_ in the Kingdom of \_\_\_\_\_, or, at \_\_\_\_\_, in the Island of \_\_\_\_\_, in the West Indies, or, at \_\_\_\_\_, in the East Indies,' or as the case may be.*  
55-56 V, c. 29, sch. 1, form D.

## FORM 5.

(Section 658.)

*Summons to a Person charged with an Indictable Offence.*

Canada, }  
Province of , }  
County of . }

To A. B., of \_\_\_\_\_, (labourer):

Whereas you have this day been charged before the undersigned, \_\_\_\_\_, a justice of the peace in and for the said county of \_\_\_\_\_, for that you on \_\_\_\_\_, at \_\_\_\_\_, (stating shortly the offence): These are therefore to command you, in His Majesty's name, to be and appear before (me) on \_\_\_\_\_, at \_\_\_\_\_ o'clock in the (fore) noon, at \_\_\_\_\_, or before such other justice or justices of the peace for the same county of \_\_\_\_\_, as shall then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under (my) hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form E.

FORMS

[ § 1152 ]

FORM 6.

(Section 659.)

*Warrant in the first instance to apprehend a Person charged with an Indictable Offence.*

Canada,  
Province of  
County of

, }  
.  
.

To all or any of the constables and other peace officers in the said county of

Whereas A. B., of , (labourer), has this day been charged upon oath before the undersigned , a justice of the peace in and for the said county of , for that he, on , at , did (*etc., stating shortly the offence*): These are, therefore, to command you, in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer unto the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form F.

FORM 7.

(Section 660.)

*Warrant when the Summons is disobeyed.*

Canada,  
Province of  
County of

, }  
.  
.

To all or any of the constables and other peace officers in the said county of

Whereas on the day of , (instant or last past) A. B., of , was charged before (*me or us,*) the undersigned (*or name the justice or justices, or as the case may be*), (*a*) justice of the peace in and for the said county of , for that (*etc., as in the summons*); and whereas I (*or he the said justice of the peace, or we or they the said justices of the peace*) did then issue (*my, our, his or their*) summons to the said A. B., commanding him, in His

Majesty's name, to be and appear before (*me*) on            at            o'clock in the (fore) noon, at            , or before such other justice or justices of the peace as should then be there, to answer to the said charge and to be further dealt with according to law; and whereas the said A. B. has neglected to be or appear at the time and place appointed in and by the said summons, although it has now been proved to (*me*) upon oath that the said summons was duly served upon the said A. B.: These are therefore to command you in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of            , to answer the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this            day of            , in the year            , at            , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form G.

#### FORM 8.

(Section 662.)

#### *Endorsement in Backing a Warrant.*

Canada,  
Province of            ,  
County of            .

Whereas proof upon oath has this day been made before me            , a justice of the peace in and for the said county of            , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. T., who brings to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of            , to execute the same within the said last mentioned county.

Given under (*my*) hand and seal, this            day of            , in the year            , at            , in the county aforesaid.

J. L.,

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form H.

FORMS

[§ 1152]

FORM 9.

(Section 665.)

*Warrant to convey before a Justice of another County.*

Canada,  
Province of }  
County of }

To all or any of the constables and other peace officers in the said county of

Whereas information upon oath was this day made before the under-  
signed that A. B., of , on the day of ,  
in the year , at , in the county of .  
(state the charge).

And whereas I have taken the deposition of X. Y. as to the said offence.

And whereas the charge is of an offence committed in the county of

This is to command you to convey the said (name of accused), of , before some justice of the last mentioned county, near the above place, and to deliver to him this warrant and the said deposition.

Dated at , in the said county of ,  
this day of , in the year .

J. S.,  
J. P., (name of county.)

To of

55-56 V, c. 29, sch. 1, form A.

FORM 10.

(Section 666.)

*Receipt to be given to the Constable by the Justice for the County in which the Offence was committed.*

Canada,  
Province of }  
County of }

I, J. L., a justice of the peace in and for the county of , hereby certify that W. T., peace officer of the county of has, on this day of , in the year , by virtue of and in obedience to a warrant of J. S., Esquire, a justice of the peace in and for the county of , produced before



me one A. B., charged before the said J. S. with having (etc., stating *shortly the offence*) and delivered him into the custody of \_\_\_\_\_, by my direction to answer to the said charge, and further to be dealt with according to law, and has also delivered unto me the said warrant, together with the information (*if any*) in that behalf, and the deposition (*s*) of C. D. (*and of* \_\_\_\_\_), in the said warrant mentioned, and that he has also proved to me, upon oath, the handwriting of the said J. S., subscribed to the same.

Dated the day and year first above mentioned, at \_\_\_\_\_, in the said county of \_\_\_\_\_

J. L.,

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form B.

# FORM 11.

(Section 671.)

## *Summons to a Witness.*

Canada,  
Province of \_\_\_\_\_  
County of \_\_\_\_\_

, }  
.  
.

To E. F., of \_\_\_\_\_

, (*labourer*):

Whereas information has been laid before the undersigned \_\_\_\_\_, a justice of the peace in and for the said county of \_\_\_\_\_, that A. B. (*etc., as in the summons or warrant against the accused*), and it has been made to appear to me that you are likely to give material evidence for (*the prosecution or for the accused*): These are therefore to require you to be and to appear before me, on \_\_\_\_\_ next, at \_\_\_\_\_ o'clock in the (fore) noon, at \_\_\_\_\_, or before such other justice or justices of the peace of the said county of \_\_\_\_\_, as shall then be there, to testify what you know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form K; 58-59 V, c. 40, s. 1.

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[§-1152]

FORM 12.

(Section 673.)

*Warrant when a Witness has not obeyed the Summons.*

Canada,  
Province of , }  
County of . }

To all or any of the constables and other peace officers in the said county of

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of (*labourer*), was likely to give material evidence for (*the prosecution*), (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at , or before such other justice or justices of the peace for the said county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such summons having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E.F. before (*me*) on at o'clock in the (*fore*) noon, at , or before such other justice or justices for the said county, as shall then be there to testify what he knows concerning the said charges so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form L.

FORM 13.

(Sections 674 and 842.)

*Conviction for Contempt.*

Canada,  
Province of , }  
County of . }

Be it remembered that on the day of , in the year , in the county of , E. F. is convicted

[§.1152]. CRIMINAL CODE (PART XXV)

before me, for that he the said E. F. did not attend before me to give evidence on the trial of a certain charge against one A. B. of theft (or as the case may be), although duly subpoenaed (or bound by recognizance to appear and give evidence in that behalf, as the case may be) but made default therein, and has not shown before me any sufficient excuse for such default, and I adjudge the said E. F., for his said offence, to be imprisoned in the common gaol of the county of , at , for the space of , there to be kept with (or without) hard labour (as may be authorized and determined, and in case a fine is also intended to be imposed, then proceed) and I also adjudge that the said E. F. do forthwith pay to and for the use of His Majesty a fine of dollars, and in default of payment, that the said fine, with the cost of collection, be levied by distress and sale of the goods and chattels of the said E. F. (or in case a fine alone is imposed, then the clause of imprisonment is to be omitted).

Given under my hand at , in the said county of , the day and year first above mentioned.

O. K.,  
Judge.

55-56 V, c. 29, sch. 1. form PP.

FORM 14.

(Section 675.)

*Warrant for witness in the First Instance.*

Canada,  
Province of ,  
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county of , that (etc., as in the summons); and it having been made to appear to (me) upon oath, that E. F. of , (labourer), is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence unless compelled to do so: These are therefore to command you to bring and have the said E. F. before (me) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace

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for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form M.

FORM 15.

(Section 677.)

*Warrant when a witness has not obeyed the subpoena.*

Canada,  
Province of                      },  
County of                      . }

To all or any of the constables and other peace officers in the said county of

Whereas information having been laid before                      , a justice of the peace, in and for the said county, that A. B. (*etc., as in the summons*); and there being reason to believe that E. F., of                      , in the province of                      , (*labourer*), was likely to give material evidence for (*the prosecution*), a writ of subpoena was issued by order of                      , judge of (*name of court*), to the said E. F., requiring him to be and appear before (*me*) on                      at                      or before such other justice or justices of the peace for the same county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such writ of subpoena having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said writ of subpoena, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on                      , at                      o'clock in the (*fore*) noon, at                      , or before such other justice or justices for the said county as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form N.

## FORM 16.

(Section 678.)

*Warrant of Commitment of a Witness for Refusing to be Sworn or to Give Evidence.*

Canada,  
 Province of ,  
 County of . }

To all or any of the constables and other peace officers in the county  
 of , and to the keeper of the common gaol at ,  
 in the said county of ,

Whereas A. B. was lately charged before , a justice of  
 the peace in and for the said county of , for that (*etc., as  
 in the summons*); and it having been made to appear to (*me*) upon  
 oath that E. F. of was likely to give material evidence  
 for the prosecution, (*I*) duly issued (*my*) summons to the said E. F.,  
 requiring him to be and appear before me on , at ,  
 or before such other justice or justices of the peace for the said county  
 as should then be there, to testify what he knows concerning the said  
 charge so made against the said A. B. as aforesaid; and the said E. F.  
 now appearing before (*me*) (*or* being brought before (*me*) by virtue  
 of a warrant in that behalf), to testify as aforesaid, and being required  
 to make oath or affirmation as a witness in that behalf, now refuses so  
 to do, (*or* being duly sworn as a witness now refuses to answer certain  
 questions concerning the premises which are now here put to him, and  
 more particularly the following ) without offering  
 any just excuse for such refusal: These are therefore to command you,  
 the said constables or peace officers, or any one of you, to take the  
 said E. F. and him safely to convey to the common gaol at ,  
 in the county aforesaid, and there to deliver him to the keeper thereof,  
 together with this precept: And I do hereby command you, the said  
 keeper of the said common gaol to receive the said E. F. into your  
 custody in the said common gaol, and him there safely keep for the  
 space of days, for the said contempt, unless in the meantime  
 he consents to be examined, and to answer concerning the premises;  
 and for your so doing, this shall be your sufficient warrant.

Given under (*my*) hand and seal, this day of ,  
 in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

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FORM 17.

(Section 679)

*Warrant Remanding a Prisoner.*

Canada,  
Province of  
County of

}  
,  
.

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at , in the said county.

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*etc., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with this precept: And I hereby command you the said keeper to receive the said A. B. into your custody in the said common gaol, and there safely keep him until the day of (*instant*), when I hereby command you to have him at , at o'clock in the (fore) noon of the same day before (*me*) or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form P.

FORM 18.

(Section 681.)

*Recognizance of Bail instead of Remand on an Adjournment of Examination.*

Canada,  
Province of  
County of

}  
,  
.

Be it remembered that on the day of , in the year , A. B., of , (*labourer*), L. M. of , (*grocer*), and N. O., of , (*butcher*),

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Taken and acknowledged the day and year first above mentioned,  
at before me.

*J. P., (name of county.)*

The condition of the within (or above written recognizance is such that whereas the within bounden A. B. was this day (or on last past) charged before me for that (etc., as in the warrant); and whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the                      day of                      (instant): If therefore, the said A. B. appears before me on the said day of                      (instant), at                      o'clock in the (fore) noon, or before such other justice or justices of the peace for the said county as shall then be there, to answer (further) to the said charge, and to be further dealt with according to law, the said recognizance to be void, otherwise to stand in full force and virtue.

**FORM 19.**

### Deposition of a Witness.

$$\left. \begin{array}{l} , \\ \cdot \end{array} \right\}$$

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*(If depositions of several witnesses are taken at the same time, they may be taken and signed as follows):*

The depositions of X. of , Y. of , Z. of ,  
etc., taken in the presence and hearing of C. D., who stands charged that  
The deponent X. *(on his oath or affirmation)* says as follows:  
The deponent Y. *(on his oath or affirmation)* says as follows:  
The deponent Z. *(on his oath, etc., etc.)*

*(The signature of the justice may be appended as follows):*

The depositions of X., Y., Z., etc., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D., and signed by the said X., Y., Z., etc., respectively in his presence. In witness whereof I have in the presence of the said C. D. signed my name.

J. S.,

55-56 V, c. 29, sch. 1, form S.

J. P., *(name of county.)*

FORM 20

*(Section 684.)*

*Statement of the Accused.*

Canada,  
Province of ,  
County of .

A. B. stands charged before the undersigned , a justice of the peace in and for the county aforesaid, this day of , in the year , for that the said A. B., on , at *(etc., as in the captions of the depositions)*; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows:

'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial, notwithstanding such promise or threat.' Whereupon the said A. B. says as follows: *(Here state whatever the prisoner says and in his very words, as nearly as possible. Get him to sign it if he will).*

A. B.

Taken before me, at mentioned.

, the day and year first above

J. S., [SEAL.]

55-56 V, c. 29, sch. 1, form T.

J. P., *(name of county.)*

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## FORM 21.

(Section 688.)

*Form of Recognizance where the prosecutor requires the Justice to bind him over to prosecute after the charge is dismissed.*

Canada,  
Province of , }  
County of . }

Whereas C. D. was discharged before me upon the information of E. F. that C. D. (*state the charge*), and upon the hearing of the said charge I discharged the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the court by which the person discharged would be tried if committed*).

The undersigned E. F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above*). And the said E. F. acknowledges himself bound to forfeit to the Crown the sum of \$ in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form U.

## FORM 22.

(Section 690.)

*Warrant of Commitment.*

Canada,  
Province of , }  
County of . }

To all or any of the constables and other peace officers of ,  
and to the keeper of the (*common gaol*) at , in  
the said county of .

Whereas A. B. was this day charged before me, J. S., one of His Majesty's justices of the peace in and for the said county of , on the oath of C. D. of , (*farmer*), and others for that (*etc., stating shortly the offence*): These are therefore to command you the said constable to take the said A. B., and him safely to convey to the (*common gaol*) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby

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command you the said keeper of the said (*common gaol*) to receive the said A. B. into your custody in the said (*common gaol*), and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form V.

FORM 23.

(Section 692.)

*Recognizance to Prosecute.*

Canada,  
Province of                      },  
County of                      . }

Be it remembered that on the                      day of                      , in  
the year                      , C. D. of                      , in  
the                      of                      , in the  
said county of                      , (*farmer*), personally came before  
me                      , a justice of the peace in and for the said county  
of                      , and acknowledged himself to owe to our Sovereign  
Lord the King, his heirs and successors, the sum of                      , of  
good and lawful current money of Canada, to be made and levied of  
his goods and chattels, lands and tenements, to the use of our said  
Sovereign Lord the King, his heirs and successors, if the said C. D.  
fails in the condition endorsed (*or hereunder written*).

Taken and acknowledged the day and year first above mentioned  
at                      , before me.

J. S.,

J. P., (*name of county.*)

*Condition to Prosecute.*

The condition of the within (*or above*) written recognizance is such  
that whereas one A. B. was this day charged before me, J. S., a justice  
of the peace within mentioned, for that (*etc., as in the caption of the  
depositions*); if therefore, he the said C. D. appears at the court by  
which the said A. B. is or shall be tried \* and there duly prosecutes  
such charge then the said recognizance to be void, otherwise to stand  
in full force and virtue.

55-56 V, c. 29, sch. 1, form W.

## FORM 24.

(Section 692.)

*Recognizance to Prosecute and Give Evidence.*

(Same as the last form, to the asterisk,\* and then thus):—And there duly prosecutes such charge against the said A. B. for the offence aforesaid, and gives evidence thereon, as well to the jurors who shall then inquire into the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue.

55-56 V., c. 29, sch. 1, form X.

## FORM 25.

(Section 692.)

*Recognizance to Give Evidence.*

(Same as form 23 to the asterisk,\* and then thus):—And there gives such evidence as he knows upon the charge to be then and there preferred against the said A. B. for the offence aforesaid, then the said recognizance to be void, otherwise to remain in full force and virtue.

55-56 V., c. 29, sch. 1, form Y.

## FORM 26.

(Section 694.)

*Commitment of a Witness for Refusing to Enter into the Recognizance.*

Canada,  
Province of ,  
County of . }

To all or any of the peace officers in the said county of ,  
and to the keeper of the common gaol of the said county  
of , at , in the said county of .

Whereas A. B. was lately charged before the undersigned (name of the justice of the peace), a justice of the peace in and for the said county of , for that (etc., as in the summons to the witness), and it having been made to appear to (me) upon oath that E. F., of , was likely to give material evidence for the prosecution, (I) duly issued (my) summons to the said E. F., requiring him to be and appear before (me) on , at or before such other justice or justices of the peace as should then be there, to

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testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (me) (or being brought before (me) by virtue of a warrant in that behalf to testify as aforesaid), has been now examined before (me) touching the premises, but being by (me) required to enter into a recognizance conditioned to give evidence against the said A. B., now refuses so to do: These are therefore to command you the said peace officers, or any one of you, to take the said E. F. and him safely convey to the common gaol at \_\_\_\_\_, in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said E. F. into your custody in the said common gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime the said E. F. duly enters into such recognizance as aforesaid, in the sum of \_\_\_\_\_ before some one justice of the peace for the said county, conditioned in the usual form to appear at the court by which the said A. B. is or shall be tried, and there to give evidence upon the charge which shall then and there be preferred against the said A. B. for the offence aforesaid.

Given under (my) hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form Z.

FORM 27.

(Section 694.)

*Order Discharging Witness, when Accused Discharged.*

Canada, }  
Province of }  
County of }

To the keeper of the common gaol at \_\_\_\_\_, in the county of \_\_\_\_\_, aforesaid.

Whereas by (my) order dated the \_\_\_\_\_ day of \_\_\_\_\_ (instant) reciting that A. B. was lately before then charged before (me) for a certain offence therein mentioned, and that E. F. having appeared before (me) and being examined as a witness for the prosecution on that behalf, refused to enter into recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid; and whereas

for want of sufficient evidence against the said A. B., the said A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you the said keeper to discharge the said E. F. out of your custody, as to the said commitment, and suffer him to go at large.

Given under (my) hand and seal, this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form AA.

#### FORM 28.

(Section 696.)

#### Recognizance of Bail.

Canada,  
Province of  
County of

}

Be it remembered that on the                      day of                      , in the  
year                      , A. B. of                      , (labourer), L. M., of  
                    , (grocer), and N. O., of                      , (butcher), personally  
came before (us) the undersigned, (two) justices of the peace for  
the county of                      , and severally acknowledged themselves  
to owe to our Sovereign Lord the King, his heirs and successors, the  
several sums following, that is to say: the said A. B., the sum of  
                    , and the said L. M. and N. O. the sum of                      , each,  
of good and lawful current money of Canada, to be made and levied  
of their several goods and chattels, lands and tenements respectively;  
to the use of our said Sovereign Lord the King, his heirs and suc-  
cessors, if he, the said A. B., fails in the condition endorsed (or here-  
under written).

Taken and acknowledged the day and year first above mentioned,  
at                      , before us.

J. S.,

J. N.,

J. P., (name of county.)

The condition of the within (or above) written recognizance is such  
that whereas the said A. B. was this day charged before (us), the

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63-64 V, c. 46, form BB.

**(Section 698.)**

Canada, }  
Province of , }  
County of . }

Given under (our) hands and seals this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. N., [SEAL.]

63-64 V, c. 46, form CC.

## FORM 30.

(Section 704.)

*Gaoler's Receipt to the Constable for the Prisoner.*

I hereby certify that I have received from W. T., constable, of the county of \_\_\_\_\_, the body of A. B., together with a warrant under the hand and seal of J. S., Esquire, justice of the peace for the said county of \_\_\_\_\_, and that the said A. B. was sober, (or as the case may be), at the time he was delivered into my custody.

P. K.,

*Keper of the common gaol of the said county.*

55-56 V, c. 29, sch. 1, form DD.

## FORM 31.

(Section 727.)

*Conviction for a Penalty to be Levied by Distress and in Default of Sufficient Distress, by Imprisonment.*

Canada, }  
 Province of , }  
 County of . }

Be it remembered that on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the said county, A. B. is convicted before the undersigned, \_\_\_\_\_, a justice of the peace for the said county, for that the said A. B. (*etc., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of \$ \_\_\_\_\_ (*stating the penalty, and also the compensation, if any*), to be paid and applied according to law, and also to pay to the said C. D. the sum of \_\_\_\_\_, for his costs in this behalf; and if the said several sums are not paid forthwith, (or on or before the \_\_\_\_\_ of \_\_\_\_\_ next), \* I order that the same be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress, \* I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at \_\_\_\_\_, in the said county of \_\_\_\_\_, (there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of \_\_\_\_\_, unless the said several sums and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said gaol are sooner paid.

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Given under (my) hand and seal, the day and year first above mentioned, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

\*Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks \* \* say, 'inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family,' (or, 'that the said A. B. has no goods or chattels whereon to levy the said sums by distress').

55-56 V, c. 29, sch. 1, form VV.

## FORM 32.

(Section 727.)

*Conviction for a Penalty, and in Default of Payment, Imprisonment.*

Canada,  
Province of  
County of

}

Be it remembered that on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the said county, A. B. is convicted before the undersigned, \_\_\_\_\_, a justice of the peace for the said county, for that he the said A. B. (*etc., stating the offence, and the time and place when and where it was committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of \_\_\_\_\_ (*stating the penalty and the compensation, if any*) to be paid and applied according to law; and also to pay to the said C. D. the sum of \_\_\_\_\_ for his costs in this behalf; and if the said several sums are not paid forthwith (*or, on or before* next), I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at \_\_\_\_\_, in the said county of \_\_\_\_\_ (and there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of \_\_\_\_\_, unless the said sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under (my) hand and seal, the day and year first above mentioned, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form WW.



## FORM 33.

(Section 727.)

*Conviction when the Punishment is by Imprisonment, etc.*

Canada,  
 Province of , }  
 County of . }

Be it remembered that on the                      day of                      , in the year                      , at                      , in the said county, A. B. is convicted before the undersigned,                      , a justice of the peace in and for the said county, for that he the said A. B. (*etc., stating the offence, and the time and place when and where it was committed*); and I adjudge the said A. B. for his said offence to be imprisoned in the common gaol of the said county, at                      , in the county of                      , (and there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of                      ; and I also adjudge the said A. B. to pay to the said C. D. the sum of                      , for his costs in this behalf, and if the said sum for costs is not paid forthwith (or on or before                      next), then \* I order that the said sum be levied by distress and sale of the goods and chattels of the said A. B.; and in default of sufficient distress in that behalf,\* I adjudge the said A. B. to be imprisoned in the said common gaol (and kept there at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of                      , to commence at and from the expiration of the term of his imprisonment aforesaid, unless the said sum for costs and the costs and charges of the commitment and of the conveying of the said A. B. to gaol are sooner paid.

Given under (my) hand and seal, the day and year first above mentioned, at                      , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

\* Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks \* \* say, 'inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family,' (or, 'that the said A. B. has no goods or chattels whereon to levy the said sum for costs by distress').

55-56 V, c. 29, sch. 1, form XX.

## FORM 34.

(Section 727.)

*Order for Payment of Money to be Levied by Distress, and in Default of Distress, Imprisonment.*

Canada,  
Province of  
County of

}  
,  
,  
}

Be it remembered that on \_\_\_\_\_, a complaint was made before the undersigned, \_\_\_\_\_, a justice of the peace in and for the said county of \_\_\_\_\_, for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now at this day, to wit, on \_\_\_\_\_, at \_\_\_\_\_, the parties aforesaid appear before me the said justice (or the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here on this day before me or such justice or justices of the peace for the county, as should now be here, to answer the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of \_\_\_\_\_ forthwith (or on or before \_\_\_\_\_ next, or as the Act or law requires), and also to pay to the said C. D. the sum of \_\_\_\_\_ for his costs in this behalf, and if the said several sums are not paid forthwith (or on or before \_\_\_\_\_ next), then,\* I hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B. and in default of sufficient distress in that behalf \* I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at \_\_\_\_\_, in the said county of \_\_\_\_\_, (and there kept at hard labour, if the Act or law authorizes this, and it is so adjudged) for the term of \_\_\_\_\_, unless the said several sums and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under (my) hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

\* Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks \* say, 'inasmuch as it is now made to appear to me that the issuing of a

warrant of distress in this behalf would be ruinous to the said A. B. and his family,' (or 'that the said A. B. has no goods or chattels whereon to levy the said sums by distress').  
55-56 V, c. 29, sch. 1, form YY.

## FORM 35.

(Section 727.)

*Order for Payment of Money, and in Default of Payment, Imprisonment.*

Canada,  
Province of  
County of

}  
}  
}

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (or the said C. D. appears before me, the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such justice or justices of the peace for the said county, as should now be here, to answer to the said complaint, and to be further dealt with according to law), and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (or on or before next, or as the Act or law requires), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (or on or before next, then I adjudge the said A. B. to be imprisoned in the common gaol of the said county at , in the said county of , (there to be kept at hard labour, if the Act or law authorizes this, and it is so adjudged), for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under (my) hand and seal, this day of ,  
in the year , at , in the county aforesaid.

J. S., [SEAL]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form ZZ.

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[ § 1452 ]

FORM 36.

(Section 727.)

*Order for any other Matter where the Disobeying of it is punishable with Imprisonment.*

Canada,  
Province of  
County of

}  
.  
}

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place where and when they occurred*); and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (or the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me, upon oath, that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such justice or justices of the peace for the said county, as should now be here, to answer to the said complaint and to be further dealt with according to law); and now, having heard the matter of the said complaint, I do adjudge the said A. B. to (*here state the matter required to be done*), and if, upon a copy of the minute of this order being served upon the said A. B., either personally or by leaving the same for him at his last or most usual place of abode, he neglects or refuses to obey the same, in that case I adjudge the said A. B., for such his disobedience, to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said order is sooner obeyed, and I do also adjudge the said A. B. to pay to the said C. D. the sum of £ for his costs in this behalf, and if the said sum for costs is not paid forthwith (or on or before next), I order the same to be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress in that behalf I adjudge the said A. B. to be imprisoned in the said common gaol (there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under (my) hand and seal, this day of  
in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

## FORM 37.

(Section 730.)

*Form of Order of Dismissal of an Information or Complaint.*

Canada,  
Province of  
County of

}  
,  
.

Be it remembered that on \_\_\_\_\_, information was laid (or complaint was made) before the undersigned, \_\_\_\_\_, a justice of the peace in and for the said county of \_\_\_\_\_, for that (etc., as in the summons of the defendant) and now at this day, to wit, on \_\_\_\_\_, at \_\_\_\_\_, (if at any adjournment insert here: 'to which day the hearing of this case was duly adjourned, of which the said C. D. had due notice.') both the said parties appear before me in order that I should hear and determine the said information (or complaint) (or the said A. B. appears before me, but the said C. D., although duly called, does not appear); [whereupon the matter of the said information (or complaint) being by me duly considered, it manifestly appears to me that the said information (or complaint) is not proved, and] (if the informant or complainant does not appear, these words may be omitted,) I do therefore dismiss the same, and do adjudge that the said C. D. do pay to the said A. B. the sum of \_\_\_\_\_, for his costs incurred by him in defence in his behalf; and if the said sum for costs is not paid forthwith (or on or before \_\_\_\_\_), I order that the same be levied by distress and sale of the goods and chattels of the said C. D., and in default of sufficient distress in that behalf, I adjudge the said C. D. to be imprisoned in the common gaol of the said county of \_\_\_\_\_, at \_\_\_\_\_, in the said county of \_\_\_\_\_ (and there kept at hard labour, if the Act or law authorizes this, and it is so adjudged) for the term of \_\_\_\_\_, unless the said sum for costs, and all costs and charges of the said distress and of the commitment and of the conveying of the said C. D. to the said common gaol are sooner paid.

Given under (my) hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form BBB.

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[ § 1152 ]

FORM 38.

(Section 730.)

*Form of Certificate of Dismissal.*

Canada,  
Province of , }  
County of . }

I hereby certify that an information (or complaint) preferred by C. D. against A. B. for that (*etc., as in the summons*) was this day considered by me, a justice of the peace in and for the said county of , and was by me dismissed (with costs).

Dated at , this day of , in the year .

J. S.,

*J. P., (name of county.)*

55-56 V, c. 29, sch. 1, form CCC.

FORM 39.

(Section 741.)

*Warrant of Distress upon a Conviction for a Penalty.*

Canada,  
Province of , }  
County of . }

To all or any of the constables and other peace officers in the said county of

Whereas A. B., late of , (*labourer*), was on this day (or on last past) duly convicted before , a justice of the peace, in and for the said county of , for that (*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B. should for such his offence, forfeit and pay (*etc., as in the conviction*), and should also pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby ordered that if the said several sums were not paid (forthwith) the same should be levied by distress and sale of the goods and chattels of the said A. B., and it was thereby also adjudged that the said A. B., in default of sufficient distress, should be imprisoned in the common gaol of the said county, at , in the said county of (and there kept at hard labour *if the conviction so adjudges*) for the space of , unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of

the said A. B. to the said common gaol were sooner paid; \* And whereas the said A. B., being so convicted as aforesaid, and being (now) required to pay the said sums of                      and                      has not paid the same or any part thereof, but therein has made default: These are, therefore, to command you in His Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if within                      days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me, the convicting justice (or one of the convicting justices), that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.: and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain.

Given under (my) hand and seal, this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form DDD.

FORM 40.

(Section 741.)

*Warrant of Distress upon an Order for the Payment of Money.*

Canada,                      }  
Province of                      ,  
County of                      . }

To all or any of the constables and other peace officers in the said county of                      .

Whereas on                      , last past, a complaint was made before                      , a justice of the peace in and for the said county, for that (etc., as in the order), and afterwards, to wit, on                      , at                      , the said parties appeared before                      (as in the order), and thereupon the matter of the said complaint having been considered, the said A. B. was adjudged to pay to the said C. D. the sum of                      , on or before                      then next, and also to pay to the said C. D. the sum of                      , for his costs in that behalf; and it was ordered that if the said several sums were not paid on or before the said                      then next, the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was adjudged that in default of sufficient distress in that behalf,

the said A. B. should be imprisoned in the common gaol of the said county, at \_\_\_\_\_, in the said county of \_\_\_\_\_ (and there kept at hard labour *if the order so directs*) for the term of \_\_\_\_\_, unless the said several sums and all costs and charges of the distress (and of the commitment and conveying of the said A. B. to the said common gaol) were sooner paid; \* And whereas the time in and by the said order appointed for the payment of the said several sums of \_\_\_\_\_, and \_\_\_\_\_ has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within the space of \_\_\_\_\_ days after the making of such distress, the said last mentioned sums, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me (*or some other of the convicting justices, as the case may be*), that I (*or he*) may pay or apply the same as by law directed, and may render the overplus, if any, on demand to the said A. B.; and if no such distress can be found, then to certify the same unto me, to the end that such proceedings may be had therein, as to law appertain.

Given under (my) hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form EEE.

FORM 41.

(Section 741.)

*Warrant of Commitment upon a Conviction for a Penalty in the first instance.*

Canada,  
Province of \_\_\_\_\_,  
County of \_\_\_\_\_.

To all or any of the constables and other peace officers in the said county of \_\_\_\_\_, and to the keeper of the common gaol of the said county of \_\_\_\_\_, at \_\_\_\_\_, in the said county of \_\_\_\_\_.

Whereas A. B., late of \_\_\_\_\_, (*labourer*), was on this day convicted before the undersigned, \_\_\_\_\_, a justice of the peace in and for the said county, for that (*stating the offence, as in the*



*conviction*), and it was thereby adjudged that the said A. B., for his offence, should forfeit and pay the sum of \_\_\_\_\_ (*etc., as in the conviction*), and should pay to the said C. D. the sum of \_\_\_\_\_, for his costs in that behalf; and it was thereby further adjudged that if the said several sums were not paid (forthwith) the said A. B. should be imprisoned in the common gaol of the county, at \_\_\_\_\_, in the said county of \_\_\_\_\_ (and there kept at hard labour *if the conviction so adjudges*) for the term of \_\_\_\_\_, unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol were sooner paid; And whereas the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at \_\_\_\_\_ aforesaid, and there to deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour *if the conviction so adjudges*) for the term of \_\_\_\_\_, unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid unto you, the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form FFF.

FORM 42.

(Section 741.)

*Warrant of Commitment on an Order in the first instance.*

Canada, }  
Province of }  
County of }

To all or any of the constables and other peace officers in the said county of \_\_\_\_\_, and to the keeper of the common gaol of the county of \_\_\_\_\_, at \_\_\_\_\_, in the said county of \_\_\_\_\_.

Whereas, on \_\_\_\_\_ last past, complaint was made before \_\_\_\_\_, a justice of the peace in and for the

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said county of , for that (*etc., as in the order*), and afterwards, to wit, on the day of , at A. B. and C. D. appeared before me the said justice (*or as it is in the order*), and thereupon having considered the matter of the complaint, I adjudged the said A. B. to pay the said C. D. the sum of , on or before the day of then next, and also to pay to the said C. D. the sum of , for his costs in that behalf; and I also thereby adjudged that if the said several sums were not paid on or before the day of then next, the said A. B. should be imprisoned in the common gaol of the county of , at , in the said county of (and there be kept at hard labour *if the order so directs*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol, were sooner paid: And whereas the time in and by the said order appointed for the payment of the said several sums of money has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said peace officers, or any of you, to take the said A. B. and him safely to convey to the said common gaol, at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour *if the order so directs*) for the term of unless the said several sums and the costs and charges of the commitment and of conveying him to the said common gaol are sooner paid unto you the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of ,  
in the year , at , in the county aforesaid.

J. S., [SEAL]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form GGG.

FORM 43.

(Section 741.)

*Constable's Return to a Warrant of Distress.*

I, W. T., constable, of , in the county of , hereby certify to J. S., Esquire, a justice of the peace in and for the county of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within mentioned A. B., and

that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this                      day of                      , one thousand  
nine hundred and                      .  
55-56 V. c. 29, sch. 1, form III.

## FORM 44.

(Section 741.)

*Warrant for Commitment for Want of Distress.*

Canada,  
Province of                      ,  
County of                      .

To all or any of the constables and other peace officers in the  
county of                      , and to the keeper of the common  
gaol of the said county of                      , at                      , in the  
said county.

Whereas (etc., as in either of the foregoing distress warrants 39 or  
40, to the asterisk, \* and then thus): And whereas, afterwards on  
the                      day of                      , in the year aforesaid, I, the said  
justice, issued a warrant to all or any of the peace officers of the  
county of                      , commanding them, or any of them, to levy the  
said sums of                      and                      by distress and sale of the goods  
and chattels of the said A. B.: And whereas it appears to me, as well  
by the return of the said warrant of distress by the peace officer who  
had the execution of the same, as otherwise, that the said peace officer  
has made diligent search for the goods and chattels of the said A. B.,  
but that no sufficient distress whereon to levy the sums above men-  
tioned could be found: These are, therefore, to command you, the said  
peace officers, or any one of you, to take the said A. B., and him safely  
to convey to the common gaol at                      aforesaid, and there deliver  
him to the said keeper, together with this precept: And I do hereby  
command you, the said keeper of the said common gaol, to receive the  
said A. B. into your custody, in the said common gaol, there to imprison  
him (and keep him at hard labour *if the order so directs*) for the term  
of                      , unless the said several sums, and all the costs and  
charges of the said distress and of the commitment and of the convey-  
ing of the said A. B. to the said common gaol are sooner paid unto you,  
the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this                      day of                      .  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

## FORM 45.

(Section 742.)

*Warrant of Distress for Costs upon an Order for Dismissal of an  
Information or Complaint.*

To all or any of the constables and other peace officers in the said  
county of

Canada,  
Province of  
County of

}  
,  
.

Whereas on last past, information was laid (or complaint was made) before , a justice of the peace in and for the said county of , for that (*etc., as in the order of dismissal*) and afterwards, to wit, on , at , both parties appearing before (*me*) , in order that (*I*) should hear and determine the same, and the several proofs adduced to (*me*) in that behalf, being by (*me*) duly heard and considered, and it manifestly appearing to (*me*) that the said information (or complaint) was not proved, (*I*) therefore dismissed the same and adjudged that the said C. D. should pay to the said A. B. the sum of , for his costs incurred by him in his defence in that behalf; and (*I*) ordered that if the said sum for costs was not paid (forthwith) the same should be levied on the goods and chattels of the said C. D., and (*I*) adjudged that in default of sufficient distress in that behalf the said C. D. should be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour *if the order so directed*) for the space of unless the said sum for costs, and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol, were sooner paid; \* And whereas the said C. D. being now required to pay to the said A. B. the said sum for costs, has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said C. D., and if within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to (*me*) that (*I*) may pay and apply the same as by law directed, and may render the overplus (if any) on demand to the said C. D., and if no distress can be found, then to certify

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the same unto (*me*) (or to any other justice of the peace for the said county), that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL.]

J. P., (*name of county.*)

55-56 V, c. 29, sch. 1, form KKK.

FORM 46.

(Section 742.)

*Warrant of Commitment for Want of Distress.*

Canada,                      }  
Province of                      ,  
County of                      . }

To all or any of the constables and other peace officers in the said county of                      , and to the keeper of the common gaol of the said county of                      , at                      , in the said county of                      .

Whereas (*etc., as in form 45 to the asterisk, \* and then thus*): And whereas afterwards, on the                      day of                      , in the year aforesaid, I, the said justice, issued a warrant to all or any of the peace officers of the said county, commanding them, or any one of them, to levy the said sum of                      , for costs, by distress and sale of the goods and chattels of the said C. D.: And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said C. D., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said C. D., and him safely convey to the common gaol of the said county, at                      aforesaid, and there deliver him to the keeper thereof, together with this precept: And I hereby command you, the said keeper of the said common gaol, to receive the said C. D. into your custody in the said common gaol, there to imprison him (and keep him at hard labour *if the order so directed*) for the term of                      , unless the said sum, and all the costs and charges of the said distress and of the commitment and of the conveying of the said C. D. to the said common

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gaol are sooner paid unto you the said keeper; and for you so doing, this shall be your sufficient warrant.

Given under my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, at \_\_\_\_\_, in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form LLL.

FORM 47.

(Section 743.)

*Endorsement in Backing a Warrant of Distress.*

Canada, }  
Province of }  
County of }

Whereas proof upon oath has this day been made before me \_\_\_\_\_, a justice of the peace in and for the said county, that the name of J. S. to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned, I do therefore authorize W. T., who brings me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all peace officers in the said county of \_\_\_\_\_, to execute the same within the said county.

Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_, one thousand nine hundred and \_\_\_\_\_

O. K.,

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form HHH.

FORM 48.

(Section 748.)

*Complaint by the Party Threatened, for Sureties for the Peace.*

Canada, }  
Province of }  
County of }

The information (or complaint) of C. D., of \_\_\_\_\_, in the said county of \_\_\_\_\_, (labourer), (if preferred by an attorney or agent, say—by D. E., his duly authorized agent (or attorney), in this behalf), taken upon oath, before me, the undersigned, a justice of the peace, in and for the said county of \_\_\_\_\_, at \_\_\_\_\_ in the said county of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_ in \_\_\_\_\_

the year \_\_\_\_\_, who says that A. B., of \_\_\_\_\_, in the said county, did, on the \_\_\_\_\_ day of \_\_\_\_\_ (instant or last past), threaten the said C. D. in the words or to the effect following, that is to say: (*set them out, with the circumstances under which they were used*); and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D., is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behaviour towards him, the said C. D.; and the said C. D. also says that he does not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

55-56 V, c. 29, sch. 1, form WWW.

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FORM 49.

(Sections 748 and 1058.)

*Form of Recognizance to Keep the Peace.*

Canada,  
Provinces of \_\_\_\_\_,  
County of \_\_\_\_\_.

Be it remembered that on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, A. B., of \_\_\_\_\_, (*labourer*), L. M., of \_\_\_\_\_, (*grocer*), and N. O., of \_\_\_\_\_, (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of \_\_\_\_\_, and severally acknowledged themselves to owe to our Lord the King the several sums following, that is to say: the said A. B. the sum of \_\_\_\_\_, and the said L. M. and N. O., the sum of \_\_\_\_\_, each, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said A. B., fail in the condition endorsed (*or hereunder written*).

Taken and acknowledged the day and year first above mentioned at \_\_\_\_\_ before us,

J. S.,

J. T.,

J. P., (*name of county.*)

The condition of the within (*or above*) written recognizance is such that if the within bound A. B. (*of, etc.*), keeps the peace and is of good behaviour towards His Majesty and his liege people, and specially towards C. D. (*of, etc.*), for the term of \_\_\_\_\_ now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

55-56 V, c. 29, sch. 1, form XXX.

FORM 50.

(Section 748.)

*Form of Commitment in Default of Sureties.*

Canada, }  
Province of }  
County of }

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol of the said county of , at , in the said county.

Whereas on the day of (instant), complaint on oath was made before the undersigned (or J. L., Esquire), a justice of the peace in and for the said county of , by C. D., of , in the said county, (labourer), that A. B., of (etc.), on the day of , at aforesaid, did threaten (etc., follow to the end of complaint, as in form above, in the past tense, then): And whereas the said A. B. was this day brought and appeared before me, the said justice (or J. L., Esquire, a justice of the peace in and for the said county of ), to answer unto the said complaint; and having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of each, to keep the peace and be of good behaviour towards His Majesty and his liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are, therefore, to command you, and each of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him for the space of , or until he shall otherwise be discharged in due course of law, unless he, in the meantime, finds sufficient sureties to keep the peace as aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)



## FORM 51.

(Section 750.)

*Form of Recognizance to try the Appeal.*

Canada,  
Province of  
County of

}  
,  
.

Be it remembered that on , A. B., of , (labourer), and L. M., of , (grocer), and N. O., of , (yeoman), personally came before the undersigned, , a justice of the peace in and for the said county of , and severally acknowledged themselves to owe to our Sovereign Lord the King, the several sums following, that is to say, the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he the said A. B. fails in the condition endorsed (or hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,

J. P., (name of county.)

The condition of the within (or the above) written recognizance is such that if the said A. B. personally appears at the (next) General Sessions of the Peace (or other court discharging the functions of the Court of General Sessions, as the case may be), to be holden at , on the day of , next, in and for the said county of , and tries an appeal against a certain conviction, bearing date the day of , (instant), and made by (me) the said justice, whereby he, the said A. B., was convicted for that he, the said A. B., did, on the day of , at , in the said county of , (here set out the offence as stated in the conviction); and also abides by the judgment of the court upon such appeal and pays such costs as are by the court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.

*Form of Notice of such Recognizance to be given to the Appellant and his Sureties.*

Take notice, that you, A. B., are bound in the sum of , and you, L. M. and N. O., in the sum of , each, that you the said A. B. will personally appear at the next General Sessions of the Peace to be holden at , in and for the said county

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of \_\_\_\_\_, and try an appeal against a conviction (or order) dated the \_\_\_\_\_ day of \_\_\_\_\_, (instant), whereby you A. B. were convicted of (or ordered, etc.), (stating offence or the subject of the order shortly), and abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, and unless you the said A. B. personally appear and try such appeal and abide by such judgment and pay such costs accordingly, the recognizance entered into by you will forthwith be levied on you, and each of you.

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, one thousand nine hundred and \_\_\_\_\_.

55-56 V, c. 29, sch. 1, form 000.

## FORM 52

(Section 759.)

*Certificate of Clerk of the Peace that the Costs of an Appeal are not paid.*

Office of the clerk of the peace for the county of \_\_\_\_\_.

### *Title of the Appeal.*

I hereby certify that at a Court of General Sessions of the Peace, (or other court discharging the functions of the Court of General Sessions, as the case may be), holden at \_\_\_\_\_, in and for the said county, on \_\_\_\_\_ last past, an appeal by A. B. against a conviction (or order) of J. S., Esquire, a justice of the peace in and for the said county, came on to be tried, and was there heard and determined, and the said Court of General Sessions (or other court, as the case may be) thereupon ordered that the said conviction (or order) should be confirmed (or quashed), and that the said (appellant) should pay to the said (respondent) the sum of \_\_\_\_\_, for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the clerk of the peace for the said county, on or before the \_\_\_\_\_ day of \_\_\_\_\_ (instant), to be by him handed over to the said (respondent), and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order.

Dated at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, one thousand nine hundred and \_\_\_\_\_.

G. H.,

*Clerk of the Peace.*

55-56 V, c. 29, sch. 1, form PPP.

## FORM 53

(Section 759.)

*Warrant of Distress for Costs of an Appeal against a Conviction or Order.*

Canada,  
 Province of  
 County of

}  
 ,  
 .

To all or any of the constables and other peace officers in the said county of

Whereas (etc., as in the warrants of distress, forms 39 or 40, and to the end of the statement of the conviction or order, and then thus): And whereas the said A. B. appealed to the Court of General Sessions of the Peace (or other court discharging the functions of the Court of General Sessions, as the case may be), for the said county, against the said conviction or order, in which appeal the said A. B. was the appellant, and the said C. D. (or J. S., Esquire, the justice of the peace who made the said conviction (or order) ) was the respondent, and which said appeal came on to be tried and was heard and determined at the last General Sessions of the Peace (or other court, as the case may be) for the said county, holden at , on ; and the said court thereupon ordered that the said conviction (or order) should be confirmed (or quashed) and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, which said sum was to be paid to the clerk of the peace for the said county, on or before the day of , one thousand nine hundred and , to be by him handed over to the said C. D.; and whereas the clerk of the peace of the said county has, on the day of (instant), duly certified that the said sum for costs had not been paid: \* These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if, within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the clerk of the peace for the said county of , that he may pay and apply the same as by law directed; and if no such distress can be found, then to certify the same unto me or any other justice of the peace for the said county, that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL.]

J. P., (name of county.)

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FORM 54.

(Section 759.)

*Warrant of Commitment for want of Distress in the last case.*

Canada,  
Province of  
County of

}  
,  
.

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the said county at , in the said county.

Whereas (etc., as in form 53, to the asterisk \* and then thus): And whereas, afterwards, on the day of , in the year aforesaid, I, the undersigned, issued a warrant to all or any of the peace officers in the said county of , commanding them, or any of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer who was charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the said sum above mentioned could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol of the said county of , at aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him for the term of , unless the said sum and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol, are sooner paid unto you, the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL.]

*J. P., (name of county.)*

55-56 V, c. 29, sch. 1, form RRB.

## FORM 55.

(Section 799.)

*Conviction.*

Canada,  
Province of  
County of

}  
,  
.

Be it remembered that on the                      day of  
in the year                      , at                      , A. B., being charged  
before me, the undersigned,                      , of the said (*city*) (and  
consenting to my trying the charge summarily), is convicted before me,  
for that he, the said A. B., (*etc., stating the offence, and the time and  
place when and where committed*), and I adjudge the said A. B., for  
his said offence, to be imprisoned in the                      (and there  
kept at hard labour, *if it is so adjudged*) for the term of                      .

Given under my hand and seal, the day and year first above mentioned,  
at                      aforesaid.

G. F., [SEAL.]

Police magistrate

for

(or as the case may be).

55-56 V, c. 29, sch. 1, form QQ.

## FORM 56.

(Section 799.)

*Conviction upon a Plea of Guilty.*

Canada,  
Province of  
County of

}  
,  
.

Be it remembered that on the                      day of  
in the year                      , at                      , A. B. being charged  
before me, the undersigned,                      of the said (*city*) (and  
consenting to my trying the charge summarily), for that he, the said  
A. B., (*etc., stating the offence, and the time and place when and where  
committed*), and pleading guilty to such charge, he is thereupon convicted  
before me of the said offence; and I adjudge him, the said A. B., for

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his said offence, to be imprisoned in the (and there kept  
at hard labour, *if it is so adjudged*) for the term of .

Given under my hand and seal, the day and year first above mentioned,  
at aforesaid.

G. F., [SEAL.]  
Police magistrate  
for  
(*or as the case may be*).

55-56 V, c. 29, sch. 1, form RR.

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**FORM 57.**

(Section 799.)

*Certificate of Dismissal.*

Canada,  
Province of , }  
County of . }

I, the undersigned, , of the city (*or as the case  
may be*) of , certify that on the day of  
, in the year , at aforesaid,  
A. B., being charged before me (and consenting to my trying the charge  
summarily), for that he, the said A. B., (*etc., stating the offence charged,  
and the time and place when and where alleged to have been committed*),  
I did, after having summarily tried the said charge, dismiss the same.

Given under my hand and seal, this day of ,  
in the year , at aforesaid.

G. F., [SEAL.]  
Police magistrate  
for  
(*or as the case may be*).

55-56 V, c. 29, sch. 1, form SS.

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CRIMINAL CODE (PART XXV)

FORM 58.

(Section 813.)

*Certificate of Dismissal.*

Canada,  
Province of  
County of

}  
.  
}

, justices of  
the peace for the of  
, (or if a recorder, etc.,

I a , of the  
of , as the case may be), do hereby certify that on  
the day of , in the year  
at , in the said of , A. B. was brought  
before us, the said justices (or me, the said ), charged  
with the following offence, that is to say (*here state briefly the particulars of the charge*), and that we, the said justices, (or I, the said  
) thereupon dismissed the said charge.

Given under our hands and seals (or my hand and seal), this  
day of , in the year , at aforesaid.

J. P. [SEAL.]  
J. R. [SEAL.]  
or S. J. [SEAL.]

55-56 V, c. 29, sch. 1, form TT.

FORM 59.

(Section 814.)

*Conviction.*

Canada,  
Province of  
County of

}  
.  
}

Be it remembered that on the day of , in  
the year , at ; in the county  
of , A. B. is convicted before us, J. P. and J. R.,  
justices of the peace for the said county (or me, S. J., recorder, of the  
, of , or as the case may be) for that  
he, the said A. B., did (*specify the offence and the time and place when  
and where the same was committed, as the case may be, but without*

*setting forth the evidence*), and we, the said J. P. and J. R. (or I, the said S. J.), adjudge the said A. B., for his said offence, to be imprisoned in the \_\_\_\_\_ with (or without) hard labour (*in the discretion of the justice*) for the space of \_\_\_\_\_, (or we) (or I) adjudge the said A. B., for his said offence, to forfeit and pay (*here state the penalty actually imposed*), and in default of immediate payment of the said sum, to be imprisoned in the \_\_\_\_\_ with (or without) hard labour (*in the discretion of the justice*) for the term of \_\_\_\_\_, unless the said sum is sooner paid.

Given under our hands and seals (or my hand and seal), the day and year first above mentioned.

J. P. [SEAL.]

J. R. [SEAL.]

or S. J. [SEAL.]

55-56 V, c. 29, sch. 1, form UU.

FORM 60.

(Section 827.)

*Form of Record when the Prisoner Pleads Guilty.*

Canada,  
Province of \_\_\_\_\_,  
County of \_\_\_\_\_

Be it remembered that A. B., being a prisoner in the gaol of the said county, on a charge of having on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, stolen, etc., (*one cow, the property of C. D., or as the case may be, stating briefly the offence*), and being brought before me (*describe the judge*) on the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that the said A. B. being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said A. B. to (*here insert such sentence as the law allows and the judge thinks right*).

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_.

O. K.,  
Judge.

55-56 V, c. 29, sch. 1, form NN.



## FORM 61.

(Section 833.)

*Form of Record when the Prisoner Pleads Not Guilty.*

Canada,  
Province of  
County of

}  
,  
}

Be it remembered that A. B. being a prisoner in the gaol of the said county, committed for trial on a charge of having on                      day of                      , in the year                      stolen, etc., (*one cow, the property of C. D., or as the case may be, stating briefly the offence*) and having been brought before me (*describe the judge*) on the day of                      , in the year                      , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that upon the                      day of                      , in the year                      , the said A. B., being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence (*or as the case may be*), I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to (*here insert such sentence as the law allows and the judge thinks right*), (*or I find him not guilty of the offence with which he is charged, and discharge him accordingly*).

Witness my hand at                      , in the county of                      ,  
this day of                      , in the year                      .

O. K.,

Judge.

55-56 V, c. 29, sch. 1, form MM.

## FORM 62.

(Section 842.)

*Warrant to apprehend Witness.*

Canada,  
Province of  
County of

}  
,  
}

To all or any of the constables and other peace officers in the said county of                      .

Whereas it having been made to appear before me, that E. F., of                      , in the said county of                      , is likely to give material evidence on behalf of the prosecution (*or defence, as the case*

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*may be*), on the trial of a certain charge of (*as theft, or as the case may be*), against A. B., and that the said E. F. was duly subpoenaed (or bound under recognizance) to appear on the                      day of                      , in the year                      , at                      , in the said county at                      o'clock (forenoon or afternoon, *as the case may be*), before me, to testify what he knows concerning the said charge against the said A. B.

And whereas proof has this day been made before me, upon oath of such subpoena having been duly served upon the said E. F., (or of the said E. F. having been duly bound under recognizance to appear before me, *as the case may be*); and whereas the said E. F. has neglected to appear at the trial and place appointed, and no just excuse has been offered for such neglect: These are, therefore, to command you to take the said E. F., and to bring him and have him forthwith before me, to testify what he knows concerning the said charge against the said A. B., and also to answer his contempt for such neglect.

Given under my hand this                      day of                      , in the year                      .

O. K.,  
Judge.

55-56 V, c. 29, sch. 1, form OO.

## FORM 63.

(Sections 845 and 856.)

### *Headings of Indictment.*

In the (*name of the court in which the indictment is found*).

The jurors for our Lord the King present that

(*Where there are more counts than one, add at the beginning of each count*):

'The said jurors further present that                      .'

55-56 V, c. 29, sch. 1, form EE.

## FORM 64.

(Section 852.)

### *Examples of the manner of stating offences.*

- (a) A. murdered B. at                      , on                      .
- (b) A. stole a sack of flour from a ship called the                      ,  
at                      , on                      .
- (c) A. obtained by false pretenses from B., a horse, a cart, and the  
harness of a horse at                      , on                      .
- (d) A. committed perjury with intent to procure the conviction of

B. for an offence punishable with penal servitude, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on the                      day of                      , 190                      ; first, that he, A. saw B. at Ottawa, on the                      day of                      ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc.                      or

(e) The said A. committed perjury on the trial of B. at a Court of Quarter Sessions held at Ottawa, on                      for an assault alleged to have been committed by the said B. on C. at Ottawa, on the                      day of                      by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston.

(f) A., with intent to maim, disfigure, disable or do grievous bodily harm to B. or with intent to resist the lawful apprehension or detainer of A. (or C.), did actual bodily harm to B. (or D.).

(g) A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on                      at                      by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction*).

(h) A. published a defamatory libel on B. in a certain newspaper, called the                      , on the                      day of                      190                      , which libel was contained in an article headed or commencing (*describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him*), and which libel was written in the sense of imputing that the said B. was (*as the case may be*).

55-56 V, c. 29, sch. 1, form FF.

FORM 65.

(Section 879.)

*Certificate of Indictment being Found.*

Canada,                      }  
Province of                      ,  
County of                      . }

I hereby certify that at a Court of (Oyer and Terminer, or General Gaol Delivery, or General Sessions of the Peace) holden in and for the county of                      , at                      , in the said (county), on                      , a bill of indictment was found by the grand jury

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against A. B., therein described as A. B., late of , (labourer),  
for that he (etc., stating shortly the offence), and that the said A. B.  
has not appeared or pleaded to the said indictment.

Dated this day of , in the year

Z. X.

(Title of officer.)

55-56 V, c. 29, sch. 1, form GG.

FORM 66.

(Section 880.)

*Warrant to Apprehend a Person Indicted.*

Canada,  
Province of , }  
County of . }

To all or any of the constables and other peace officers in the said  
county of .

Whereas it has been duly certified by J. D., clerk of the (name the  
court) (or E. G., deputy clerk of the Crown or clerk of the peace, or as  
the case may be), in and for the county of , that (etc.,  
stating the certificate): These are, therefore, to command you in His  
Majesty's name forthwith to apprehend the said A. B., and to bring  
him before (me) or some other justice or justices of the peace in and  
for the said county, to be dealt with according to law.

Given under my hand and seal, this day of  
in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form HH.

FORM 67.

(Section 881.)

*Warrant of Commitment of a Person Indicted.*

Canada,  
Province of , }  
County of . }

To all or any of the constables and other peace officers in the said  
county of , and the keeper of the common gaol,  
at , in the said county of .

Whereas by a warrant under the hand and seal of , (a)  
justice of the peace in and for the said county of , dated  
, after reciting that it had been certified by J. D. (etc., as

in the certificate), the said justice of the peace commanded all or any of the constables or peace officers of the said county, in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (him) the said justice of the peace or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (me) it is hereupon duly proved to (me) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at \_\_\_\_\_, in the said county of \_\_\_\_\_, and there to deliver him to the keeper thereof, together with this precept: And (I) hereby command you the said keeper to receive the said A. B. into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

Given under (*my*) hand and seal, this                      day of                      ,  
in the year                      , at                      , in the county aforesaid.

J. S., [SEAL.]

**J. P., (name of county.)**

55-56 V, c. 29, sch. 1, form II.

**FORM 68.**

**(Section 882.)**

*Warrant to detain a Person indicted who is already in Custody for another Offence.*

Canada,  
Province of  
County of

To the keeper of the common gaol at \_\_\_\_\_, in the said county  
of \_\_\_\_\_.

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (or deputy clerk of the Crown or clerk of the peace of and for the county of \_\_\_\_\_, (*or as the case may be*), that (*etc., stating the certificate*); And whereas (*I am*) informed that the said A. B. is in your custody in the said common gaol at \_\_\_\_\_ aforesaid, charged with some offence, or other matter; and it being now duly proved upon oath before (*me*) that the said A. B., so indicted as aforesaid, and the said A. B., in your custody, as aforesaid, are one and the

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same person: These are therefore to command you, in His Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under (my) hand and seal, this                      day of                      , in the year                      , at                      in the county aforesaid.

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, form JJ.

FORM 69.

(Section 925.)

*Challenge to Array.*

Canada,  
Province of  
County of

}  
,  
.

The King } The said A. B., who prosecutes for our Lord the  
v. } King (or the said C. D., *as the case may be*) challenges  
C. D. } the array of the panel on the ground that it was re-  
turned by X. Y., sheriff of the county of                      (or E. F., deputy  
of X. Y., sheriff of the county of                      *as the case may be*),  
and that the said X. Y. (or E. F., *as the case may be*) was guilty of  
partiality (or fraud, or wilful misconduct) on returning said panel.  
55-56 V, c. 29, sch. 1, form KK.

FORM 70.

(Section 936.)

*Challenge to Poll.*

Canada,  
Province of  
County of

}  
,  
.

The King } The said A. B., who prosecutes, *etc.* (or the said  
v. } C. D., *as the case may be*) challenges G. H., on the  
C. D. } ground that his name does not appear in the panel [or  
that he is not indifferent between the King and the said C. D., or that  
he was convicted and sentenced to (death, or penal servitude, or im-  
prisonment with hard labour, or exceeding twelve months), or that he  
is disqualified as an alien.]  
55-56 V, c. 29, sch. 1, form LL.

## FORM 71.

(Section 1068.)

*Certificate of Execution of Judgment of Death.*

I, A. B., surgeon (or as the case may be) of the (describe the prison), hereby certify that I, this day, examined the body of C. D. on whom judgment of death was this day executed in the said prison; and that on such examination I found that the said C. D. was dead.

(Signed), A. B.

Dated this                      day of                      , in the year,                      .  
55-56 V, c. 29, sch. 1, form UUU.

## FORM 72.

(Section 1068.)

*Declaration of Sheriff and Others.*

We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (describe the prison) in our presence.

Dated this                      day of                      , in the year                      .

E. F., Sheriff of \_\_\_\_\_

L. M., Justice of the Peace for \_\_\_\_\_

G. H., Gaoler of \_\_\_\_\_

etc., etc.

55-56 V, c. 29, sch. 1, form VVV.

## FORM 73.

(Section 1097.)

*Certificate of Non-appearance to be endorsed on the Defendant's Recognizance.*

I hereby certify that the said A. B. has not appeared at the time and place in the said condition mentioned, but therein has made default by reason whereof the within written recognizance is forfeited.

Dated at

J. S., [SEAL.]

J. P., (name of county.)

55-56 V, c. 29, sch. 1, forms B. and MMM.

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FORM 74.

(Section 1105.)

*Writ of Fieri Facias.*

Edward VII, by the Grace of God, etc.

To the sheriff of \_\_\_\_\_, greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of each of the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason that no goods or chattels, lands or tenements can be found belonging to the said persons, respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*) upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied unless any of such persons respectively gives sufficient security for his appearance at the said court, on the return day hereof, for which you will be held answerable; and what you do in the premises make appear before us in our court (*as the case may be*), on the \_\_\_\_\_ day of \_\_\_\_\_ term next, and have then and there this writ. Witness, etc., G. H., clerk (*as the case may be*).

55-56 V, c. 29, sch. 1, form TTT.



[§ 1153]

CRIMINAL CODE (PART XXV)

FORM 75.

(Section 1133.)

*Justices' Return.*

RETURN of convictions made by me (or us, as the case may be), during  
the quarter ending , 19 .

Name of the Prosecutor.	Name of the Defendant.	Nature of the Charge.	Date of Conviction.	Name of Convicting Justice.	Amount of Penalty. Fine or Damage.	Time when paid or to be paid to the said Justice.	To whom paid over by the said Justice.	If not paid, why not, and general observa- tions, if any.

J. S., Convicting Justice,  
or

J. S. and O. K., Convicting Justices (as the case may be).

55-56 V, c. 29, sch. 1, form 888.

## APPENDIX

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Sections 1-37, inclusive, of the Canada Evidence Act, including Part I of that Act, made applicable to criminal proceedings.

(R.S.C. 1906, chap. 145, and amendments).

(An Act respecting Witnesses and Evidence.)

### SHORT TITLE.

**Short Title.—Citation.**

1. This Act may be cited as the Canada Evidence Act.

### PART I.

#### APPLICATION.

**Application to criminal proceedings.**

2. This Part shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

#### WITNESSES.

**No incompetency from interest or crime.**

3. A person shall not be incompetent to give evidence by reason of interest or crime.

**Accused and wife or husband competent witnesses for defence.—**

**Wife or husband competent and compellable witnesses for prosecution.—Disclosure of communications during marriage not compellable.—Common law.—Failure of accused or consort to testify.—Comment prohibited.**

4. Every person charged with an offence, and, except in this section otherwise provided, the wife or husband, as the case

may be, of the person so charged, shall be a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

2. The wife or husband of a person charged with an offence against any of the sections 202 to 206, inclusive, 211 to 219, inclusive, 238, 239, 242A, 244, 245, 298 to 302, inclusive, 307 to 311, inclusive, 313 to 316, inclusive, of the Criminal Code, shall be a competent and compellable witness for the prosecution without the consent of the person charged.

3. No husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.

4. Nothing in this section shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

5. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution.

*Competency of accused as a witness; right to full answer and defence*—See notes to Code secs. 259, 942; *R. v. D'Aoust*, 3 O.L.R. 653, 5 Can. Cr. Cas. 407; 1 O.W.R. 344.

*Where wife or husband a compellable witness against consort*—See notes to the various Code sections referred to in sub-sec. (2); *R. v. Allen*, 22 Can. Cr. Cas. 124, 41 N.B.R. 516; *R. v. Bissell*, 1 Ont. R. 514; *Mulligan v. Thompson*, 23 Ont. R. 54; *Leach v. Director of Public Prosecutions* (1912) 7 Cr. App. R. 157.

*Where persons tried on a joint indictment*—See note to Code sec. 856; *R. v. Connors*, 3 Que. K.B. 100; *R. v. Hadwen* [1902] 1 K.B. 882.

*Comment on failure to testify*—See note to sec. 263; *R. v. Coleman*, 30 Ont. R. 108; *R. v. Blais*, 11 O.L.R. 345; *R. v. Beaulieu* (1915) 24 Can. Cr. Cas. 65 (N.B.); *R. v. Charles King*, 1 W.L.R. 235, 9 Can. Cr. Cas. 426; *R. v. McGuire*, 36 N.B.R. 609; *R. v. MacLean*, 11 Can. Cr. Cas. 283 (N.S.); *R. v. Guerin*, 18 O.L.R. 425; *R. v. May* (1915) 7 W.W.R. 1261 (B.C.); *Di Lena v. The King*, (1915) 24 Can. Cr. Cas. 301, 24 Que. K.B. 262; *R. v. Romano*, (1915) 24 Que. K.B. 40, 24 Can. Cr. Cas. 30; *R. v. Dickman*, (1910) 26 Times L.R. 640; *R. v. Hill*, 33 N.S.R. 253; *R. v. Corby*, 30 N.S.R. 330.

**Incriminating questions.—Answer not receivable against witness.**

5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

*Incriminating answers where compelled after protest*—See note to Code sec. 263; *re* Ginsberg, 40 O.L.R. 136; *R. v. Coote* (1873) 42 L.J.P.C. 45 (Quebec appeal); *R. v. Van Meter*, 11 Can. Cr. Cas. 207 (Terr.); *R. v. Lovitt*, 13 Can. Cr. Cas. 15 (N.S.); *ex parte Ferguson*, 17 Can. Cr. Cas. 437 (N.S.).

**Evidence of mute.**

6. A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible.

**Expert witnesses.—Not more than five without leave.—When leave to be obtained.**

7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding.

2. Such leave shall be applied for before the examination of any of the experts who may be examined without such leave.

*Opinion evidence of experts*—See notes to Code secs. 19, 259, 307, 308, 966; *R. v. Proesper*, 15 S.C.R. 409; *R. v. Moke* [1917] 3 W.W.R.

576, 28 Can. Cr. Cas. 296 (Alta.); article in 12 Bench and Bar (N.S.) 287; *R. v. Bleiler* (1912) 2 W.W.R. 5 (Alta.); *Canadian Northern Western Ry. v. Moore*, 53 S.C.R. 519, affirming 8 Alta. L.R. 379; *re Goodman* (1916) 10 W.W.R. 1178, 26 Man. R. 537; 26 Can. Cr. Cas. 254; *C.P.R. v. Jackson*, 52 S.C.R. 281, affirming *Jackson v. C.P.R.*, 9 Alta. L.R. 137, 31 W.L.R. 726.

#### Comparison of handwriting.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

*Comparison of disputed writing*—See notes to Code secs. 466 (on forgery), 317 and 334 (libel); *R. v. Ranger*, 30 Can. Cr. Cas. 65; *Thompson v. Thompson*, 4 O.L.R. 442; *Kalmet v. Keizer* (1910) 3 Alta. L.R. 26; *R. v. Dixon* (No. 2), 3 Can. Cr. Cas. 220, 29 N.S.R. 462; *R. v. Grinder*, 11 B.C.R. 370; *Scott v. Crerar*, 14 A.R. 152 (Ont.); *R. v. Law*, 19 Man. R. 259; *United States v. Ford* (1916) 10 W.W.R. 1042, 26 Can. Cr. Cas. 430, 34 W.L.R. 912 (Man.); *Pratte v. Voisard*, 57 S.C.R. 184; *Fohel v. Darwish* [1918] 1 W.W.R. 627, 13 Alta. L.R. 180, [1918] 2 W.W.R. 525, 13 Alta. L.R. 312; *Dominion Permanent v. Morgan*, 7 W.W.R. 844, 50 S.C.R. 485.

#### Adverse witnesses may be contradicted.—Previous statements.

9. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

*Adverse witness*—See *R. v. May* (1915) 7 W.W.R. 1261 (B.C.); *R. v. Hutchinson*, 11 B.C.R. 24; *R. v. Laurin*, 6 Can. Cr. Cas. 135 (Que.); *Greenough v. Eccles*, 5 C.B.N.S. 784; *Maver v. G.T.P.*, 5 W.W.R. 212 (Alta.); *Hamm v. Bashford*, 9 W.W.R. 1044, 9 Sask. L.R. 68, reversing same case *sub nom.*, *Re Rosthern Election*, 8 W.W.R. 793.

**Cross-examination as to previous statements in writing.—Deposition of witness in criminal investigation.**

10. Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him: Provided that, if it is intended to contradict the witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and that the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

2. A deposition of the witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness.

*Previous written statement of witness*—See *R. v. Benjamin*, (1913) 8 Cr. App. R. 146; *R. v. Troop*, 30 N.S.R. 339; *R. v. Prasiloski*, 15 B.C.R. 29, 13 W.L.R. 298, 16 Can. Cr. Cas 139.

**Cross-examination as to previous oral statements.**

11. If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

*Previous oral statement of witness*—See *R. v. Clark*, 12 Can. Cr. Cas. 299 (N.B.); *R. v. Mulvihill* (1914) 5 W.W.R. 1229, 19 B.C.R. 197; *Mulvihill v. The King* (1914) 6 W.W.R. 462, 49 S.C.R. 587; *R. v. Prentice and Wright* (1914) 7 W.W.R. 271, 7 Alta. L.R. 479; *R. v. Walker*, 6 Terr. L.R. 276.

**Examination as to previous conviction.—How conviction proved.**

**12.** A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

2. The conviction may be proved by producing,—

(a) a certificate containing the substance and effect only omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(b) proof of identity.

*Cross-examination of witness as to his previous conviction*—A defendant electing to give testimony on his own behalf becomes subject to this provision. *R. v. D.Aoust*, 3 O.L.R. 653, 5 Can. Cr. Cas. 407, 1 O.W.R. 344; *R. v. Mulvihill*, 6 W.W.R. 462, 19 B.C.R. 197, 22 Can. Cr. Cas. 354, 49 S.C.R. 587; *R. v. McCranor* (1918) 15 O.W.N. 260.

**OATHS AND AFFIRMATIONS.****Who may administer oaths.**

**13.** Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

*Mode of taking the oath*—See notes to Code secs. 170-175; *Curry v. The King*, 48 S.C.R. 532; *R. v. Lai Ping*, 11 B.C.R. 102; *R. v. Wilson*, 22 Can. Cr. Cas. 161, 26 W.L.R. 148; *Shajoo Ram v. The King* (1916) 8 W.W.R. 613, 25 Can. Cr. Cas. 69, 51 S.C.R. 392.

**Affirmation by witness instead of oath.**

**14.** If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath, or is

objected to as incompetent to take an oath, such person may make the following affirmation:—

‘I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.’

2. Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

*Affirmation in certain cases*—See *R. v. Deakin*, 16 B.C.R. 271, 19 Can. Cr. Cas. 62, 19 W.L.R. 43.

#### **Affirmation by person making affidavit or deposition.**

15. If a person required or desiring to make an affidavit or deposition in a proceeding or on an occasion whereon or touching a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit such person, instead of being sworn, to make his solemn affirmation in the words following, viz.: ‘I, A. B., do solemnly affirm, etc.’; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

2. Any witness whose evidence is admitted or who makes an affirmation under this or the last preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn.

#### **Evidence of child.—Corroboration.**

16. In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. No case shall be decided upon such evidence alone, and



such evidence must be corroborated by some other material evidence.

*Evidence of child not under oath*—See note to Code sec. 1003.

#### JUDICIAL NOTICE.

##### **Judicial notice of Imperial and Provincial Acts, etc.**

**17.** Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all the acts of the legislature of any such province or colony, whether enacted before or after the passing of the British North America Act, 1867.

##### **Judicial notice of Canada Public Acts.**

**18.** Judicial notice shall be taken of all public Acts of the Parliament of Canada without such Acts being specially pleaded.

#### DOCUMENTARY EVIDENCE.

##### **Statutes printed by King's Printer.—Evidence.**

**19.** Every copy of any Act of the Parliament of Canada, public or private, printed by the King's Printer, shall be evidence of such Act and of its contents; and every copy purporting to be printed by the King's Printer shall be deemed to be so printed, unless the contrary is shown.

##### **Imperial proclamations, etc.—Evidence.**

**20.** Imperial proclamations, orders in council, treaties, orders, warrants, licenses, certificates, rules, regulations, or other Imperial official records, Acts or documents may be proved,—

- (a) in the same manner as they may from time to time be provable in any court in England; or
- (b) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof; or,
- (c) by the production of a copy thereof purporting to be printed by the King's Printer for Canada.

**Orders in Council.—Proclamations, etc., of Governor General.**

**21.** Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada, may be given in all or any of the modes following, that is to say:—

- (a) By the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of such proclamation, order, regulation, or appointment or a notice thereof;
- (b) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the King's Printer for Canada; and,
- (c) By the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the King's Privy Council for Canada; and in the case of any order, regulation or appointment made or issued by or under the authority of any such minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

**Proclamations, etc., of Lieutenant Governor.**

**22.** Evidence of any proclamation, order, regulation or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the modes following, that is to say,—

- (a) By the production of a copy of the official gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof;

- (b) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the government or King's Printer for the province;
- (c) By the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, or by the head of any department of the government of a province, or by his deputy or acting deputy as the case may be.

2. *Prima facie* evidence of any proclamation, order, regulation or appointment made by the lieutenant governor or lieutenant governor in council of the Northwest Territories, as constituted previously to the first day of September, 1905, or of the commissioner in council of the Northwest Territories as now constituted, or of the commissioner in council of the Yukon Territory may also be given by the production of a copy of the *Canada Gazette* purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof.

**Evidence of judicial proceedings, etc.—Authentication.**

**23.** Evidence of any proceeding or record whatsoever of, in, or before any court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any court in any province of Canada, or any court in any British colony or possession, or any court of record of the United States of America, or of any state of the United States of America, or of any other foreign country, or before any justice of the peace or coroner in any province of Canada, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever.

2. If any such court, justice or coroner, has no seal, or so certifies, such evidence may be made by a copy purporting to be certified under the signature of a judge or presiding magistrate

of such court or of such justice or coroner, without any proof of the authenticity of such signature, or other proof whatsoever

**Official or public documents of Canada.—Municipal by-laws or regulations.—Evidence.**

**24.** In every case in which the original record could be received in evidence,—

- (a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed; or,
- (b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or statute of Canada or of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof;

shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

**Extracts from public books and documents.—Evidence.**

**25.** Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

**Entries in books of Government departments.—Evidence.**

**26.** A copy of any entry in any book kept in any department of the Government of Canada, shall be received as evidence of such entry and of the matters, transactions and accounts therein

recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof.

**Copies of notarial acts in Quebec.**

**27.** Any document purporting to be a copy of a notarial act or instrument made, filed or enregistered in the province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be received in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved: Provided that it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of the province of Quebec, be taken before a notary or be filed, enrolled or enregistered by a notary in the said province.

**Notice of using copy under secs. 25 to 27.**

**28.** No copy of any book or other document shall be received in evidence, under the authority of any of the last five preceding sections, upon any trial, unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention.

2. The reasonableness of the notice shall be determined by the court or judge, but the notice shall not in any case be less than ten days.

**Order signed by Secretary of State.**

**29.** Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor General, shall be received in evidence as the order of the Governor General.

**Official notices.—Copies printed in *Canada Gazette*.**

**30.** All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* shall be *prima facie* evidence of the originals, and of the contents thereof.

**Proof of handwriting of person certifying not required.**

**31.** No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document.

2. Any such copy or extract may be in print or in writing, or partly in print and partly in writing.

**Proving certain documents without the attesting witness.**

**32.** It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite.

2. Such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto.

**Forged instrument may be impounded.**

**33.** Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the court or the judge or person who admits the instrument may, at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions, as to the court, judge or person admitting the instrument seems meet.

**Evidence Act supplemental to previous law.**

**34.** The provisions of this Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute, or existing at law.

**PROVINCIAL LAWS OF EVIDENCE.****Provincial laws of evidence to apply except where varied by Canada statutes.**

**35.** In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the

province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings.

#### STATUTORY DECLARATIONS.

##### Statutory declarations.—Form.

**36.** Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or Dominion courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in the form following, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:—

I, A. B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

Declared before me  
at                      this                      day of                      A.D. 19

*Statutory declarations*].—See note to Code sec. 176.

#### INSURANCE PROOFS.

##### Affidavits authorized for insurance proofs.

**37.** Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, or before any justice of the peace, or before any notary public for any province of Canada; and such officer is hereby required to take such affidavit, affirmation or declaration.

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